

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA362/2018
[2020] NZCA 653**

BETWEEN C (CA362/2018)
Appellant

AND THE QUEEN
Respondent

Hearing: 15 October 2019
Court: French, Lang and Mander JJ
Counsel: N Levy for Appellant
F R J Sinclair and A D H Colley for Respondents
Judgment: 17 December 2019 at 3 pm

JUDGMENT OF THE COURT

- A Both parties' applications for leave to adduce further evidence are granted.**
B The appeal against conviction is dismissed.
C The appeal against sentence is dismissed.
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REASONS OF THE COURT

(Given by Mander J)

[1] C was convicted following a judge-alone trial on charges of sexual offending against his half-sister when she was aged between five and 15 years.¹ The Crown case

¹ R v [C] [2018] NZDC 4191 [District Court Judgment].

was that over that period the appellant indecently touched the complainant's body and genital area which progressed to digital penetration of her vagina, and then rape when she was 13 years old. C was sentenced to 14 years' imprisonment.² He appeals both his convictions and sentence.

[2] C has a history of mental impairment. He represented himself at his trial. His appeal is brought on the basis that his mental state prevented him from being able to conduct his defence and to communicate adequately with standby counsel. It is alleged that he was not fit to stand his trial and that, as a result, the trial was unfair.

[3] In regard to the sentence appeal, it is argued that insufficient allowance was made for C's mental impairment. Specifically, that the linkage between his condition and his offending, and the additional hardship of imprisonment arising from those limitations, should have resulted in a greater discount.

[4] Both parties sought leave to adduce further evidence on appeal. C applied for leave to adduce affidavits sworn by himself and standby counsel, as well as medical evidence directed to the issue of his mental health at the time of trial. The Crown also applied for leave to adduce evidence from Professor Mellsop, on the appellant's mental health at the time of trial. The evidence that is the subject of both applications is fresh and cogent, and we accordingly admit it.

Background

The alleged offending

[5] The circumstances of C's alleged offending relate to a period of some 11 years between 2004 and 2015, during which C took the opportunity when staying with or visiting his family to sexually assault his half sister. It was the Crown's case that initial grooming and sexual touching of the child occurred in a caravan after C came to live with the family. This led to more invasive indecencies and to forceful acts of unlawful sexual connection and rape after the family moved to a new town. The offending was said to have taken place in either the complainant's bedroom when her parents were

² *R v [C]* [2018] NZDC 8224 [Sentencing Notes].

out or in a shipping container that C used as his room when he stayed with the family. There was a 12 year age disparity. C would have been 17 years old when the indecencies started and 25 years when the rapes began.

[6] In June 2016, C was charged with these allegations. However, in September of that year he was assessed as being unfit to stand trial.

Initial unfitness to stand trial

[7] At an early age C was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), and when he was 15 years old he suffered a traumatic brain injury that resulted in frontal lobe damage. He has a history of difficulties regarding impulsive behaviours, substance abuse and anti-social personality traits which are likely to have been exacerbated by his brain injury. It is suggested that he may suffer from a major mood disorder.

[8] In assessing C to be unfit to stand trial, Dr Lehany, a forensic psychiatrist, found that C was clearly aware that he was facing charges but extremely vague as to what exactly those charges were. Dr Lehany was unsure whether C was being deliberately evasive or genuinely had an incomplete understanding of the charges. He was also unclear whether C fully understood the implications of the pleas available to him. C presented as generally “agitated and irritable”. He would become even more so when talking about the allegations or court processes. He appeared preoccupied “by his sense of injustice” and maintained the sexual allegations were false.

[9] Dr Lehany considered that C would not be able to follow the court proceedings and properly instruct a solicitor. However, he considered that a period of inpatient assessment and treatment could result in C becoming fit to stand trial and permit the court proceedings to continue — though he was reluctant to give a definitive opinion about the likelihood of C remaining unfit.

C found fit to stand trial

[10] After several months of treatment in a secure mental health unit C made substantial progress and became significantly more settled. He was no longer considered unfit to stand trial. In reaching that conclusion, Dr Lehany observed:

The longstanding abnormalities [C] can present in terms of his mental state remain as described in my previous report, but are clearly very much better since his period as an inpatient when his medication was rationalised. Although he can be angry and irritable when talking about the allegations he faces, at other times he is able to give reasoned and reasonable explanations for things. I consider he fully understands the legal process and is able to engage in this and instruct counsel appropriately.

It is possible [C] will struggle with the court process itself as in the court hearings he is likely to become angry and his behaviour may not be appropriate at these times. On balance, I do not consider it likely that this would make him unable to follow trial processes however, and I do not consider that the difficulties that he has in this area are sufficient to make him unfit to stand trial. The court could attempt to assist in this by keeping hearings relatively short, and allowing [C] extra time to articulate his views.

[11] A senior psychologist, Ms Reader, reached the same conclusion but expressed similar concerns regarding C's likely behaviour at trial. A theme of both Dr Lehany's and Ms Reader's reports was how easily stressed and angered C would become when the alleged offending was raised with him. C had considerable difficulty exercising emotional self-regulation when discussing the sexual allegations and would become extremely reactive and upset unless redirected.

[12] The health assessors' opinions were not contested, and in April 2017 Judge Crayton determined that C was no longer unfit to stand trial.³ At that stage C had counsel acting for him. He pleaded not guilty to the sexual charges.⁴ In September 2017, he chose to represent himself and Mr Crowley was appointed as standby counsel.

³ *R v [C]* DC Whanganui CRI-2016-083-1873, 20 April 2017. See Criminal Procedure (Mentally Impaired Persons) Act 2003, s 14.

⁴ C pleaded guilty to two unrelated charges of possessing an offensive weapon and possession of an amphetamine.

The role of standby counsel

[13] In November 2017, Mr Crowley sought copies of Dr Lehany and Ms Reader's reports. From his albeit brief observations of C, Mr Crowley thought that another report might be justified. He discussed that possibility with Ms Moulder, the justice liaison nurse with the local forensic mental health service, but after receiving the health assessors' reports took the view that C was fit to stand trial and could instruct counsel. Mr Crowley met with C on 11 December 2017. C refused to engage with him:

He made it clear to me he did not want the complainant cross-examined, and that he did not want me to do any cross-examination. He told me he had documentation that would prove his innocence, but refused to let me see it, saying he would provide it to the Court on the day, during the trial. His general instruction to me, on that day, was that it was all lies, and he didn't need any help.

