IN THE COURT OF APPEAL OF NEW ZEALAND

CA499/2015
[2016] NZCA 99

BETWEEN	TONY DOUGLAS ROBERTSON Appellant
AND	THE QUEEN Respondent

Hearing:	3 February 2016
Court:	Harrison, Miller and Cooper JJ
Counsel:	Appellant in person M Lillico and K Grau for Respondent C B Wilkinson-Smith as amicus
Judgment:	8 April 2016 at 11.30 am

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] Tony Robertson appeals his convictions and sentence for the rape and murder of Blesilda Gotingco.

[2] On the evening of 24 May 2014 Mr Robertson struck Mrs Gotingco with his car as she was walking home, causing her serious injuries. He placed her in the back seat and took her to his home nearby. In his garage he stabbed and cut her repeatedly

with a knife. Early the following morning, 25 May, he hid her body in scrub at the Eskdale cemetery in Birkdale. He had visited the cemetery about 6 pm on 24 May, about two hours before encountering Mrs Gotingco. None of this is in dispute.

[3] The Crown maintained that Mrs Gotingco was run down to incapacitate and rape her, that the crime had been planned in advance, that in the garage she was manually strangled then raped and stabbed, that she was alive when attacked with the knife but died almost immediately from resulting blood loss, and that all of this was done with murderous intent. All of this is in dispute.

[4] Mr Robertson's case at trial was that the car injuries were accidental, that when she arrived at his house Mrs Gotingco evidently was unconscious and he believed her to be dead, and that he accordingly acted without murderous intent when he inflicted the knife wounds. In evidence he said that he used the knife in a panicked attempt to disguise the car injuries, that it took only a very few minutes, and that he was "smashed" on drugs at the time. He denied strangling or raping Mrs Gotingco and explained the presence of his semen on vaginal swabs by saying that the police planted the evidence and the Institute of Environmental Science and Research (ESR) contaminated and mislaid it. He also claimed that someone had planted bloodstains on a filleting knife that he had not in fact used, and he denied inflicting on the body several knife wounds that were consistent with Mrs Gotingco being alive and struggling when stabbed. The jury must have rejected much if not all of this account.

[5] On appeal Mr Robertson maintains all of these allegations but also says that Mrs Gotingco may have been dead before she was stabbed and he was so drugged as to be incapable of forming an intent. He says that the Judge's summing-up was wrong; that evidence was wrongly admitted; that the trial, at which he represented himself with assistance from amicus, was unfair; and that the jury must have been exposed to suppressed information about him. He says further that the minimum period of imprisonment of 24 years imposed on him for murder is manifestly excessive.

Narrative

[6] On 11 December 2013 Mr Robertson was released from prison. It was the expiry date of an eight-year sentence for serious sexual offending against a child.[1] The Parole Board imposed release conditions, one of which was that he be subjected to an 8 pm to 6 am curfew and electronic monitoring. He was required to wear a bracelet that could be tracked using the Global Positioning System (GPS). He took a flat at Monte Cassino Place, Birkdale.

[7] Mrs Gotingco lived in the same area. At 7.47 pm on 24 May 2014 she got off a bus and began to walk home. She was struck by Mr Robertson's BMW when walking on Salisbury Road, breaking her leg and suffering facial injuries. There was a contest at trial about precisely where she was struck — on the footpath or verge, where items belonging to her were found, or on the road — and whether Mr Robertson struck her deliberately or failed to see her because he was tailgating another driver who swerved to avoid her as she crossed the road.

[8] The police were monitoring Mr Robertson as a high-risk offender. After Mrs Gotingco was reported missing that evening, Detective Constable Cooper contacted Corrections to seek GPS data on the ground that Mr Robertson was a suspect in her disappearance. It revealed that Mr Robertson had been on Salisbury Road at about the same time as Mrs Gotingco, and further that he had been to the cemetery shortly after his curfew expired at 6 am on 25 May. Using the GPS data Corrections staff guided police to her body, which had been wrapped in a bedsheet and left in scrub. A search warrant was obtained for Mr Robertson's home. It yielded a large quantity of forensic evidence, some of it from a wheelie bin in which were found bloodstained towels and other items consistent with an attempt to clean up.

[9] Mr Robertson challenged the admissibility of the GPS data, but Winkelmann J ruled it admissible and this Court upheld her decision on appeal.[2] The challenge is renewed on this appeal, principally on the ground that the evidence at

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1 We record, in case he should think we have overlooked it, that Mr Robertson still maintains his innocence.

2 *R v R* [2015] NZHC 713 and *R (CA201/2015) v R* [2015] NZCA 165.

trial showed the data to be less reliable than this Court was previously led to believe. The challenge is not now to the data that revealed the body. Rather, it is to data that showed Mr Robertson had visited the cemetery earlier on 24 May. The Crown relied on this data to suggest that he planned the crime, and Mr Robertson says the data is not reliable enough to show that he may have been searching for a place to dump a body.

[10] Mr Robertson was found fit to stand trial on 23 April 2015,[3] and there is no challenge to that decision. We mention it because Winkelmann J found that he had been diagnosed with post-traumatic stress disorder (PTSD) and a personality disorder and was receiving treatment for depression. There was evidence that the trial process caused him stress, and he had difficulty trusting his legal advisors. Nonetheless, she found that he was able to participate fully and took a keen interest in proceedings.

[11] The trial attracted intense media scrutiny. Apart from the brutal and tragic circumstances of Mrs Gotingco's death, Mr Robertson had only recently been released from prison for serious sexual offending that had been the subject of an unsuccessful Crown application for preventive detention. So it mattered that the jury should not learn of his previous convictions. At the same time, his monitoring bracelet and curfew formed an essential part of the narrative; apart from the circumstances of the body's discovery, the Crown relied on the GPS data to place Mr Robertson at the cemetery two hours before the incident and Mr Robertson relied on his curfew to explain why he panicked and took Mrs Gotingco to his house.

[12] At the first callover on 18 June 2014 Brewer J prohibited publication of Mr Robertson's name and any details likely to lead to his identification either as the person charged or as having been convicted of any other offences. Mr Robertson subsequently sought unsuccessfully to have the proceedings stayed on the ground that notwithstanding the suppression order it was possible to link him to the killing of Mrs Gotingco and to his previous offending. Justice Winkelmann accepted that anyone seeking out Mr Robertson's identity could easily follow a trail of internet

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3 *R v R* [2015] NZHC 815.

postings that would lead to him but did not accept that pre-trial publicity had been such as to contaminate the jury pool.[4]

[13] Before the trial commenced, Brewer J ruled that Mr Robertson's name would remain suppressed but permitted photography and filming in accordance with the media guidelines.[5] He declined to question the jurors during the empanelling process, but did warn them in very clear terms against making their own inquiries, and at the close of the trial he asked each juror to confirm individually that they had not learned anything of Mr Robertson's history other than in the courtroom. The answers were all affirmative.

