NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PROHIBITED BY S 201 OF THE CRIMINAL PROCEDURE ACT 2011.

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

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA136/2019
[2022] NZCA 412

BETWEEN	C (CA136/2019) Appellant
AND	THE QUEEN Respondent

Hearing:	10 May 2022
Court:	Clifford, Venning and Moore JJ
Counsel:	Appellant in Person M J Dyhrberg QC as Standby Counsel E J Hoskin for Respondent
Judgment:	29 August 2022 at 10.30 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The application for leave to adduce fresh evidence is declined.

C The appeal against conviction is dismissed.

D The appeal against sentence is dismissed.

REASONS OF THE COURT

(Given by Moore J)

Introduction

[1] C was found guilty following a jury trial in the Whangārei District Court of three charges of incest,[1] one charge of sexual violation by rape,[2] and one charge of sexual violation by unlawful sexual connection.[3] On 15 March 2017, Judge D J Sharp sentenced him to 15 years' imprisonment with a minimum period of imprisonment (MPI) of nine years.[4]

[2] C appeals his convictions and sentence. His conviction appeal is advanced on the basis of trial counsel error. No oral or written submissions were made in support of his sentence appeal.

[3] C's appeal was filed some two years after he was convicted. Whilst that delay is significant, it is partly explained. C says he was unable to engage a lawyer to assist him with lodging an appeal, which was in part due to him moving prisons. The Crown did not make much of the delay. Given the seriousness of C's convictions and sentence, we consider it is in the interests of justice to grant an extension of time to appeal.

The offending

[4] C is the father to (at least) 12 children, including two daughters who we will refer to as "R" and "CC". R was born in 1994. CC was born four years later in 1998. Mr and Mrs C raised both daughters until they were removed from their care in 2004.

[5] R nevertheless returned to live with Mr and Mrs C when she was 17 years old. Approximately nine months later in September 2012, R gave birth to her first son, "E". His birth certificate does not name the father. He was taken into Child, Youth and Family (CYF) care.

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1 Crimes Act 1961, s 130. Maximum penalty of 10 years' imprisonment.
2 Sections 128(1)(a) and 128B. Maximum penalty of 20 years' imprisonment.
3 Sections 128(1)(b) and 128B. Maximum penalty of 20 years' imprisonment.
4 *R v [C]* [2017] NZDC 5650 [Sentencing notes].

[6] By November 2013, CYF and medical professionals were concerned with E's development. They instructed a laboratory to undertake genetic testing. The subsequent report recorded that 27 per cent of E's genetic material demonstrated long continuous stretches of homozygosity (LCSH). It noted that first cousins typically have around 6 per cent of their genetic material exhibit LCSH. The report writer had not previously encountered such a high degree of LCSH.

[7] In March 2014, R gave birth to her second son, "S". His birth certificate also does not name the father. It was only when S experienced breathing difficulties and required an air ambulance to take him to hospital that his birth was revealed. He too was taken into CYF care.

[8] R's maternal grandparents raised concerns with the Police that C had fathered both children. The Police investigated. DNA samples were taken from both boys.

[9] In early 2015, C was arrested on an unrelated matter. A suspect DNA sample was taken and entered into the National DNA Database. Chromosomal DNA testing revealed C was the most likely person on the database to be the children's father. This evidence formed the basis for the first two charges of incest.

[10] In June 2015, R suffered a severe asthma attack. She was airlifted to hospital. Medical staff determined that she was 37 weeks pregnant. Her third son was delivered by way of an emergency caesarean section. He died the following day. The next day R died in hospital. Post-mortem DNA samples were taken. The analysis of these samples linked C paternally. This formed the basis for the third charge of incest.

[11] Shortly after, CC made a complaint to Police that C had sexually violated her when she was a child. The Police interviewed her on 3 July 2015. She told them that when she was aged between four and six years old she was repeatedly raped by C. She described one incident when C told her and R that unless they had sex with him, they would be beaten with his belt.

[12] CC described C using his fingers to apply spit to her vaginal area, before penetrating her with his penis. She said that the sex hurt her vagina and that R

remained in the room while it took place. CC's account led to C facing four charges of sexual violation by rape and sexual violation by unlawful sexual connection, two of which were representative. The remaining two specifically related to the incident described.