[14] Mr Crowley's appointment as standby counsel was necessary not only to provide assistance to C, should he seek it, but to undertake any cross-examination of the complainant. C, as the defendant, was not permitted to undertake that exercise in person.⁵ Mr Crowley made attempts to see C again on 31 January and then on the morning of his trial, but he refused to meet him.

Ritalin medication

[15] During C's prior admission to the mental health unit his Ritalin medication was reduced. It appears that C had developed a dependence on that drug. While initially thought to be helpful to treat his ADHD and the symptoms of his frontal lobe damage, it was viewed by some of C's treating clinicians as contributing to his behaviour. His elevated mood, grandiosity and hostility were in part attributed to the Ritalin. Withdrawal of this medication, while opposed by C himself, was considered to have contributed to his improved mental state during his admission to hospital.

[16] It appears there were differing views regarding the efficacy of the Ritalin. After being returned to prison on remand awaiting his trial C was again prescribed that drug. In December 2017 some concerns were expressed regarding his elevated mood

⁵ Evidence Act 2006, s 95(1).

and accompanying hostility. After disruptive behaviour resulted in him being placed in the At Risk Unit of the prison, a decision was made in late January 2018 to reduce his daily Ritalin over the forthcoming weeks. That process appears to have been ongoing at the time of his trial with the process due to be completed by 21 February.

The trial

[17] C’s trial commenced on 19 February 2018 before Judge Crayton. The hearing proceeded as a judge-alone trial after C withdrew his election to be tried by jury.⁶ Around this time one of his treating clinicians, Dr Hansby, flagged the potential impact C’s mental state may have on the court process. Arrangements were made for Ms Moulder to attend court and observe C, but, apart from taking regular and frequent breaks during the hearing day, it appears no other action was considered necessary.

[18] After the Crown’s opening and the evidence of the specialist interviewer, the trial reached the point where the complainant was to be called. The Judge recorded that C by this stage had already become quite agitated when matters had arisen that involved either the complainant or his mother. It was noted that “his mood becomes elevated and he becomes quite excitable in the submissions he makes”.⁷

[19] C applied to be excused from court when the complainant’s evidential video was played. The Judge endeavoured to persuade C to remain. He changed his mind several times. However, when the complainant was called C indicated that he did not wish to hear the evidence, as he put it, of his “accuser”. He was described as becoming agitated, and the Judge was concerned that he would disrupt the proceeding if his application to be excused was declined.

[20] Having been granted permission to be absent from court during the playing of the complainant’s evidential interview, C accepted a further opportunity to view the

⁶ The trial took place prior to the amendments to the Criminal Procedure Act 2011 contained in the Court Matters Act 2018 coming into force and accordingly this Court remains the first appeal court following *Jackson v R* [2016] NZCA 627. See *Wirihana v R* [2019] NZCA 368 at [5]–[14] for an explanation of how this position has changed.

⁷ *R v [C]* DC Whanganui CRI-2016-083-1073, 19 February 2018 (Minute No 1) at [1].

complainant's recorded interview with standby counsel. The Judge recorded how matters unfolded from that point:⁸

[3] ... I then gave Mr Crowley an opportunity to take instructions from the defendant as regards questions he wished to ask and issues he wished to be put in cross-examination. Mr Crowley returned to the Court indicating that at that stage, unfortunately, the defendant had not engaged and provided instructions.

[4] [C] was brought into Court and I sought to confirm with him the position. [C] indicated that he wished Mr Crowley to cross-examine as he wanted. I then provided [C] with another opportunity to provide instructions identifying the questions he wished to be asked and the issues he wished to raise and challenge with the witness.

[5] [C] indicated, prior to my rising, that he did not wish anything to be asked and any issues to be raised. Nonetheless I gave him time and Mr Crowley the opportunity to explore that and confirm that position.

[6] Mr Crowley and [C] returned to Court when we restarted and it was confirmed in the presence of [C] and by [C] that he did not wish any cross-examination.

[7] [C] has, on a number of occasions though, identified that he will be presenting evidence which is in alibi form for what is referred to as the last occasion of offending. [C] has identified to the Court, that he will be presenting evidence that shows that he was in prison at a time suggested by him, as being proved by the evidence as being the last occasion referred to by the complainant in her video interview and in the balance of the evidence.

[21] Mr Crowley in his affidavit provided evidence of what was occurring between himself and C at this time:

16. However, at 2:25 p.m. I sat in the Courtroom with [C] to watch the DVD. He was rambling and yelling. He declined to sit where he could see the DVD clearly, and rambled loudly throughout the playing of the DVD. He said he did not know who the woman was, she wasn't his sister, and he talked about falling off a cliff, Jim Bolger, Winston Peters, and Black Power.
17. [C] did not want me writing anything down, and wouldn't confirm any instructions in writing. Each time I tried to make a note, he would say he did not want me to record anything, and was quite aggressive.
18. After the video finished at 3:50 p.m. I attended [C] in the cells. He said I had all the information I needed, and he did not need any assistance. He knew he could not cross-examine the complainant; and was ranting about Minutes from the Judge.

⁸ R v [C] DC Whanganui CRI-2016-083-1073, 19 February 2018 (Minute No 2).

19. From speaking with [C], I understood that his general defence was first ... that [the complainant] was lying, second that he had been in prison at the time of the first charge and the last charge, and finally that he had not done the acts complained of.
20. [C] confirmed that my ideas about the defence were correct—he said she was making it up, he hadn't done it, [a former boyfriend of the complainant] was relevant in some way. However, his instructions were clear—that I was not to ask the complainant any questions. I advised him of my proposed questions, but he did not accept these, and said to ask nothing.
21. [C] was either incapable or unwilling to give instructions that could be followed. He was constantly yelling and being grandiose, and rifling through an enormous bundle of documents looking for things that didn't exist. He would give instructions to me, and then withdraw them. I made it clear to him that if the evidence was untested by cross-examination, the Judge would accept the allegations. [C] wouldn't accept this advice. I found him not unintelligent, but he would become verbose, lose his cool and then retreat and refuse to give further instructions. My sense was that while [C] was capable on one level of understanding the trial process and what his defence was, the pressure of the whole situation was simply too great for him to be able to concentrate long enough to provide coherent instructions that would enable his defence to be put to the complainant.