[14] The trial began on 28 April 2015. Before the defence delivered its opening statement on the following day, Mr Robertson dispensed with the services of counsel, Mr Wilkinson-Smith, Mr Brosnahan and Ms Brown. It seems that Mr Robertson thought this would secure him an adjournment, but the Judge appointed Mr Wilkinson-Smith amicus and the trial continued. The Judge relied on amicus to assist Mr Robertson and took a number of adjournments during the trial to give Mr Robertson time to prepare. He also assisted the defence in securing funding for a pathologist and a DNA expert. On 20 May, when the trial was drawing to a close, Mr Robertson elected to reappoint counsel and that was done. Mr Wilkinson-Smith delivered the closing address.

[15] From time to time during the trial Mr Robertson misconducted himself. The Judge instructed the jury not to hold Mr Robertson's behaviour against him, noting how vital was the trial to Mr Robertson and suggesting that he got upset and angry when he heard things that he found disagreeable. Mr Robertson found the presence of media, particularly television cameras, stressful, and the Judge responded by limiting filming. Notably, he prohibited the media from filming Mr Robertson when he gave his evidence.

[16] As noted, the factual narrative included evidence that Mr Robertson was wearing a GPS bracelet at the time of the offence. The Judge directed the jury that

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4 *R v R* [2015] NZHC 798.
5 *R v R* [2015] NZHC 817.

the reasons for the bracelet were of no concern to them and they must not make inquiries into that matter. The jury did learn that Mr Robertson had been in prison; that fact was disclosed without prompting by a defence witness. The Judge refused an application for a mistrial.

[17] The Crown opened its case on the basis that Mr Robertson deliberately drove off the road onto the footpath to run down Mrs Gotingco with the object of abducting and raping her. During its case the Crown agreed to call a witness, Anau Junior Anau, who had driven along Salisbury Road on the evening of 24 May. He deposed that he had swerved to avoid a woman in the middle of the road. He said he was being followed closely by a BMW at the time. He stopped further along the road, meaning to have it out with the driver, but the BMW did not arrive.

[18] The evidence of the Crown pathologist, Dr Wigren, assumed considerable significance in the trial. The Crown relied upon it to establish that Mrs Gotingco was first knocked down with the car then manually strangled and raped before being stabbed, following which she died. The evidence was also relied upon to respond to Mr Robertson's contention that he believed Mrs Gotingco to be dead when he stabbed her; the Crown contended that the wounds evidenced intention to kill. Dr Wigren was the only pathologist called, but as noted earlier the defence had briefed a pathologist, Dr Chapman. After putting his views to Dr Wigren the defence elected not to call him. That decision, which Mr Robertson does not seek to revisit on appeal, was made in the knowledge that the Judge would instruct the jury not to treat as evidence questions based on Dr Chapman's views and asked of Dr Wigren, unless Dr Wigren had accepted them.

[19] For reasons of expense not all of the swabs from Mrs Gotingco's body were analysed by ESR initially, the Crown relying on analysis of swabs from the introitus and vaginal wall only. But at the fitness to plead hearing on 22 April 2015 it was suggested that Mr Robertson's semen may have been introduced into her vagina through mishandling of a speculum to which the semen had become attached. That led the Crown to have a cervical swab tested too. The result was positive for Mr Robertson's DNA. Justice Brewer allowed the evidence, having satisfied himself

that the defence DNA expert, Ms Millingham, could review and report on it. Ultimately the defence did not call Ms Millingham.

[20] Mr Robertson maintained that his semen might have been planted. He suggested in evidence that the police must have obtained it from items such as underwear or bedclothes. It was established that the body bag containing Mrs Gotingco's body may not have been secured by a padlock at the morgue, and there was evidence that staining was observed when the rape kit was removed from storage for further testing. Contamination by blood was a possible explanation. There was evidence that at ESR a sample envelope had been mistakenly opened and then resealed, and that a crack had been observed in a test tube. The ESR witness, Ms Vintiner, was nonetheless confident that there was no contamination by transfer of Mr Robertson's DNA from one sample to another; the samples were kept separate.

[21] Mr Robertson's home was cordoned off and searched for four days after his arrest. On the second day, 28 May, the filleting knife was found in a kitchen drawer. It bore Mrs Gotingco's blood on the handle, but not on the blade. There was a conflict of evidence between two police officers about which of them found it. The Crown had mentioned the bloodstained knife in opening, and it was in Court and produced as an exhibit. During the trial Mr Robertson did not deny that it was his knife; rather, he insisted he used a different knife that had been found in the garden during the search. That led the Crown to close on the basis that he admitted using a knife and it did not matter which. For his part, Mr Robertson insisted that the police must have planted the blood on the filleting knife. This allegation was said to support his claim that the DNA evidence may have been planted, and more generally that much of the Crown's evidence was unreliable.

[22] Opening his case, Mr Robertson said that the evidence would show that he panicked and put Mrs Gotingco in his car and drove straight home to comply with his curfew, which required that he be there by 8 pm. Amicus added, on Mr Robertson's instructions, that the car struck Mrs Gotingco by accident and the curfew meant that he had to be upstairs at his home after 8 pm, the significance of this point being that whatever was done to Mrs Gotingco in the downstairs garage took only a very few minutes. In evidence Mr Robertson confirmed this account.

He said that after the accident she was not moving and he was convinced she was dead. He accounted for his decision to mutilate her by saying that when it was seen she had been the victim of a car crash the police would come to his house and see his "smashed up" car, so he tried to disguise it as a "random attack".

[23] Mr Robertson also gave evidence about his drug use. In his evidence-in-chief he had said he was a daily user of methamphetamine and cannabis, and that he went to the cemetery on 24 May to smoke the "three or four puffs" of methamphetamine that he had left from the day before. He was on Salisbury Road on the evening of 24 May because he was looking to buy drugs, having failed to obtain them from his usual sources. However, he also said that when he stabbed Mrs Gotingco he was not thinking straight because he was "high on methamphetamine" and "smashed off [his] face". He was allowed to adduce evidence of a prior consistent statement made to a forensic nurse, in which he said that he had been using methamphetamine and cannabis daily and was "coming down" from methamphetamine when remanded in custody.