[13] On 7 July 2015, the Police spoke to C. They put the allegations to him. He responded, "I don't have anything to say to you" and "it's a big set up, John Key set me up for these things because of the Government warnings".

The trial

[14] C pleaded not guilty to all charges. He elected trial by jury. At trial he did not give or call evidence. He was represented by Mr Watson.

[15] The Crown case on the incest charges relied primarily on expert DNA analysis. Ms Susan Vintiner's evidence was that C and the children's DNA strongly indicated that C was their father. The Crown also relied on evidence of the surrounding circumstances, particularly that E was conceived shortly after R returned to live with Mr and Mrs C, and that the two children who followed were conceived shortly after.

[16] The Crown case on the sexual violation charges was that they were supported by CC's evidence. She described the rape and other offending in detail. The Crown submitted her evidence was honest and accurate. Any inconsistencies or flaws in her memory were inconsequential.

[17] The defence acknowledged that there was scientific expert evidence indicating that C was the father of R's sons. The defence emphasised the expert's concession made in cross-examination that one of R's brothers being the father was "a possibility that should not be excluded". Counsel submitted that in light of this concession the jury could not be sure of paternity.

[18] The defence also submitted that CC's allegations lacked credibility. It was put to the jury they did not happen. Counsel submitted that CC had maintained contact with her father for many years, during which no complaint was made. It was claimed

CC's memory of the alleged sexual violation was unreliable; at times it was detailed while at other times it lacked fundamental specificity.

[19] The jury returned verdicts of guilty on the incest charges and sexual violation charges relating to the specific incident described by CC. C was found not guilty of the representative charges of sexual violation.

Approach on appeal

Appeal against conviction

[20] Appeals against conviction are brought under s 232 of the Criminal Procedure Act 2011 (the CPA). This Court must allow the appeal if it is satisfied that the jury's verdict was unreasonable, or that a miscarriage of justice has occurred for any reason.[5] A miscarriage of justice includes any error, irregularity, or occurrence in or in relation to or affecting the trial that:[6]

(a) has created a real risk that the outcome of the trial was affected; or

(b) has resulted in an unfair trial or a trial that was a nullity.

[21] A real risk arises if there is a reasonable possibility that a more favourable verdict might have been delivered if nothing had gone wrong.[7]

[22] In *R v Scurrah*, this Court set out the following approach to appeals against conviction on the basis of trial counsel error:[8]

> [17] The approach appears to be, then, to ask first whether there was an error on the part of counsel and, if so, whether there is a real risk that it affected the outcome by rendering the verdict unsafe. If the answer to both questions is "yes", this will generally be sufficient to establish a miscarriage of justice, so that an appeal will be allowed.
>
> [18] On the other hand, where counsel has made a tactical or other decision which was reasonable in the context of the trial, an appeal will not ordinarily be allowed even though there is a possibility that the decision affected the

5 Criminal Procedure Act 2011, s 232(2)(a) and (c).
6 Section 232(4).
7 *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730 at [110].
8 *R v Scurrah* CA159/06, 12 September 2006.

> outcome of the trial. This reflects the reality that trial counsel must make decisions before and during trial, exercising their best judgment in the circumstances as they exist at the time. Simply because, with hindsight, such a decision is seen to have reduced the chance of the accused achieving a favourable outcome does not mean that there has been a miscarriage of justice. Nor will there have been a miscarriage of justice simply because some other decision is thought, with hindsight, to have offered a better prospect of an outcome favourable to the accused than the decision made.