[22] In accordance with C's instructions, there was no cross-examination of the complainant. C's stance regarding the complainant's evidence parallels the position he took regarding the evidence of his mother. He did not oppose a mode of evidence application made by the Crown concerning that witness. He advised the Court that her evidence did not affect his defence of having been in prison at the time of the alleged offending. He further stated that he was likely to become upset when his mother gave evidence and that he wished to be excused. In the event, he remained in court but did not wish to ask her any questions.

[23] No questions were asked of C's stepfather who was also called as a witness. However, several other witnesses were cross-examined either by C alone or in conjunction with Mr Crowley. C gave evidence in his defence. That was initially led by Mr Crowley until it became apparent that C wished to present his evidence in a particular way and that he no longer wanted Mr Crowley's assistance.

[24] The justice liaison nurse, Ms Moulder, observed the trial. She described C at times as displaying features of elevated mood and hostility. When aroused, he behaved in a hostile and confrontational manner towards others. When she was alone

in his presence during an adjournment, Ms Moulder described C as initially “yelling, ranting and raving in context to the accusations of the charges and being detained against his will in a penal institution”. This dissipated when Ms Moulder challenged him about his behaviour and that she would not tolerate it. Ms Moulder described C’s behaviour towards Mr Crowley as being at times the same, but that he would “alternatively” demand Mr Crowley urgently do or give him something. He was considerably less challenging towards the Judge. She noted he was particularly argumentative and antagonistic towards the Crown prosecutor.

[25] Ms Moulder noted that in court C would speak without stopping and at volume for long periods if allowed. This is borne out by the notes of evidence that record C addressing the Court for long periods, straying into irrelevancies and being repetitive. On request he could speak in quieter tones and at a more balanced pace for short periods, but this control would dissipate when he protested his innocence and attempted to discredit Crown witnesses. He was noted to be fixated on a small number of key topics. Ms Moulder observed that C struggled to be calm during discussions relating to the content of the charges, “but settled readily when re-directed” by the Judge.

[26] C’s overall presentation was described by Ms Moulder as variable, but that he did not suffer from delusional thinking, nor were any perceptual abnormalities evident. He was noted at times as focussing on irrelevant details. At times his speech was difficult to follow and “unnecessary” details were added “but eventually it reached the goal”. Ms Moulder reported that on rare occasions

there was a mild loosening of associations, without thought blocking or illogical thoughts. Despite this, there was also at times a linear, logical and goal directed argument that was relevant presented

[27] While his concentration varied, Ms Moulder noted that he was afforded numerous and regular breaks, including when C required additional time to process information or to sort through his “paperwork evidence”. She noted that the process and anticipated structure of the trial were explained to him and that he was given many opportunities to discuss issues with standby counsel.

The conviction appeal

[28] C brings his conviction appeal on the basis that he was likely unfit to participate in his trial and that the quality of his self-representation resulted in an unfair trial. Ms Levy submitted that these deficiencies were particularly acute at two critical points in the trial process. Firstly, when it came to the cross-examination of the complainant and, secondly, when giving evidence himself.

[29] Ms Levy emphasised that C was obliged to communicate with standby counsel because he was not permitted to cross-examine the complainant himself. In her submission, C's mental impairments rendered him unable to adequately undertake that exercise and resulted in the complainant not being cross-examined at all. As a consequence, his defence was not adequately put and that rendered the trial unfair. Ms Levy placed particular reliance on Mr Crowley's evidence that C was overwhelmed by the situation and unable to concentrate long enough to provide him with coherent instructions. Counsel argued that this was consistent with the difficulties the health assessors experienced in engaging with C on the substance of the allegations he faced. C himself deposed that he had difficulty concentrating during the trial and that he was "not there fully".

[30] It was acknowledged that notwithstanding the irrelevant and unnecessary material C canvassed with the Court, his defence of denial and alibi were clearly and repeatedly articulated by him throughout the trial. It was also accepted that C was able to understand the issues relating to and provide instructions about such matters as whether the complainant's mother could give her evidence by way of a CCTV link. However, Ms Levy argued that when it came to the critical decision as to whether to cross-examine the complainant that, notwithstanding the steps taken by the Judge and having the benefit of experienced standby counsel, C was unable to provide instructions. It was submitted that, as a result, the complainant's account of events went unchallenged and the ultimate findings by the Judge in relation to her evidence were almost inevitable.

[31] The other deficiency upon which Ms Levy focussed was C's inability to conduct a defence on his own behalf. Ms Levy submitted that in order to carry out

that task there needs to be “a measure of rationality” on the part of the defendant, and an ability to understand relevance and to control one’s behaviour during the trial. Ms Levy submitted that C’s evidence lacked structure, and that beyond the issuing of a blanket denial of the offending and the repetition of irrelevancies, his defence was not advanced. His reliance on an alibi was said to be clearly inadequate to meet the timeframes of the charges. What relevant evidence was provided by C was submitted to have been lost “in the sea of repeated irrelevancies which C regarded as meeting the task at hand”. Ms Levy submitted that, as a result, the fact-finder in such circumstances was unable to make a fair and rational assessment of the relevant evidence.

The Crown’s response

[32] The Crown acknowledged that if C met the statutory criteria for unfitness, any trial conducted while he was in such a state would be unfair. However, Mr Sinclair submitted that the medical opinion, both before trial and that obtained for the purposes of the appeal, placed C in the category of a person who was fit to stand trial, albeit a man who suffered from some degree of mental impairment. The Crown observed that when a person in C’s position decides to represent themselves and to limit their assistance from standby counsel a tension will arise between the right to self-representation and the right to a fair trial, but that the trial will not be rendered unfair merely because counsel would have conducted the defence more skilfully.

[33] In the present case, Mr Sinclair submitted that the nature of the defences were such that they could be put without the assistance of counsel. C’s alibi was adequately communicated to the trial Court, and his decision not to cross-examine the complainant did not result in him losing any real possibility of acquittal. The trial Court had not accepted the complainant’s account by default because of the absence of cross-examination. Mr Sinclair submitted that it had not been necessary for C to put his allegation of fabrication to the complainant in order for the complainant’s evidence or his defence to be properly considered by the Court. The Judge, sitting as the trier of fact, had made appropriate allowances for C’s limitations and took effective steps to ensure his right to a fair trial was preserved.