[24] The Crown closed on the basis that Mrs Gotingco's wounds showed she was alive and struggling when she was stabbed; further, the DNA evidence confirmed she had been raped. She had also been strangled to overcome her resistance. Prosecuting counsel, Mr Raftery, maintained that she was knocked down to incapacitate her, Mr Robertson having scouted a location in the cemetery to dump a body, but added that even if the knocking down was accidental what happened afterward was murder. The GPS data was relied upon to show Mr Robertson was home by 7.56 pm and went back into the garage (which was not visible to GPS satellites and so returned a zero reading) several times during the evening and spent significant periods there. The suggestion that evidence had been planted and contaminated was described as a "defence of the desperate" for which there was no evidence.

[25] The Judge provided the jury with a question trail that asked whether they were sure "that Mr Robertson killed Mrs Gotingco by inflicting knife wounds on her" and, if so, that when he "inflicted the knife wounds which killed" her he acted with murderous intent. Dealing with the first question, he stated that:

> [83] I don't think question 1 is going to take you much time. There is no question that it was Mr Robertson who stabbed Mrs Gotingco. The pathologist's evidence is clear that her death followed within a few minutes of those knife wounds being inflicted. He said that all of the injuries contributed to her death, but they were the final injuries and they certainly hastened her death. That is the first question.

[26] The Judge went on to record that Mr Robertson accepted that he "inflicted the knife wounds on Mrs Gotingco which killed her". When discussing the cases for both sides he focused on murderous intent. By consent the alternative of manslaughter was not left to the jury.

[27] When directing the jury on the significance of drug use, the Judge drew attention to Mr Robertson's evidence that he was "off his face" and gave the usual direction that a drugged intention is still an intention unless the person is so affected by drugs as to be incapable of forming an intention. He explained that:

> [32] In this case, you will have to decide whether the Crown has proved that Mr Robertson had the necessary criminal intention for the crimes of rape and murder. Mr Robertson does not, and it is for you, seem to go so far as to say that he was too drugged to be aware of what he was doing. It is more that his behaviour and thinking were affected; that the drugs help explain why he did things that, as Mr Wilkinson-Smith said, are unusual. Well, you are going to have to look at that evidence and make your own decision.

[28] The jury returned their verdicts after three hours' deliberation. On 6 August Brewer J sentenced Mr Robertson to preventive detention with a minimum period of 10 years for the rape, and life imprisonment with a minimum period of 24 years for the murder.[6] The Judge took a starting point of 23 years for the minimum period of imprisonment and added a year for Mr Robertson's offending history. He identified no mitigating features. When reviewing the facts, Brewer J rejected Mr Wilkinson-Smith's submission that the running down was accidental. He stated that "having heard all of the evidence, I accept the Crown's theory on these points", and explained his reason for doing so was that Mr Robertson's conduct after running down Mrs Gotingco was "entirely consistent" with the Crown's theory of the case and inconsistent with mere accident. The Judge also accepted that Mrs Gotingco must have suffered greatly. Issue is taken with both of these factual findings.

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6 *R v Robertson* [2015] NZHC 1849.

The appeal

[29] Mr Robertson filed his appeal in August 2015 and Mr Wilkinson-Smith was assigned as counsel. On 7 December the Registrar confirmed the fixture would be held on 3 February 2016. Media applications were filed and Mr Wilkinson-Smith advised that they were opposed on the ground that Mr Robertson did not want his image disseminated. The first set of applications was granted on 17 December. Mr Robertson subsequently instructed counsel not to file the substantive submissions that had been prepared and advised the Registrar that he had decided to dispense with counsel's services. He sought an adjournment so that an unnamed lawyer could assist him. The request was refused (as were several subsequent applications). Mr Wilkinson-Smith was appointed amicus and was able to file his submissions on 24 December.

[30] Mr Robertson was offered the opportunity to appear by audio visual link from Paremoremo Prison, where he is held in maximum security. Corrections supported this proposal on security grounds and because it was thought that his mental state might deteriorate if he were required to travel for the hearing (a view not shared by Mr Robertson himself). Mr Robertson prevaricated as to whether he wished to appear in person on being advised that the media would still be permitted to film him and that he would be required to travel to Wellington in the company of other prisoners. An order to produce was issued, and in due course he appeared in Wellington on 3 February. He was secured by a long restraint on Corrections' advice. Filming was limited to 15 minutes at the commencement of the hearing. None of this appeared to cause Mr Robertson any difficulty. He represented himself in a confident and articulate manner.

[31] Mr Robertson filed lengthy submissions in which he expanded upon his grounds of appeal. At a late stage, 27 January, he filed a document headed "affidavit" (but not sworn) in which he complained about Mr Wilkinson-Smith's conduct of the trial (at which, as noted, Mr Wilkinson-Smith for the most part appeared not as Mr Robertson's counsel but as amicus). He was permitted to advance all of these matters. For reasons explained below, the complaints affecting counsel did not necessitate an adjournment.

[32] We observe that Mr Robertson chose not to expand on his submissions on some of his grounds. This, like his late accusations against counsel, we take to have been done in support of a claim that he has had insufficient time to prepare. We do not accept that that is so. We observe that Mr Robertson was clearly very familiar with the issues and the evidence. With the assistance of counsel, we are satisfied that we have been able to address all of the grounds of appeal.

[33] We group the issues as follows:

(a) The first set concerns the cause of death; in particular, whether there was evidence that the car injuries may have killed Mrs Gotingco before Mr Robertson did anything else to her. If she was dead Mr Robertson could not have raped her and the possibility is said to arise that he lacked murderous intent because the car injuries were accidental. Mr Robertson maintains that there was such evidence and the Judge erred by directing the jury that Mrs Gotingco had been killed by stabbing. He complains too that the evidence did not establish manual strangulation.

(b) The second set concerns Mr Robertson's state of mind. Several issues are raised: whether he was so affected by drugs as to be incapable of forming an intention; whether drugs explain an irrational decision to mutilate what he believed to be a dead body to disguise the car injuries; whether he believed Mrs Gotingco to be dead when he stabbed and allegedly raped her; and whether the Judge's summing-up discounted the evidence about his drug use and state of mind.

(c) The third set concerns deliberate misconduct by police officers and/or ESR scientists: whether they or other unknown agents of the state inflicted knife wounds to Mrs Gotingco's back to make it seem she had been struggling when stabbed; whether police officers planted blood on the filleting knife; and whether vaginal swabs were contaminated with Mr Robertson's semen or otherwise mishandled by the police or ESR.