Appeal against sentence

[23] Appeals against sentence are brought under s 250 of the CPA. This Court must allow the appeal if it is satisfied that for any reason there was an error in the sentence imposed on conviction and a different sentence should be imposed.[9] The focus is on the sentence imposed, rather than the process by which it is reached.[10] The Court will not intervene where the sentence is within the range that can properly be justified by accepted sentencing principles.[11] To this end the concept of a "manifestly excessive" sentence is well-engrained and there is no reason not to use it.[12]

The appeal

[24] Ms Dyhrberg QC was appointed as standby counsel. She filed comprehensive written submissions to which she appended a transcript of detailed handwritten notes given to her by C setting out his criticisms of Mr Watson's performance as trial counsel. She also attached a typewritten statement from Mrs C in which she described her dealings with Mr Watson. Also attached, but not referenced by either C or his wife, was a copy of a scientific article entitled "Childhood maltreatment and DNA methylation: A systemic review".[13] This appears to have been published in 2020 in Neuroscience and Behavioural Reviews.

[25] C and Mrs C each made two affidavits. They first set out their dealings with Mr Watson and their criticisms of his performance as counsel. They then replied to Mr Watson's affidavit.

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9 Section 250(2).
10 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].
11 At [36].
12 At [35].
13 Charlotte A M Cecil, Yuning Zhang and Tobias Nolte "Childhood maltreatment and DNA methylation: A systematic review" (2020) 112 Neuroscience and Biobehavioral Reviews 392.

[26] Ms Dyhrberg's submissions incorporated C's arguments which Ms Dyhrberg helpfully pared down into the following summary which we agree reflects the points advanced by C in the documents he has filed for the appeal.

[27] C's appeal against conviction is brought on the basis that Mr Watson made a series of errors in his conduct of C's trial which give rise to a real risk of a miscarriage of justice. The first five focus on Mr Watson's alleged errors and in particular whether he:

(a) erred by failing to adduce C's medical records to advance a defence based upon his state of health;

(b) erred by failing to obtain CC's medical records for the purpose of challenging her reliability and credibility;

(c) failed to adhere to instructions, including to call witnesses that C requested be called in his defence;

(d) failed to properly cross-examine CC; and

(e) failed to instruct an independent DNA expert to examine and challenge the DNA evidence relied upon at trial.

[28] The sixth ground of appeal is connected to the application for leave to admit fresh evidence. This is the article on DNA methylation.

[29] The sole issue on C's sentence appeal is whether the end sentence that was manifestly excessive.

[30] We turn to consider each of the grounds on the conviction appeal.

Did trial counsel err by failing to adduce C's medical records to advance a defence based upon his state of health?

[31] Ms Dyhrberg raised three issues relating to C's state of mental health at the time of trial.

Fitness to stand trial

[32] First, Ms Dyhrberg submitted that trial counsel failed to obtain medical records to support an application that C was unfit to stand trial.

[33] Ms Hoskin, for the Crown, answered that C's fitness to stand trial was comprehensively explored prior to trial. He was adjudged fully fit.

[34] She pointed out that several psychiatric reports were commissioned to assess C's mental condition. The first, dated 8 July 2015, expressed the view that C suffered from a severe delusional and paranoid illness. His judgement was impaired, and he lacked insight to the extent that his fitness to plead was likely compromised.

[35] A second and more comprehensive report dated 20 July 2015 was authored by Dr Ian Goodwin. C presented to him as "totally preoccupied by his delusional beliefs". Dr Goodwin's opinion was that it is likely the court would find C unfit to stand trial as assessed at that time. A second opinion by Dr Shanmukh Lokesh, dated 11 August 2015, shared Dr Goodwin's view.

[36] Two more reports followed detailing C's clinical progress. Then, on 19 October 2015, Dr Goodwin noted that "[C's] mental state and capacity to engage around his legal matters has substantially improved". His view was that C had recovered to the extent necessary for him to be found fit to stand trial. Dr Lokesh agreed in a report dated 20 October 2015.

[37] At this point the issues relating to C's fitness to stand trial were resolved. This was recorded in a minute of Judge D G Harvey on 30 November 2015.[14]

[38] As noted by Ms Hoskin, any criticisms such as they are cannot be attributed to Mr Watson. All these matters pre-dated his assignment. Plainly no criticism can properly be levelled at Mr Watson for not inquiring into issues of mental capacity when they had been comprehensively ventilated and resolved prior to his instruction. C was adjudged fit to stand trial. Mr Watson was correct to proceed on that basis.