Principles

[34] The question of whether a defendant is fit to stand trial is governed by the Criminal Procedure (Mentally Impaired Persons) Act 2003. Section 4(1) states that “unfit to stand trial” in relation to a defendant “means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so”; and includes a defendant who due to mental impairment is unable to plead, to adequately understand the nature or purpose or possible consequences of the proceedings, or to communicate adequately with counsel for the purposes of conducting a defence.⁹

[35] The requirement that a defendant has sufficient capacity to stand trial is said to be closely linked to the right of a defendant to be present at, and to present a defence at their trial.¹⁰ This Court observed in *R v Cumming* that the right extends to being psychologically, as well as physically present at the trial, in the sense that the defendant must understand what is going on.¹¹ An important element of the right is that the defendant is capable of appreciating the prosecution case and effectively defending the charges. The defendant must rationally be able to understand the proceeding and functionally be able to defend it through participation in the trial process.¹²

[36] A defendant with mental health issues also has the protection of criminal process rights under s 25 of the New Zealand Bill of Rights Act 1990. Even if the Criminal Procedure (Mentally Impaired Persons) Act does not have application, a defendant is entitled to a fair trial. A trial may be rendered unfair if the defendant suffers from a mental impairment that prevents that person from being able to adequately defend themselves.¹³

[37] However, defendants also have the right to personally conduct their own defence at trial. This reflects the principle that defendants are entitled to choose their defences to the charges, to determine the content of those defences and to present them

⁹ Criminal Procedure (Mentally Impaired Persons) Act, s 4(1) definition of unfit to stand trial.

¹⁰ *R v Cumming* [2006] 2 NZLR 597 at [38] citing New Zealand Bill of Rights Act 1990, s 25(e).

¹¹ At [38].

¹² At [38] citing W J Brookbanks “Judicial Determination of Fitness to Plead — The Fitness Hearing” (1992) 7(4) Otago LR 520 at 521.

¹³ At [50].

in the manner they choose.¹⁴ As a result, self-representation may be accompanied by the increased risk of conviction, but that right is not denied to those who may be ill-equipped to carry out the task.¹⁵ In *R v Cumming*, this Court held:¹⁶

[43] The exercise by accused persons of their right to conduct the defence personally accordingly is not premised on an expectation that they will do so in a skilful or effective manner. The context of intended self-representation does not permit the Court, when considering if ss 24 and 25 rights are infringed, to take into account whether the decision to dispense with counsel is in accordance with the accused's best interests.

[44] ... Litigants in person do not often give evidence or cross-examine in an orderly way that focuses on what is relevant and avoids repetition. Nor do they generally have the advantage of the detachment of counsel in conducting the defence. The right to self-representation exists despite these features, and they cannot be advanced to gainsay it. As Richardson P said in *R v Power* (Court of Appeal, 22 October 1996) at pp 7–8:

“A high threshold of fitness, including a best interests component, would derogate from the fundamental principle that accused persons are entitled to choose their own defences and to present them as they choose.”

[45] The right to self-representation is upheld when the trial process allows accused persons a fair chance to present the defence case in their own way, with a Court respecting their strategic choices and avoiding misplaced solicitude over whether what is advanced to the jury is in the best interests of the accused.

[38] It is not suggested that C's psychiatric background prevents him from having the capacity to dispense with counsel's services and to represent himself, only that during his trial his fluctuating mental condition was such that he was not capable of doing so at that time. It is argued that C was unfit to stand trial because he was unable to communicate adequately with standby counsel for the purposes of conducting a defence due to the level of his mental impairment.¹⁷ Alternatively, that his trial was unfair because his mental impairment at the time meant he was not able to present his defence by representing himself.

¹⁴ At [42].

¹⁵ *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392 at [45].

¹⁶ *R v Cumming*, above n 10.

¹⁷ Criminal Procedure (Mentally Impaired Persons) Act, s 4(1) definition of unfit to stand trial (b)(iii).

[39] Notwithstanding which lens is applied, the approach to be taken to the exercise of appellate review in a situation such as the present is that set out in *Fahey v R*:¹⁸

[46] A first appeal court must allow an appeal against conviction if satisfied that there has been a miscarriage of justice, which means “any error, irregularity, or occurrence” in or affecting the trial that created a “real risk” that the outcome was affected or resulted in an unfair trial or a trial that was a nullity. Although defendants must ordinarily live with decisions made at trial — the decisions to plead and to give evidence are the paradigm examples — an appeal will be allowed if the appellate court is persuaded that there has been a miscarriage, however occasioned.

[40] As the Crown acknowledged, if C was unfit to stand his trial, then it is axiomatic that his trial was unfair whether represented by counsel or not. Insofar as to whether C’s trial was rendered unfair because of the standard of his self-representation, we also apply the following analysis from *Fahey* that addresses that more focussed enquiry:

[47] ... a defendant who made an informed decision to self-represent is permitted to establish on appeal that (a) the defence could not have been put adequately without counsel's assistance and (b) in consequence, a real possibility of acquittal was lost. If the trial was unfair in this substantive sense, the appellate court will find that there was a miscarriage of justice and order a retrial. The question whether the defence could not have been put without counsel is answered by carefully considering the seriousness and complexity of the case and the circumstances of the defendant.

[41] We firstly examine the threshold question of whether C was unfit to stand trial before considering whether his self-representation led to the trial being unfair.

Fitness to stand trial

[42] We do not consider there is a sufficient foundation before us upon which to conclude that C was unfit to stand trial in February 2018. There is no expert evidence to that effect. The opinion of the two health assessors in April 2017 was that notwithstanding his difficulties C was not unfit to stand trial. In the weeks leading up to his trial, C’s treating clinician, Dr Hansby, expressed concerns about C’s mental state. He recorded C’s aggressive reaction to the reduction in his Ritalin, his elevated

¹⁸ *Fahey v R*, above n 15 (footnotes omitted). See also *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [29]; and *Misa v R* [2019] NZSC 134 at [47].

and irritable state, and discussed this with Ms Moulder. However, neither he nor the forensic services nurse considered any further action was necessary.

Professor Mellsop's evidence

[43] In addition to the assessments provided by Dr Lehany and Ms Reader regarding C's fitness to stand trial, the Crown also relied on the opinion of Professor Mellsop, an experienced forensic psychiatrist. He was provided with the affidavit evidence filed in support of the appeal, including the reports and medical notes regarding C's mental health and his care and treatment. Professor Mellsop was also supplied with the transcript of evidence from C's trial. From that material Professor Mellsop opined that, on the balance of probabilities, C was fit to stand trial in February 2018.