(d) The fourth set concerns claims that the Crown made, allegedly without sufficient foundation; such as the claim that Mrs Gotingco was run down deliberately in pursuit of a plan and the claim that the filleting knife was the murder weapon.

(e) The fifth set concerns evidence that ought to have been led, or not led: whether GPS data about Mr Robertson's visit to the cemetery before the incident was unreliable and inadmissible; whether his phone records should have been in evidence; and whether the trial should have been aborted when a defence witness told the jury that Mr Robertson had been in prison.

(f) The sixth set concerns the conduct of the trial: whether the defence was given insufficient time to prepare, especially as the Crown case evolved during trial and Mr Robertson was being medicated to help him cope.

(g) The seventh set concerns the conduct of defence counsel and amicus.

(h) The eighth set concerns the summing-up; whether it was unbalanced.

(i) The ninth set concerns suppression orders and prejudicial publicity. Mr Robertson says it is likely that the jury learned of his background. This set of issues includes the conduct of a Registry staff member who posted information about the trial online.

(j) The tenth and final set concerns sentence; whether the 24-year minimum period was too long; and whether the Judge erred by relying on aggravating features that had not been proved to the criminal standard.

Cause of death

[34] It is not in dispute that Mr Robertson was responsible for all of the injuries that caused Mrs Gotingco's death. The significance of the evidence about cause of

death is that if the car injuries killed her before anything else was done to her, there is a narrative on which the jury might accept that her death was accidental. The Judge did not leave that possibility to the jury. It is said that he erred because he misinterpreted the evidence of the pathologist. Mr Robertson and Mr Wilkinson-Smith drew our attention to the following passage from Dr Wigren's evidence:

> Q. Finally then, I'd just like to ask about the cause of death. Was there any one particular injury that caused death or is it impossible to attribute death to one singular injury?
>
> A. I think it's difficult to attribute death to one singular injury, but if I were to make a guess, more probable than not guess, I would say that the stabbing was the thing that hastened death.
>
> Q. But in terms of when you look at all the injuries she received, what was your ultimate finding or conclusion as to the cause of death?
>
> A. I think it was a combination of all three of the manual strangulation, the blunt impact suffered when she was hit by the car and then of course the stab wounds and the incised wounds, the sharp force injuries.
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> THE COURT:
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> Q. Well perhaps if I ask one or two questions first and then you'll have cross-examination and you might pick matters up in the re-examination. Doctor, let's assume that the injuries which Mrs Gotingco suffered first were due to being hit by a car, all right?
>
> A. (no audible answer)
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> Q. Can you give us a sequence for the subsequent injuries?
>
> A. And you're referring to the manual strangulation and then the sharp force injuries?
>
> Q. Yes.
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> A. I would think that the manual strangulation came first, as a way of incapacitating her if she was resisting, actively resisting. Even though her leg was broken she had massive blunt force injuries, she was having trouble inflating her lungs because her ribs were broken and so I think that the manual strangulation was a way to cause her to stop resisting, it may have even rendered her temporarily unconscious and then I think the stabbing happened afterward in the incised (inaudible). And part of my reasoning there is that if the assailant had incised her neck, you know, across the front, it would be — it would not be — I couldn't see him putting his hand over, you know, her neck and then squeezing it with this huge bleeding, you know, incised wound there.

> Q. You've said that in your opinion the cause of death was the combination of all of the injuries Mrs Gotingco suffered. Am I right?
>
> A. That's correct.
>
> Q. Can you say anything about how long it would have taken her to die from the time of receiving the blunt force injuries?
>
> A. If we subtract the sharp force injury and the manual strangulation?
>
> Q. Mmm.
>
> A. And just simply the blunt force injuries? She could have lived for days and possibly even survived, even — perhaps even without medical treatment. It would not have been very comfortable but it's possible, yes.
>
> Q. All right, well just focusing on the sharp wound injuries. How long would it take her to die from those?
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> A. Fairly quickly, within minutes. I mean her throat had been slashed, her windpipe was now exposed. It was a very vascular area. There was active bleeding, she was aspirating that as she was breathing. She was essentially drowning in her own blood and not only that but she had a perforation of her right upper lobe of her lung from one of the stab wounds, so…

[35] To this Mr Robertson added that there was no evidence that Mrs Gotingco was conscious at any time after she was struck by the car and further that the pathologist erred by attaching significance to the presence of blood in her lungs, since that might have been explained by her facial injuries. He pointed to an absence of defensive injuries of the kind not infrequently seen on knife victims.

[36] The blunt force injuries caused by the car were severe. Among other things Mrs Gotingco suffered a broken leg, several broken ribs, fractured neck vertebrae, and a broken jaw and teeth. But when the pathologist's evidence is read as a whole it is very clear that he found the knife wounds to be the immediate cause of death. He was firm in his opinion that the blunt force injuries would not have killed her immediately, saying that she could have stayed alive for days longer or even recovered. He was also firmly of the opinion that she was breathing when attacked with the knife because the inhaled blood came from knife wounds to her neck, not from her facial injuries. Dr Chapman disagreed, but as Dr Wigren pointed out, he had not viewed the slides upon which Dr Wigren's opinion rested. It was also his opinion that her heart was functioning when she was stabbed because she bled out,

meaning that blood drained from her body while her heart was still working. That conclusion was supported by the absence of post-mortem lividity.

[37] In addition, the jury were of course not confined to the opinion evidence of the pathologist. For example, the Crown also invited the jury to draw inferences from the nature of the knife wounds. Mrs Gotingco suffered long and very deep incised wounds to her neck and stab wounds to her upper body, including her back. These wounds suggested murderous intent, and that there had been a struggle while she was attacked with the knife. They are difficult if not impossible to reconcile with Mr Robertson's claim that he did not look at her as she lay dead or unconscious on her back and he mutilated her body.

[38] Further, Dr Wigren also found that Mrs Gotingco had suffered a broken thyroid horn. Dr Wigren attributed this to manual strangulation, noting that it was associated with indications of bruising to the neck. Dr Chapman questioned this opinion, suggesting that the injury might be attributable to the car, but Dr Wigren insisted there was no evidence of blunt force trauma to the front of her neck. Mr Robertson contends that the evidence was "not strong enough to be relied on". We reject that submission. It was not necessary that the pathologist exclude all other possible explanations. His opinion was grounded in the evidence and capable of sustaining the inference that manual strangulation caused the broken thyroid horn.