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[14] *R v [C]* DC Whangārei CRI-2015-088-1863, 30 November 2015 (Minute of Judge D G Harvey).

C's claimed inability to give evidence

[39] Next C complained that while he instructed trial counsel that he did not wish to give evidence, the reason he did so was because he was neither mentally nor physically able to withstand cross-examination or convey his account properly. He further complained that Mr Watson told him that if he gave evidence he could be arrested for perjury. Ms Dyhrberg submitted that in these circumstances, C was effectively unable to exercise his right to give evidence.

[40] We accept Ms Hoskin's submission that C's claimed physical and mental ill-health is self-reported and uncorroborated by independent evidence. He was previously adjudged fit to stand trial. It is both a corollary of that finding and a logical inference that he was capable of giving evidence. He adduced no evidence on appeal to contradict that conclusion. There is nothing before us to indicate that at the time of his trial C was suffering from any condition which was so debilitating it prevented him from giving evidence.

[41] Related to this is C's claim Mr Watson told him he could be arrested for perjury if he gave evidence. Before us Mr Watson said that he did not discuss perjury with C. He did, however, discuss perjury with Mrs C at one of their meetings. Mr Watson explained that the topic of perjury arose after a potential witness, Matthew Watts, summarily left the meeting when he learned of the DNA evidence which indicated that C was the father of R's children.

[42] Mr Watson's evidence on this point was detailed and credible. He maintained a strong memory of the incident because he had never before seen a potential witness react in this way. We also regard it as supportive of Mr Watson's account that he maintained contemporaneous file notes. These recorded Mr Watts's view that Mrs C either knew or ought to have known that her husband was having sex with their daughter. In that context it is explicable how the question of perjury might have arisen between Mr Watson and Mrs C.

[43] On this point we accept Mr Watson's evidence and reject C's.

C's testicular injury

[44] We next address C's claim that evidence of a testicular injury was relevant to his defence to the incest charges, but that Mr Watson failed to advance it.

[45] In their affidavits, C and Mrs C claimed that in 2011 they went fishing together. During this excursion a rusty fishhook pierced C's right testicle. The injury caused severe swelling. Both C and Mrs C claim that one of the consequences of this injury is that C now ejaculates blood rather than semen. C says that he told Mr Watson about this injury, but that Mr Watson failed to facilitate a medical examination to confirm whether or not he was fertile.

[46] In his evidence before us, C was challenged as to why he did not provide medical evidence of this injury to any of his lawyers. He said that he was unable to because he was remanded in custody. He expected counsel would obtain the relevant material. Mr Watson said he asked Mrs C to obtain the records. She did not. Under cross-examination by C, Mr Watson explained that for a number of reasons he believed Mrs C was best positioned to make these enquiries. These included the limitations of time with the trial proceeding shortly after the Christmas break, the lack of contact details for C's doctor, and the absence of an authority to obtain the information.

[47] In our view it was not unreasonable for Mr Watson to request that Mrs C obtain this material. By the time of trial he was C's third counsel. He was formally assigned on 7 December 2016. The trial started on 16 January 2017. The holiday period intervened. Preparation time was limited. Priorities needed to be set. Without ready access to C's doctor's contact details or the necessary authorities, it was entirely understandable that Mr Watson believed Mrs C was best qualified to obtain this material.

[48] However, most tellingly in our view, is that even now, more than five years after the jury convicted him, C has still not provided any independent evidence of the injury or its consequences in terms of his ability to father a child. Ms Dyhrberg advised that this is because C claims the injury was never treated. Putting to one side the inherent implausibility of that assertion, it leaves unexplained why C has not since

attempted to engage an expert to examine him. Presumably that would not only confirm the injury and its symptoms as described by C and his wife, but also confirm the fact of C's infertility. Given the centrality of this issue to C's defence to the incest charges, the failure to undertake this relatively straightforward and obvious step is most surprising. It leads to the inescapable inference that this evidence simply does not exist.

[49] It follows we consider that Mr Watson's omission to obtain C's medical records could not have given rise to a miscarriage of justice.

Did trial counsel err by failing to obtain CC's medical records for the purpose of challenging her reliability and credibility?