[44] Professor Mellsop considered that C was at that time exhibiting a degree of "pathological elevation of his mood" that he considered was likely caused by his intake of Ritalin. It was noted that mood elevation aggravated his apparent lifelong difficulties in controlling his impulsivity and sometimes aggressive and self-centred behaviour. However, Professor Mellsop considered that C was aware of the court processes, and its authority, and was cognisant of what "messages he wanted to give the Court". He was aware of the roles of Mr Crowley and the prosecution lawyers.

[45] Professor Mellsop considered that C's disruptive and "somewhat imperious behaviour" together with his "sometimes spurious" arguments, and possibly his lack of judgement when insisting on producing irrelevant information that was unlikely to be accepted as totally truthful, were likely to be manifestations of his elevated mood. However, while C's mental state at the time could, as a result, be inferred as not being that of "his usual self", Professor Mellsop did not consider that he was "so severely impaired as to contradict the findings" made in April 2017 that he was not unfit to stand trial.

[46] Under cross-examination Professor Mellsop was referred to the observations in the April reports that C could find it difficult to manage his behaviour at trial and whether his impairments, inattention and lack of concentration would be aggravated by the stress of confronting the charges. Professor Mellsop observed that C has a lifelong pattern of finding it difficult to handle things "which aren't going the way he

wants them to” and that “being charged with something which he ... kept referring to as lies and not true, would be an irritant and upsetting for him”. Any stressor would cause him to respond in an “imperfect” way. Professor Mellsop noted that “it’s perhaps a common enough thing in everybody, and in him it may be a bit more so”.

[47] It was put to Professor Mellsop that C was not able to redirect himself to focus on what the Court considered to be relevant. That was not accepted:

I think he’s able to, but he didn’t want to. He wanted to get across the message that he’s trying, the various messages and justifications and rationalisations of whatever they might be. He was quite capable ... he seemed to me to be consistently trying to achieve certain outcomes to influence the Court in certain ways, so it wasn’t that he isn’t, wasn’t, capable of speaking differently but that’s what he wanted to do.

Later in his cross-examination, Professor Mellsop stated:

It appeared to me that he was able to choose what he wanted to say and what messages he wanted the Court to get and what he wanted the Court to believe and his ideas on all of those things were relevant potentially to the outcome, but he of course was not very smooth at presenting it and was over-talkative and over-repetitious and imperious and irritating.

[48] There was then the following exchange between counsel and Professor Mellsop:

Q. But it just was the, the over-talkative and the over-repetitious and the imperiousness. What’s driving that?

A. Well it seems to me from the way I read all of the other evidence that that’s not atypical for him to the extent that he was under the influence of things that were stimulating him more that would be consistent with being worse than usual.

Q. He can’t just turn that off can he?

A. Which part? The mood or what he says?

Q. The mood?

A. Um, it’s interesting you say that because I mean repeatedly when people sit down with him and Dr Hansby’s records in 2018 whenever something starts you know he will be a lot worse at the beginning and in fact they can turn things around. The same with Nurse Moulder’s interactions with him during the trial. You know, he was difficult when you start but he would listen and come around, so I was left thinking that he had a degree of control over that but his usual stance was you know part of his lifelong experience and style of being

constantly confrontational, being bullied, doing the bullying, being intimidating and impulsive ... which aren't sorry, if I can give ... which aren't characteristics that will make you good at defending yourself but they aren't unusual or rare.

[49] Professor Mellsoy was also questioned about C's response to the Judge's further invitation to discuss with standby counsel any questions he would like to have put to the complainant on his behalf. C's response was that he did not need to. C stated:

I refuse and chose not to because there is no legal, no reason to. Why I have done nothing at all whatsoever, what I've been accused of, I've the paperwork here, one (inaudible 16:13:12) need to give to you so you can see it for yourself.

Professor Mellsoy was asked whether he agreed that C appeared to be genuinely confused about the process and why he needed to speak to Mr Crowley. Professor Mellsoy replied:

- A. Well, I didn't see it quite like that, I again saw it as being he had his own agenda and the way he wanted to play it, and that is what he was — why he was throwing those things up. I didn't interpret it to mean that he didn't understand what he was being asked.
- Q. And do you agree, and I think you do, that his decisions about the way he wants to play, as you put it, are being affected by the various symptoms of the brain injury and previous diagnoses that we've talked about?
- A. I don't see any evidence for that specifically in relation to the things on [the relevant page of the transcript].

[50] Professor Mellsoy was also questioned about whether C was impaired in his ability to give Mr Crowley instructions because of his elevated mood. Professor Mellsoy did not "really see that as a particularly likely scenario". In response to the evidence of Mr Crowley that C was unable to engage with him in a way that allowed him to present the defence, the Professor stated that he could not be confident about what was driving that behaviour without being there and conducting an examination at the time. However, Professor Mellsoy commented that while that was possible, he interpreted it more that C did not want to engage with Mr Crowley rather than that he was not capable of doing so.

Observations before and during the trial

[51] Ms Levy relied heavily on Mr Crowley's observations of C when he discussed the issue of cross-examining the complainant and sought to engage with him regarding the content of any such questioning.¹⁹ Professor Mellsop had the benefit of Mr Crowley's evidence, although he did not place great store on some of the "psychological judgements" that he did not consider standby counsel was really qualified to make.

[52] It is notable that when Mr Crowley had earlier visited C at the prison on 11 December, C made it clear to him that he did not want standby counsel to conduct any cross-examination. Approximately a week after that meeting, C was seen by Dr Barry-Walsh, another consultant forensic psychiatrist. Dr Barry-Walsh recorded his understanding that C had generally been stable, although he noted that prison staff had suggested "he has fluctuated a little more over the course of the last couple of weeks". After being reviewed by the doctor, C was described as "a little voluble and pressured and inclined to be digressive. However, he reported no problems currently with his sleep, appetite or mood." Apart from noting that it was regrettable that C had been reintroduced to Ritalin and the possible need to withdraw that medication should C's behaviour deteriorate, no concerns were expressed at that time regarding his fitness to participate in his trial.

[53] In late January, the two treating clinicians, Dr Hansby and Dr Barry-Walsh, agreed that because of concerns regarding C's presentation it was necessary that his Ritalin be tapered. Dr Barry-Walsh does not recall the details of the discussions he had with Dr Hansby about C as his trial approached, other than the decision that was made for Ms Moulder to be present to ensure that C's performance was documented.