[39] In addition, the Crown relied on evidence of rape to establish a motive for killing. Apart from the DNA evidence, there was evidence that Mrs Gotingco had been undressed and re-dressed. A jacket she had been wearing as she left work was found with no blood traces or knife marks, and when her body was found her underwear was showing above her trousers and her belt was twisted and bunched. The GPS data indicated that Mr Robertson had not left her in the garage within minutes of returning home but rather returned to the garage several times during the course of the evening.

[40] It is well-established that a judge should be cautious about withdrawing from the jury a factual possibility that an element of the Crown case was unproven. But the Judge is not required to put a scenario for which there is no sufficient evidential

foundation in the evidence. There was not a sufficient foundation for the possibility that Mrs Gotingco died from blunt force trauma.[7] Mrs Gotingco was very badly hurt when the car struck her, but nothing in the evidence suggests that she would have died immediately. And against that, the evidence is overwhelming that the knife wounds were the immediate cause of death; she was alive when attacked with the knife but died within minutes. It follows that the Judge did not err by treating the knife wounds as the cause of death and directing the jury to consider whether they were inflicted with murderous intent.

[41] We observe that the cause of death is also relevant to the rape charge, which rested on the premise that Mrs Gotingco was alive at the point of penetration. There was no suggestion before us that if Mr Robertson had intercourse with her he did so after her death, but we record that our review of the evidence satisfies us that the rape was pre-mortem; that is, Mrs Gotingco was first knocked down then manually strangled and raped before being attacked with the knife.

Murderous intent

[42] We can deal with this ground of appeal shortly. Mr Robertson's first complaint was that the Judge mischaracterised the evidence when telling the jury that there was no real evidence that he was so drugged as to be incapable of forming an intent. The argument is incompatible with the explanation that Mr Robertson gave at trial, and repeated before us, to the effect that he panicked after driving into Mrs Gotingco, took her to his home so that he could meet his curfew, and there stabbed her in an attempt to disguise what had happened. His own account, in short, was that he acted intentionally. It is no answer to say that he might have acted differently but for the drugs. Nor did the Judge summarise the cases unfairly. He reminded the jury of Mr Robertson's claim that he was "off his face" and he instructed them that they would have to decide just how drugged he was. There was no specific evidence of how much cannabis Mr Robertson consumed. Mr Robertson did say that he had had only three or four puffs of methamphetamine that day and it was clear that he had run out of drugs.

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[7] *R v Keremete* CA247/03, 23 October 2003; *Kirby v R* [2013] NZCA 451, (2013) 26 CRNZ 740 at [51]–[52]; and *Iti v R* [2012] NZCA 492.

[43] Mr Robertson's second point was that the evidence did not establish murderous intent. He contended that the Crown could not exclude the reasonable possibility that he believed Mrs Gotingco was dead when he put her in his car, took her home and inflicted the knife wounds upon her. We do not accept this submission. The jury were not required to accept his evidence that she was still and silent throughout. The evidence about cause of death that we have just discussed points strongly to the conclusions not only that she was alive when stabbed but also that she struggled and had to be subdued. We observe that there was also evidence that a person nearby heard a woman screaming at about the time of the impact.

[44] We conclude that it was plainly open to the jury to find that Mr Robertson acted with murderous intent.

Police or other official misconduct

[45] Under this heading we address Mr Robertson's complaints about the bloodstained filleting knife, the knife wounds to Mrs Gotingco's back, and the DNA evidence. These complaints were examined at the trial and they were the subject of lengthy written submissions on appeal. We note that these allegations were advanced in support of a submission that we should find the Crown evidence lacking in reliability and integrity. This we take to be an argument that the verdicts are unsafe because the evidence ought not to have been admitted by the Judge or accepted by the jury.

The filleting knife

[46] Mr Robertson remains adamant that he did not use the filleting knife at all, so the bloodstains on it must have been planted. He sought support for this allegation in evidence about the search, submitting that it is suspicious that the knife was not mentioned or apparently seen when the house was first searched although it must have been obvious, and the drawer containing it was apparently not photographed. Further, he pointed out that two police officers claimed to have found it.

[47] As noted earlier, there was no dispute that Mr Robertson stabbed Mrs Gotingco with one of his knives. The prosecutor suggested that he may have

used the filleting knife, or that he picked it up with a bloodied hand, but the Crown did not have to prove which knife he used. Mr Robertson's submissions about the knife were directed to supporting his challenge to the DNA evidence; in effect, the controversy over the knife was said to demonstrate a police propensity to falsify the evidence. This complaint was before the jury, who were well placed to evaluate it.

The knife wounds to Mrs Gotingco's back

[48] We deal with this point shortly. Mr Robertson insists that someone else must have inflicted these wounds but there is no evidence at all, apart from his own, to support that inherently improbable claim.

The DNA evidence

[49] As noted, Mr Robertson claims both that the police planted the DNA and that the ESR mishandled and possibly contaminated it. He denies that he raped Mrs Gotingco, and so invites us to conclude that the evidence is false. Apart from that, he points out that there was no evidence of injury to her genitalia and asks us to draw inferences, to the effect that evidence was fabricated, from his claims about the knife and the knife wounds. We note that the absence of injury is commonplace and therefore neutral. More fundamentally, the argument asks us to accept that somehow the police found his semen on other items and transferred it in some way, ultimately to the speculum used by the pathologist to take samples. There is no evidence as to how this might have been done, or by whom, and the allegation is inherently implausible.

[50] So far as the DNA evidence is concerned, we have noted there was evidence of discolouration of one sample, which could suggest contamination, and evidence that envelopes were opened in error. Mr Robertson also drew our attention to the delay in testing the samples. However, there is nothing in the evidence to suggest that the samples were in fact contaminated. Mrs Vintiner's evidence is to the contrary; she remained confident that ESR's results were accurate.

[51] We decline Mr Robertson's invitation to find the evidence of which he complains inadmissible or unreliable.

Crown misconduct at trial

[52] Mr Robertson submitted that the Crown knowingly provided the jury with false information during the opening address, by claiming that he crossed the centre line and drove onto the footpath to deliberately strike Mrs Gotingco from behind. It is said that the Crown made this statement knowing full well that Mr Anau had given a statement to the police that supported Mr Robertson's evidence that Mrs Gotingco was struck by accident.