[50] Ms Dyhrberg submitted that Mr Watson failed to obtain CC's medical records for the purpose of challenging her reliability and credibility. This was despite C's belief that CC had experienced trauma and sexual abuse when she was in foster care and not in his custody. This, C deposed, could have affected the reliability and credibility of her account because she attributed this abuse to C as he and the abuser shared the same first name.

[51] It is not clear on what basis Mr Watson could have obtained CC's medical records. There is no evidence before us indicating that anything in CC's medical history which might have affected her ability to give evidence.

[52] The only evidence which might conceivably have been of this nature comes from Mrs C, who deposed that she believed CC was abused while in CYF care. She annexed to her affidavit a copy of one page of a three page document dated 17 July 2017 which she says was used in the Family Court. The portion of the document produced records that three of her children might have been exposed to family violence by their prior caregivers, although all were now considered safe in the care of their present caregivers. There is no reference to concerns that any of the children may have been sexually abused.

[53] We accept Ms Hoskin's submission that this limited material is insufficient to establish that CC was abused, let alone found a submission that her reliability and

credibility was thus affected. CC is not even mentioned anywhere in the reproduced page. We also note two pages of the document were omitted.

[54] Further, having reviewed CC's evidence at trial it is apparent she was an articulate, capable and compelling witness who while firm was also appropriately concessionary. Indeed, Mr Watson's response to the suggestion that CC's mental competence is notable when he deposed "[t]he clarity of this complainant's evidence at the trial itself could be said to dispel any suggestion of her mental incompetence to give evidence."

[55] We also note that in any event, apart from criticising Mr Watson for not pursuing this line of enquiry, at no point does either C or Mrs C depose that Mr Watson was so instructed.

[56] For these reasons, this ground of appeal fails.

Did trial counsel fail to adhere to instructions, including to call witnesses that C requested be called in his defence?

[57] C's next complaint is that Mr Watson ignored his instructions, including by not arranging to call witnesses who C maintains were vital to his defence. The particular witnesses cited are Mrs C, Sonny Singh, Matthew Watts, Clive Grice and Murray Hough. He also complains that he was unable to instruct Mr Watson during the trial due to the position of his wheelchair in the courtroom.

Failure to call witnesses

[58] Ms Dyhrberg accepted that C signed an authority not to call witnesses, but submitted that C was extremely unwell and felt coerced and overborne by Mr Watson to do so. She submitted that these witnesses would have given evidence that C was not in the country during the period some of the charges cover, nor was he living at the residences where it was alleged the abuse occurred. Further, he did not own or wear a belt, contrary to the allegation that he used one in his abuse of CC.

[59] Mr Watson annexed to his affidavit a handwritten instruction which C accepted he had signed. Because Mr Watson's handwriting was particularly difficult to

decipher, we asked him to read the contents of the instructions into evidence. The relevant portions are reproduced below:

> Attendance of 30 minutes on the 18/01/2017. I [C's full name] instruct:
>
> 1. The case for the prosecution has closed and the decision now is whether the defence opens its case and gives or calls evidence or does not give or call evidence.
>
> 2. At the conclusion of the Crown case, defence counsel left with me the decision as to whether the defence was open and to give or call evidence. All the advantages and disadvantages of those decisions were discussed and I was left overnight to think about those decisions.
>
> 3. My sons have not assisted the defence in providing any evidence or information. For these reasons they would not be called as witnesses to give evidence at my trial.
>
> 4. My friend Mervyn Howe[15] has not assisted the defence in providing any evidence or information. For these reasons, he would not be called as a witness to give evidence at my trial.
>
> 5. My friend Matthew Watts has spoken to my counsel and while he recalls visiting the homes at which the family lived in [locations removed] he cannot remember when those visits were. For these reasons, I have decided that Matthew Watts would not be called as a witness to give evidence at my trial.
>
> 6. Although my wife, [Mrs C], could be a witness at my trial, for reasons which I have discussed with my counsel, it has been decided by me that she will not be called as a witness at my trial.
>
> 7. I do not think that I would be a witness at my trial. My letter attached explains my reasons. It is therefore my decision that I shall not give evidence for the defence at my trial.
>
> Signed by [C] and dated in [Mr Watson's handwriting] 18/1/2017.
>
> (Footnote added.)