[54] Speaking more generally, Dr Barry-Walsh deposed that as a treating psychiatrist he may see clients who are awaiting a criminal trial following findings that they are fit to plead. Sometimes in such cases he would form the opinion that the person he was treating was seriously disabled in their ability to participate in a criminal trial. Regardless of whether that person had previously been assessed for

¹⁹ These are set out at [21].

their fitness to stand trial and any such finding in that regard, he would make his opinion known to the court. It is apparent that Dr Barry-Walsh did not consider that was necessary in the present case, although the doctor was not aware of what would be required of C in terms of representing himself at his trial.

[55] Dr Barry-Walsh considered that C's case was not clear-cut. While it was apparent to him that C's mental disorder would have an impact on his ability to participate in the trial, the extent of that impact and whether it would be so significant that it would render C unfit to plead was not, in his view, clear. In the event, he, like Dr Hansby, did not document any concerns regarding C's fitness to stand trial and did not take any further steps beyond those outlined.

[56] Finally, we note that neither the Judge, standby counsel, Crown counsel, nor Ms Moulder, raised concerns during the hearing that C was unfit to stand trial.

Conclusion

[57] Based upon a review of the available evidence, including the trial transcript, we have not been brought to the point where, on balance, we could conclude that C was unfit to stand his trial. Ms Levy urged us to focus on the point in the trial when C made his decision not to have the complainant cross-examined. As we have already noted, his approach in that regard was consistent with the stance that he had taken in respect of other family members and, significantly, with the instructions that he had already provided to Mr Crowley in December 2017, well removed from the pressures of the trial itself, and when his mental state was relatively stable.

[58] The consequences of C's decision not to cross-examine the complainant are the subject of further consideration later in this judgment when assessing whether C received a fair trial. However, we do not consider that this aspect of the trial, nor the quality of the evidence C provided in support of his defence, either in isolation or when taken together with the circumstances of the trial as a whole, provides a basis upon which we can conclude that C was unfit to stand his trial.

Did C receive a fair trial?

[59] Whether C's self-representation resulted in an unfair trial turns on the following essential questions. Firstly, whether C's mental impairment and the way in which his condition manifested itself during the trial prevented his defence from being adequately put. Secondly, whether his failure to utilise counsel's assistance meant that a real possibility of acquittal was lost. To address those issues it is necessary to review the Judge's assessment of C's defence.

The Judge's assessment of C's defence

[60] The Judge identified three planks to the defence put forward by C in response to the Crown's case. Firstly, that C was or may have been in prison at times relevant to the charges. Secondly, that he did not have the opportunity to commit the alleged offences because he visited the family home infrequently and was not alone with the complainant in either the caravan at the family's first property, nor the shipping container at their second property. Thirdly, his blanket denial of having any sexual contact with his half-sister.²⁰

[61] At his trial, C presented a copy of his criminal history together with Department of Corrections records of when he was incarcerated in an endeavour to show that he was not in a position to commit the alleged offences. From all the evidence adduced, the Judge was able to establish a timeline to compare against the timeframes for each of the charges. The Judge's analysis of the chronology in relation to each of the charges resulted in him rejecting the defendant's evidence of alibi.²¹ He then turned to whether C had the opportunity to be alone with the complainant in the places where she described the offending had occurred.

[62] The Judge referred to C's evidence that the complainant would not go into the caravan, that this was his domain, and similarly that she would not visit the shipping container.²² The Judge noted C's explanation that, as someone with a head injury, he liked his own space and that he would not be alone with the complainant. The Judge

²⁰ District Court Judgment, above n 1, at [41].

²¹ At [63].

²² At [69].

considered C's argument that, while his mother could remember him staying with the family and confirmed that he lived in the container, she could not remember the complainant going to the container.²³ The father's evidence that his daughter had not gone out to the container while he was there was also noted.²⁴

[63] After assessing the balance of the evidence and C's claims that the complainant had not gone into his room, the caravan, or the shipping container, nor he into her bedroom, the Judge rejected C's evidence that he had not, on occasions, been alone with the complainant and had not had the opportunity to offend.²⁵

[64] For various reasons expressed by the Judge he found the complainant to be a compelling witness.²⁶ In contrast, the Judge considered C's evidence in relation to the detail of matters, beyond his blanket denial and the assertion that the complainant was lying, to be contradictory.²⁷ The Judge continued:

[101] Because, of course, the primary witnesses were not given an opportunity to answer the challenge on the important aspects, it is really not possible beyond the superficial examination of those contradictions to gauge the evidential value of certain of the defendant's assertions. But where other witnesses gave evidence on matters relevant to [C], it was of note that their evidence was consistent but was at odds with that of [C] ...

[102] When I stand back and I consider the defendant's evidence as a whole, I do not accept that evidence as credible and reliable. I do not accept the defendant's blanket denial as being truthful or possibly being truthful. Having rejected the evidence, I put the defendant's evidence to one side.

The alibi and lack of opportunity defences

[65] We consider that C's defence of alibi and denial was sufficiently communicated to the Court for its consideration. It was adequately advanced by C in the form of documentary material that he put before the Court, without objection from the Crown, and was analysed in some detail by the Judge. The Judge concluded that it did not remove the opportunity for C to commit the offences at the locations the complainant described. The possibility of the alibi defence being successful was

²³ At [70].

²⁴ At [71].

²⁵ At [77]–[78].

²⁶ At 99].

²⁷ At [100].

limited. However, it was given close examination by the Judge and we do not consider it would have been improved had it been advanced with the assistance of counsel.

[66] Similarly, C's evidence and submissions relating to his minimal contact with the complainant and that he did not have the opportunity to commit the acts she alleged were all adequately advanced by C at his trial. They were given careful consideration by the Judge. We have not been provided with any details of what further information or type of material C would have been able to have put forward that he did not proffer to the trial Court, or that he would have been able to have better communicated to trial Court with the assistance of counsel.

[67] The inadequacies of these aspects of C's defence arise from their lack of merit. It is likely that with the assistance of counsel they would have been presented and developed more skilfully and perhaps to greater effect, but it is apparent from the care and attention with which the Judge examined these issues that the substance of the matters was sufficiently developed for the Court's consideration notwithstanding the idiosyncrasies and often repetitive and tangential nature of C's evidence. We consider they were put adequately despite the limited assistance of counsel, and that C did not lose any real possibility of acquittal in deciding to present those aspects of the case himself.

[68] We move now to consider C's decision not to have the complainant cross-examined and the impact of that choice on his defence of denial and his claim that the complainant was fabricating the allegations.