[53] We reject this submission. Mr Anau's statement notwithstanding, there was evidence consistent with the Crown's theory of the case. Some of Mrs Gotingco's possessions were found on the verge later in the evening of 24 May when her family were searching for her. There was debris and a tyre mark which together led a police crash investigator to opine that she was not struck on the road. Accordingly, the Crown was entitled to advance the allegation. The defence case was that the mark identified by the police may not have been a tyre mark at all, that debris was a poor indicator of the point of impact, and that Mr Anau's evidence was inconsistent with the Crown's theory of the case. Just how the impact happened was a question for the jury.

Evidence led, or not led

The GPS data

[54] As noted earlier, a pre-trial challenge to admissibility of GPS data was dismissed by this Court on appeal.[8] To the extent that Mr Robertson maintains a direct challenge to that decision, the appropriate remedy is a further appeal to the Supreme Court.[9] However, he points out that this Court proceeded on the understanding that the evidence was "inherently reliable".[10] He contends that the evidence at trial proves otherwise. We are prepared to revisit the decision to that extent.

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8 *R (CA201/2015) v R*, above n 2.

9 See, for example, *Kumar v R* [2015] NZCA 460 at [15]; and *Johnston v R* [2015] NZCA 162 at [10].

10 *R (CA201/2015) v R*, above n 2, at [36]–[37].

[55] Mr Robertson's submissions highlighted evidence that the GPS data included anomalous readings that could not possibly be correct. However, the anomalies were explained at trial and the jury were able to evaluate them. The principal explanation was that anomalies are normal, the result of phenomena such as signal interference, and what matters is the distribution of the data as a whole. Its general reliability is confirmed by the evidence that the data took the police to Mrs Gotingco's body.

[56] We conclude that the evidence was reliable. Mr Robertson admitted in evidence that it correctly placed him at the cemetery at about 6 pm on 24 May. It showed him moving around there. The Crown accepted that it did not show him going to the dump site he later used. As we see it, Mr Robertson's real complaint is not that the data is unreliable but rather that it does not sustain the inference that he went to the cemetery to scout a burial location rather than, as he claimed, to smoke drugs. But the Crown was entitled to allege that he planned the killing and the GPS data provided limited support for that contention. That being so, the evidence was properly before the jury. Whether it ultimately sustained the inference that he was scouting a location was a question for them.[11]

[57] We record that Mr Robertson complained that the GPS data was prejudicial because it confirmed he had a criminal record. But as noted at [11] above, it was necessary that the jury learn of it and the defence relied upon the curfew.

Mr Robertson's phone records

[58] Mr Robertson submitted that his phone records would have shown that throughout the night of 24 May he had been trying to contact people by text and telephone. He submitted that this would have supported his evidence that he was upstairs throughout the evening and seeking help. His explanation for failing to call this evidence is that the amicus let him down, that he was heavily medicated and stressed and he had limited time and opportunity to prepare. He also contended that photographs could have been produced that would have shown his car did not cross onto the verge to strike Mrs Gotingco as the Crown alleged.

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[11] *Bain v R* [2009] NZSC 16, [2010] 1 NZLR 1 at [53].

[59] There is no evidence of these matters. No application was made to adduce new evidence on appeal. What can be said is that evidence that he had been trying to contact others is not inconsistent with the Crown case about what he did to Mrs Gotingco, and the Crown case ultimately did not depend on evidence that he had left the road to run Mrs Gotingco down. This ground of appeal fails.

Evidence that Mr Robertson had been in prison

[60] As noted, a defence witness volunteered that Mr Robertson had been in prison. He says that this must have prejudiced the jury against him. However, the jury already knew about the bracelet and curfew, and Mr Robertson had told the jury himself that he had been in prison. The Judge appropriately exercised his discretion not to abort the trial,[12] and he gave orthodox directions about relevance and prejudice, addressing the evidence about prison time expressly. There is no reason to suppose that the jury ignored those directions.

Conduct of the trial

[61] Mr Robertson submits that he had insufficient opportunity each day to prepare for court, especially in circumstances where the Crown case evolved and Mr Robertson was under medical supervision for stress and anxiety and was on medication. Mr Wilkinson-Smith advised that he had inquired of Mr Robertson before the hearing about specific details of any resulting prejudice and was told that Mr Robertson was demonstrably unsettled during the trial and showed it by swearing, arguing with witnesses, and on one occasion leaving the courtroom during the summing-up. Mr Robertson believes he performed poorly in his evidence because of these matters, and further that his cross-examination would have been more extensive had he been given more time.

[62] We accept that Mr Robertson was under pressure and that the Crown case did evolve during the trial. But as Mr Lillico pointed out, Mr Robertson chose to represent himself and persisted in this decision after being told that the trial would continue. The Court nonetheless ensured that he was provided with legal assistance.

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[12] For a discussion of prejudice arising from defence disclosures, see *Thompson v R* [2006] NZSC 3, [2006] 2 NZLR 577 at [14].

Mr Wilkinson-Smith undertook most of the cross-examination of Crown witnesses, and was allowed to cross-examine witnesses who had already been questioned by Mr Robertson. All of the most important Crown witnesses were cross-examined by Mr Wilkinson-Smith, who in his capacity as amicus made a defence opening address, led Mr Robertson's evidence-in-chief, and made legal submissions when admissibility issues arose.

[63] In addition, the Judge afforded Mr Robertson considerable assistance during the trial, taking steps to ensure that expert witnesses could be briefed. Mr Robertson was given the time to prepare cross-examination and deal with expert evidence, and the Judge told him that if he had particular questions he wanted to ask witnesses and it seemed reasonable to give him time to prepare, such time would be given. From time to time the Judge intervened during questioning to clarify matters for Mr Robertson.

[64] For these reasons, we accept Mr Lillico's submission that although Mr Robertson was self-represented the reality was that amicus and his team conducted the defence, for the most part, and he was given every reasonable assistance by the Court.

Defence counsel/amicus errors

[65] As noted above, Mr Robertson dispensed with the services of counsel at the beginning of the trial but reappointed him for the closing address. On appeal, Mr Robertson complains that amicus failed to inquire into evidence not disclosed by the Crown and overlooked evidence crucial to the defence, being the telephone records and statements and photographs that would have answered the Crown claim that Mrs Gotingco was struck on the footpath or verge. Shortly before the appeal he advised the Court that he intended to file submissions in relation to evidence that was overlooked and which counsel was instructed to present as part of Mr Robertson's case. He advised that he would be including a conversation between himself and counsel on the first day of trial that led to him dispensing with counsel's services. At the hearing he did not elaborate upon these claims.

[66] We have already dealt with the evidence that Mr Robertson says ought to have been admitted; there was no application for leave to adduce such evidence on appeal and there is nothing before us to suggest that there is any substance to the allegation that material evidence was not presented. Counsel cannot be blamed for the Judge's decision to continue with the trial rather than adjourn.