The decision not to cross-examine the complainant

[69] As we have previously canvassed, C advised Mr Crowley as far back as 11 December 2017 that he did not want the complainant cross-examined. When the issue was revisited with him during the trial he ultimately maintained his position. It is apparent that notwithstanding his agitation and elevated mood at trial C was set upon this course. He had made that decision prior to the immediate pressures of the trial itself and at a time when there was no acute concern regarding his mental stability.

[70] While C appears to have been dismissive of the benefits to be obtained from legal representation and advice, he had the opportunity to speak to a lawyer about the issue on more than one occasion. This was not a spur of the moment choice. C also elected not to cross-examine two other family members, his mother and her partner, both of whom gave important evidence.

[71] C's decision not to cross-examine the complainant constituted a fundamental step in the trial. However, despite having chosen to represent himself, because of his access to standby counsel his decision was an informed one. Mr Crowley's evidence was that C knew that he could not cross-examine the complainant himself but that it could be done through standby counsel. He had been informed of the risk that if the evidence was untested by cross-examination the Judge could accept the allegations. Mr Crowley in fact told him that this would be the case.

[72] It was submitted that the failure to put C's blanket denial to the complainant made it inevitable that the Judge would accept her account. However, that was not the approach taken by the Judge, who took some care to ensure that C's failure to question the complainant did not prejudice the approach he took to his assessment of whether the Crown had proved the charges:

[19] The defendant did not through counsel, as it would have to have been, challenge by cross-examination the complainant's evidence. Nor did he give the complainant a chance to respond to his essential contentions. Namely, that she has fabricated the account. Further that he did not really know her or have any significant contact with her between the ages when he was 21 and 31. Further, that he could not have offended during the period of the charge because he was confined consequent upon arrest or sentence.

[20] I do not draw any adverse inference to the defendant as a consequence of that failure to put those matters directly to the complainant. They were clearly matters which [C] has raised right from the outset of this Judge alone trial. However, it does mean that I do not have the complainant's response to those matters and I have to consider the evidence, and the evidence of [C] without having the benefit of those responses.

[21] Although I was not able as a consequence, to hear and assess the complainant's response to those challenges, I am able to consider the evidence of other witnesses whose evidence weighs upon the decisions I have to make as regards whether I accept that the defendant's evidence is, or maybe true, or whether I reject the defendant's evidence and put it to one side.

[73] On his appeal, C's complaint is that he lost the opportunity to test the complainant's evidence and impeach her credibility. Ms Levy argued that, in order for standby counsel to have been able to effectively cross-examine the complainant and present C's defence, he would have needed detailed instructions and considerable input from the defendant. It was submitted that when regard is had to the content of C's evidence and the lack of relevant information he was able to provide relating to his interactions with the complainant and their shared family, C's ability to have performed that task was compromised. It was argued that this was the result of his mental impairment at the time which prevented him from being able to consult in a coherent and meaningful way with counsel.

[74] A difficulty with assessing the strength of that submission is that C has provided no evidence of the "detailed instructions" and "input" that he would now like to have provided to standby counsel to cross-examine the complainant upon. He has provided no details, even in general terms, of the relevant information that he would have sought to have provided to counsel about the complainant, her narrative of events or suggested motivation for making a fictitious complaint.

[75] As has been observed previously by this Court, where the defence is one of fabrication little may be gained and much lost by a detailed exploration of the allegations.²⁸ No adverse inference was drawn by the Judge against C for not putting his denial and defence of fabrication to the complainant and, to that extent, it may have been to his advantage that the complainant was not provided with an opportunity to repeat her damaging allegations.

[76] The duty to cross-examine a witness on significant relevant matters arises from the need to provide the witness, as a matter of fairness, with the opportunity to respond to contradictory evidence.²⁹ In the present case a failure to cross-examine did not result in the Judge affording C's evidence less weight, nor did it cause the Judge to accept the complainant's testimony by default. After rejecting C's evidence as it related to his defences of alibi and lack of opportunity, the Judge, in orthodox fashion,

²⁸ *R v K (CA531/2007)* [2009] NZCA 97 at [15].

²⁹ Evidence Act, s 92.

carefully considered the complainant's evidence and why he preferred it over that of C's, which he rejected as not credible or reliable.

[77] Having reached that conclusion, the Judge examined whether the Crown had proved the requisite elements of each of the charges. It is notable that after assessing the material concerning when C had been incarcerated after the complainant's 15th birthday, the Judge was not satisfied that there had been a further occasion of rape after the complainant turned 15. He found C not guilty of that discrete charge.³⁰

Conclusion

[78] In the particular circumstances of C's trial, which was before a Judge sitting alone, we do not consider that his failure to instruct counsel to cross-examine the complainant was an indispensable step that resulted in an unfair trial. It appears that C had resolved some two months before his trial and before any notable deterioration in his otherwise relatively stable mental state, not to cross-examine family members, including the complainant. In the event, having made the decision not to cross-examine the complainant we do not consider he lost any real possibility of acquittal in choosing the course he did.

[79] Ultimately, C's denial was not accepted as being truthful or possibly truthful and the Judge set it to one side. In contrast, he found the complainant to be a compelling witness. In what was a contest of oath against oath, the evidence of other witnesses, many of whom were cross-examined either by C or with Mr Crowley's assistance, was found by the Judge to be consistent with the complainant's testimony and to conflict with C's claims, particularly as it related to the opportunity to offend and his lack of interaction with the complainant.

[80] There is no basis to suggest that the Judge's reasoned analysis of the evidence was influenced by the way C behaved during the course of the trial. The Judge made appropriate allowances to ensure the respective merits of the competing cases could be properly considered. We do not consider any miscarriage arose from C's decision not to cross-examine the complainant, nor more generally from the presentation of his

³⁰ District Court Judgment, above n 1, at [115].

case, which we consider was adequately put by him notwithstanding the conduct of his own representation. Despite the heightened behavioural traits of his diagnosed mental condition that he displayed during the course of the proceeding, we consider that a fair trial was secured.

The sentence appeal

[81] In sentencing C, Judge Crayton provided a discount of two years' imprisonment (12.5 per cent) from a starting point of 16 years in acknowledgment of C's traumatic brain injury.³¹ In particular, its effect upon his behaviour and decision making and the difficulties it will cause C in serving his sentence. However, because of the heightened risk of reoffending that C presents, the Judge considered that any allowance had to be tempered by the need to protect the community.