[67] So far as alleged errors made during the course of trial are concerned, we have noted that Mr Wilkinson-Smith appeared as amicus. It follows that Mr Robertson cannot, strictly speaking, advance allegations of counsel error. We accept, however, that Mr Robertson and the Court did rely on amicus to assist Mr Robertson and we are prepared to accept the general proposition that a miscarriage of justice could result from something that counsel had done, or not done, while serving as amicus. We are not persuaded, however, that anything of that kind has happened in this case.

The summing-up: balance

[68] Mr Robertson complained that the summing-up was unbalanced because the Judge repeatedly used the term "running down" when describing the collision between the car and Mrs Gotingco. He submitted that the Judge thereby conveyed to the jury that she was deliberately attacked.

[69] We do not accept this submission. The Judge did use the term "running down", but he did not use it to convey that the incident was deliberate. On the contrary, he instructed the jury that they must decide whether they could draw "a safe, logical and rational conclusion that the running down was deliberate".

[70] Mr Robertson also pointed out that when summarising his evidence and noting that he had taken a shower after the incident, the Judge observed that he was "covered in blood of course". This was said to be pejorative. There was no evidence that Mr Robertson was "covered" in blood. But he had showered to clean up and he had accepted in cross-examination that Mrs Gotingco must have bled out. In the circumstances this remark was immaterial.

[71] We have reviewed the summing-up as a whole. We do not accept that it exhibited lack of balance or failed to put the defence case adequately.[13]

Suppression orders and prejudicial publication

[72] Mr Robertson contends that he was denied a fair trial because the Judge continued name suppression while permitting his image to be published, because a Registry staff member posted inflammatory comments online, and because media reporting was one-sided. An issue also arose during the trial when a juror passed a note to a female journalist with his phone number on it, wanting to talk after the trial. The incident was drawn to the Court's attention at the time and the Judge saw no need to take the matter any further. The Judge addressed the jury about the staff member's conduct at the time, it having been reported in an article in the New Zealand Herald. He warned the jury in strong terms that it was their duty to decide the case on the evidence heard in the courtroom and told them that he intended to ask each of them individually whether they had complied with his directions not to make inquiries on the internet.

[73] There is no evidence that the media breached suppression orders during the trial, and no reason to suppose that the jury ignored the Judge's directions or otherwise learned of Mr Robertson's background. As the Judge said he would do, he questioned each juror individually. Each of them confirmed that he or she had not learned anything of Mr Robertson's history other than in the courtroom.

[74] Mr Wilkinson-Smith explained that media coverage before verdict focused on Mr Robertson's distinctive tattoos, his occasionally heated cross-examinations and his evidence in which he accepted stabbing Mrs Gotingco and disposing of her body. There is no reason to suppose the reporting had any impact on the jury, who had seen and heard the same things for themselves.

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[13] *R v Keremete*, above n 7, at [18]–[19].

Sentence

[75] It was open to Brewer J to rely on any fact that was disclosed by evidence at the trial and not inconsistent with the jury verdicts.[14] But the Judge had to be satisfied that any disputed aggravating fact was necessary to the jury verdicts or proved beyond reasonable doubt.[15]

[76] In this case Brewer J relied on two disputed aggravating facts; the deliberate running down and Mrs Gotingco's subsequent suffering at Mr Robertson's hands.[16] However, these facts were not essential to the verdicts and the Judge did not say that he found them proved to the criminal standard. We are not prepared to infer that he was satisfied to that standard. Had he been so, we would have deferred to his advantages as the trial Judge. As he did not state that he was, we have found it necessary to consider for ourselves whether the evidence reached that standard.

[77] So far as Mrs Gotingco's suffering was concerned, the Judge's point was that when raped Mrs Gotingco was already severely injured and must have been suffering greatly. Mr Wilkinson-Smith pointed out that on the medical evidence the pathologist could not be sure that she was conscious throughout, but as we have explained the evidence as a whole compels that conclusion. This point was proved to the criminal standard, and the Judge was right to take it into account.

[78] However, we are not satisfied beyond reasonable doubt that the running down was deliberate. On the written record of the trial the Crown's evidence did not establish clearly that Mrs Gotingco was struck on the footpath or verge and Mr Anau's evidence raised a reasonable possibility that she had been struck on the road and Mr Robertson did not see her in time because he was following too closely. Recognising this possibility, the Crown invited the jury to focus on what happened afterward, and the Judge directed the jury accordingly. It follows that we must set the deliberate running down to one side when reviewing the minimum period.

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14 Sentencing Act 2002, s 24; and *R v Heti* (1992) 8 CRNZ 554 (CA) at 555.
15 Sentencing Act, s 24(1) and (2).
16 *R v Robertson*, above n 6, at [6] and [12].

[79] The Judge also relied on the undisputed fact that Mr Robertson was on release conditions at the time of the offending. Mr Wilkinson-Smith pointed out that release conditions are not listed as an aggravating factor in s 9 of the Sentencing Act 2002. However, that list comprises mandatory considerations. It does not exclude others.[17] The fact that Mr Robertson was on release conditions when he offended is properly regarded as an aggravating factor because it evidences the failure of both deterrence and supervision.

[80] We turn to the appropriate minimum period. There is a line of authorities in this Court explaining that a sentencing judge should approach the imposition of a minimum period under ss 103 and 104 of the Sentencing Act in the following way.[18] First, the judge should compare the offender's culpability with cases of murder that attract the statutory minimum of 10 years, which serves as a datum point or benchmark. Second, the judge should decide whether an additional minimum period is needed to satisfy the sentencing purposes of accountability, denunciation, deterrence and community protection.[19] When following these processes the judge must apply the legislative policy that, in general, the presence of one or more s 104 factors justifies a minimum period of not less than 17 years; and further, that there may be cases in which the sentencing purposes in s 103(2) require that the sentence be served without parole.[20] Third, the judge should compare sentencing decisions in other cases for reasonable consistency of outcome.[21] As this Court explained in *R v Howse* and repeated in *R v Bell,* the primary comparison is between the individual case and the 10-year datum point. Comparison with other cases is a secondary requirement, albeit necessary and important as a check.[22]

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17 Sentencing Act, s 9(4)(a).

18 *R v Howse* [2003] 3 NZLR 767 (CA) at [61]–[64]; *R v Williams* [2005] 2 NZLR 506 (CA) at [49] and [51]; *R v Bell* CA80/03, 7 August 2003 at [9]; and *R v Reid* [2009] NZCA 281 at [92].

19 Sentencing Act, s 103(2). *R v Williams*, above n 18, at [49]. Note that *Williams* did not refer to the last of these considerations, community protection. Section 103 had not been amended when the offence was committed.

20 This last consideration reflects a change in legislative policy since *Williams*. Section 103(2A) was enacted in 2010.

21 *R v Howse*, above n 18, at [61]–[64]; and *R v Bell*, above n 18, at [9]. Section 8(e) of the Sentencing Act provides that the Court must take into account "the general desirability of consistency with appropriate sentencing levels" for similar offenders in similar cases.

22 *R v Howse*, above n 18, at [63]; *R v Bell*, above n 18, at [9]; and *R v Reid*, above n 18, at [92].

[81] When comparing cases it is also necessary to bear in mind that the legislation has changed over the years. In some cases s 104 did not apply because the offending predated the Sentencing Act.[23] In others the offence was committed before s 103 was amended in 2004 to specify that the purposes of denunciation, deterrence, accountability and community protection may justify a minimum period longer than 10 years.[24] (Before amendment s 103 simply directed judges to consider the circumstances of the offence.) Since 2010 the legislation has contemplated that the same purposes may require that the sentence be served without parole. In addition to these statutory changes, sentencing levels evolve with collective experience.

[82] By comparison with murders attracting a 10-year minimum, the culpability of Mr Robertson's offending was very high. The crime engages several of the s 104 criteria. It was exceptionally cruel and brutal. Although it may not have been planned, the murder was calculated; he sought to escape detection by murdering Mrs Gotingco and hiding her body. He committed rape as well as murder, and Mrs Gotingco suffered greatly. She was particularly vulnerable. To recognise special vulnerability when it is part and parcel of the offending can be to double count, but in this case we have been prepared to accept that the car injuries that incapacitated her were accidental. These considerations collectively point to a starting point substantially higher than 17 years.

[83] In addition, it is necessary to consider the circumstances of the offender and the need for community protection. Justice Brewer did not refer expressly to community protection. Before him, however, were a number of psychiatric reports that point to a very high risk of future violent sexual offending. An opinion prepared for the fitness to plead hearing (and updated for sentencing) diagnoses Mr Robertson as having an antisocial personality disorder with psychopathic features. His score on the PCL-R (Psychopathy Checklist-Revised) is high, and the reports point to a number of factors that increase his risk: sexual deviation, substance abuse, employment problems, escalation in severity of offending, extreme minimisation and denial, and past supervision failures. His continued denial of offending reduces such

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23 Under s 154 of the Act, offences before its enactment were sentenced under it but s 104 did not apply. This affected *Howse* and *Bell*.

24 This affected *Williams*.

likelihood as there is that he may respond to treatment. We observe that he is now aged 29, so age may not mitigate his risk for many years.

[84] Psychological reports are prepared when the Court is considering the indefinite sentence of preventive detention as an alternative to a determinate sentence. There was no question of a determinate sentence in this case; Mr Robertson was also being sentenced for murder. But s 103 recognises that community protection may justify a longer minimum period notwithstanding that the offender will not be released unless and until the Parole Board considers that his reoffending risk has been reduced to an acceptable level. The Court must be prepared to make its own assessment when the circumstances require it and the evidence and sentencing materials permit. This is such a case. Justice Brewer stated that Mr Robertson would be likely to commit another qualifying offence no matter how long any determinate sentence might be.[25] That assessment was well-founded. It follows that community protection justifies a long minimum period in this case. Its omission from the Judge's reasons offsets the increase for premeditation.

[85] We turn to consider comparable cases. Counsel referred us to a number of them.[26] The most similar is *R v Alder*, the facts of which parallel this case closely.[27] The minimum period ultimately fixed on appeal was 17 years. However, sentence was passed in 2002, under the former Criminal Justice Act 1985. The appellant had pleaded guilty on the first day of trial, he had no previous convictions, and it was a Solicitor-General's appeal.

[86] *R v Waihape* was a 2006 case in which the offender had sexually violated two women and murdered one of them by running her over repeatedly with his car.[28] Justice Chisholm adopted a starting point of 22 years (before credit for guilty pleas)

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25 *R v Robertson,* above n 6, at [18].

26 *R v Ellis* HC Auckland CRI-2010-044-4912, 7 December 2011; *R v Hotene* HC Auckland S23/00, 9 October 2000; *R v Cameron* HC Christchurch CRI-2008-009-6389, 24 August 2009; *R v Reid,* above n 18; *R v Weatherston* HC Christchurch CRI-2008-012-137, 15 September 2009; *R v Alder* CA430/01, 25 June 2002; *R v Kinghorn* [2014] NZCA 168; *R v Bell*, above n 18; *R v Howse*, above n 18; *R v Burton* HC Wellington CRI-2007-085-736, 3 April 2007; *R v McLaughlin* [2013] NZHC 2625; *Wallace v R* [2010] NZCA 46; *R v McDonald* [2014] NZHC 2054; *R v Cameron* HC Christchurch CRI-2008-009-6389, 24 August 2009; and *R v Waihape* HC Christchurch CRI-2005-009-14252.

27 *R v Alder*, above n 26.

28 *R v Waihape*, above n 26.

by reference to brutality and vulnerability. The offender's risk of violent reoffending was serious, but the Judge did not cite community protection as an influence on the minimum period.

[87] *R v Reid* was a 2009 judgment of this Court in which the minimum period for rape of two women and the murder of one of them was reduced from 26 to 23 years.[29] Although there were two victims and the offending was premeditated, the violence was not especially serious by the standards of s 104 cases. The appellant was very dangerous to women and likely to remain so, absent some miraculous transformation. The Court accordingly gave consideration to the need for community protection, but it concluded that 26 years was too high when compared to other cases, noting that in very few cases have minimum periods of more than 25 years been imposed.

[88] At 24 years, the minimum period that Brewer J adopted is longer than that in *Reid*, but not by much. And while this case lacks an "offending spree" and the element of premeditation, it involved a higher degree of brutality and callousness. Further, the murder was committed to escape detection. Mr Robertson is very dangerous to females of all ages and likely to remain so.

[89] For these reasons, we conclude that the general desirability of consistency in sentencing does not require that the otherwise appropriate minimum period chosen by Brewer J be reduced.

Decision

[90] The appeals against conviction and sentence are dismissed.

Solicitors:
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[29] *R v Reid*, above n 18.