[82] There is no challenge to the starting point. The long period over which this serious and repeated offending occurred, the grooming of the complainant from a very young age, her obvious vulnerability and the inherent breach of trust, meant the offending indisputably fell within band four of the guidance provided by this Court in *R v AM*.³² C's complaint is that insufficient allowance was made for the likely role his head injury and other mental health difficulties had in the commission of his sexual offending.

[83] It is not clear from the Judge's sentencing remarks whether the allowance he made for C's mental condition was intended to include any recognition for the part his impairment may have played in his offending. The Judge referred to the observation made in the pre-sentence report that C's health issues had "overlaid" all his offending and that he was clearly someone who appeared to have no control over many aspects of his behaviour.³³ However, beyond those observations and in the absence of any expert advice, it is not apparent that any linkage was made between C's mental impairment and his sexual offending.

³¹ Sentencing Notes, above n 2, at [41]–[42].

³² *R v AM* [2010] NZCA 114, [2010] 2 NZLR 750.

³³ Sentencing Notes, above n 2, at [17] and [27].

[84] This part of the sentencing exercise was made more difficult because C refused to cooperate with the psychological assessment requested by the Court to assist in determining the appropriate sentence. The Court was reliant on previous reports prepared for different purposes. However, Ms Levy submitted that it can be inferred that C was significantly unwell and suffering from the effects of the head injury throughout the period of his offending. Counsel submitted that C's head injury was suffered in 2002 and his sexual offending commenced during the following year when he was aged 17 years. C's medical records document that he suffered ongoing mental health difficulties from that point and that these resulted in periodic inpatient psychiatric care.

[85] In the absence of any expert opinion, Ms Levy emphasised the comments the complainant made during the course of her evidential interview. She stated that she always thought that C "was a bit crazy", and she referred to how she tried to make the position she found herself in seem better "by saying that it wasn't his fault because he's got a head injury". Ms Levy submitted that despite her youth and vulnerability, the complainant recognised that C was not a normal person and that allowances had to be made for him.

[86] An otherwise appropriate sentence may be reduced in recognition of an offender's diminished intellectual capacity.³⁴ If causative of the offending, the mental impairment may moderate the offender's culpability and reduce the relevance of deterrence, accountability and denunciation as sentencing concerns.³⁵ It may also render a sentence of imprisonment more subjectively punitive because the sentence will weigh more heavily on such a person or have a significant impact on the offender's mental health.³⁶ However, where an offender's mental condition may increase the risk of reoffending, considerations of public protection and deterrence will need to be taken into account.³⁷

³⁴ Sentencing Act 2002, s 9(2)(e).

³⁵ *E (CA689/2016) v R* [2011] NZCA 13, (2011) 25 CRNZ 411 at [68]; *Shailer v R* [2017] NZCA 38, [2017] 2 NZLR 629 at [45]; *Orchard v R* [2019] NZCA 529 at [46]; and *Zhang v R* [2019] NZCA 507 at [153].

³⁶ *E (CA689/2016) v R*, above n 35, at [68]; and *Orchard v R*, above n 35, at [46].

³⁷ *E (CA689/2016) v R*, above n 35, at [69]; and *Orchard v R*, above n 35, at [47].

[87] The Crown acknowledged that C's mental health issues heighten the punitive impact of imprisonment, and the Judge recognised the difficulties that C would experience within the prison environment. Not long after his sentencing in June 2018, Dr Barry-Walsh noted a decline in C's mental state which meant that he was again on a waiting list for admission to a mental health facility. C has entrenched mental health difficulties and it is apparent from his history that he has experienced ongoing difficulties in controlling many aspects of his behaviour. His fluctuating mental condition will likely continue to impact on his ability to participate in prison life.

[88] Ms Colley, who presented this part of the argument on behalf of the Crown, submitted that the Judge's two year discount appropriately recognised these difficulties. However, because there remains no established causal link between C's condition and his offending, and because of the high risk he poses, the Crown submitted that no further adjustment was warranted.

Decision

[89] The information before the sentencing Court did not connect C's mental impairment with his sexual offending, nor has any new material been put before us in furtherance of the appeal that supports that contention. While it is suggested that his anti-social personality traits and impulsivity bears more generally on his offending history, it has not been shown that his mental health is causatively related to the sexual offending against his sister.³⁸ As a result, we are unable to conclude that his condition reduces his moral culpability. We do not consider the complainant's rationalisation of why her brother would subject her to such sexual offending provides a sufficient basis to find such a causal link. In the absence of evidence to enable us to draw that connection, we are unable to conclude that the Judge erred in his approach to this aspect of the sentencing exercise.

[90] While there can be no rigid tariffs, discounts for mental health issues have generally ranged from 12 to 30 per cent.³⁹ Greater discounts than the 12.5 per cent reduction extended by the sentencing Judge in the present case are largely reserved for

³⁸ See similarly, *E (CA689/2016) v R*, above n 35, at [68]; *Orchard v R*, above n 35, at [46]; and *Gotz v R* [2019] NZCA 99 at [20].

³⁹ *Orchard v R*, above n 35, at [48] citing *E (CA689/2016) v R*, above n 35, at [71].

cases where there is clear evidence of a connection between the mental impairment and the offending.⁴⁰ It follows that we do not consider the failure to provide any greater deduction than the two years afforded to C resulted in his sentence being manifestly excessive.

[91] To the extent that C's long difficulties with his mental health over the period of his offending are capable of being taken into account more generally as a mitigating consideration arising from his difficult personal background, we consider that is largely offset by the high risk of reoffending that he presents. C lacks any acceptance of his culpability and has no insight into its effects. That is likely to be the result of his mental impairment but, regrettably, it means his rehabilitative prospects are limited and the need to protect the community comes to the fore.

[92] Finally, we note that no minimum period of imprisonment was imposed. Ordinarily, offending of this nature and duration may attract such an order. The approach taken no doubt reflects the ongoing and fluctuating nature of C's impairment and its likely effect on the timing and circumstances of his release. We consider that concession appropriately provides for this feature of C's personal make-up.

Result

[93] Both parties' applications for leave to adduce further evidence are granted.

[94] The appeal against conviction is dismissed.

[95] The appeal against sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁴⁰ See for example *R v Wright* [2001] 3 NZLR 22 (CA) at [10]–[11] and [29]–[30]; *Tuia v RCA312/02*, 27 November 2002 at [22]; *R v Whiu* [2007] NZCA 591 at [44]; *Dalley v R* [2010] NZCA 290 at [10]–[19] and [24]–[25]; *E (CA689/2016) v R*, above n 35, at [71].