[60] We regard this comprehensive and reasoned instruction as a complete answer to C's criticisms of Mr Watson for the reasons which follow.

[61] First, we reject any suggestion C was coerced or overborne by Mr Watson. Mr Watson's affidavit describes the circumstances which surrounded the making and signing of the instructions. Mr Watson, having held a practising certificate for 40 years, deposed that in order to avoid the very sort of allegations C now makes

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[15] It would appear that Mervyn Howe and Murray Hough are references to the same person.

against him, it was his practice to give his clients time to reflect on whether to give or call evidence.

[62] Here the Crown closed its case at 4:27 pm on 17 January 2017. The trial had taken place in Courtroom 4 on the first floor of the Whangārei Court complex. Because C was in a wheelchair, security staff took him to a ground floor interview room. Mr Watson met him there at 4:45 pm. The meeting took 45 minutes. Mr Watson's notes of that meeting record that various prospective witnesses were discussed including C's sons, Mr Howe, Mr Watts and Mrs C. The various disadvantages in calling each of them were canvassed. The theory of the defence case on the incest charges was covered, as was the helpful concession that the ESR scientist could not exclude C's sons as a possible father. Also discussed was CC's credibility and that she had been shown to have lied. The note finishes with: "Leave him to consider overnight. His decision to give evidence."

[63] At 9:10 am the following morning Mr Watson met with C. The meeting took 30 minutes. It was in the course of that meeting C signed the instructions. Given the evident care and lack of urgency which characterised Mr Watson's dealings with C at this point in the trial, it is difficult to see any room for criticism.

[64] Neither is there anything in C's claim he was "extremely unwell" at the time. He lists various ailments in his affidavit and refers to medical reports which he claims support and confirm this. However, the documents relied and appended to his affidavit include a 2015 letter from a pharmacy advising C had been prescribed analgesic medication for unspecified conditions, a 2013 note of uncertain provenance describing back pain presentation and investigation, and a handwritten 2016 letter apparently authored by C and addressed to Whangārei Hospital describing certain urinary and related health issues. None of these, either individually or collectively, assists in supporting C's claim that his parlous medical presentation contributed to his decision to sign the instructions. It is notable that no report, brief or statement from a medical practitioner has been produced to support the claim C was extremely unwell at the time of the trial.

[65] There are other reasons why this ground of appeal must necessarily fail. As Ms Hoskin submitted, nowhere has C attempted to particularise the evidence the nominated potential witnesses might give. No draft briefs of evidence or statements have been filed. Secondly, Mr Watson deposed that having been shown C's passport by Mrs C it was apparent that he was out of the country for only one month of the five-year period spanned by the sexual violation charges.

[66] We accept that C's instructions accurately record the reasons for his sons, and Messrs Howe and Watts not being called to give evidence. In particular, the document records that the witnesses were neither willing to, nor could, give evidence that C was out of the country during the period to which some charges relate, or that he was not living at the residences where it was alleged the abuse occurred. Another file note dated 17 January 2017 (the previous day) records that Mrs C provided Mr Watson with two photographs of the residences at which they were living at the relevant time which showed pine trees and a pole house, both of which supported CC's own memory of the offending.

[67] Furthermore, we do not accept that these witnesses could have given evidence that C never wore a belt. One of Mr Watson's file notes dated 10 and 11 January 2017 records that C showed him a photograph of the family in which C was wearing jeans. It records:

> Points to photographs — family he is wearing jeans, therefore a belt?

[68] Mr Watson deposed that he added the question mark because C had previously claimed he never wore a belt. The question mark is consistent with his stated confusion at being presented with photographic evidence tending to support a contrary proposition. In any event confirmation that none of the witnesses had seen C wearing a belt would not be determinative of CC's credibility.

[69] As for Messrs Singh and Grice, Mr Watson deposed that while C mentioned them both in passing, neither was seriously discussed as a potential witness. This is consistent with the instructions, which omit any mention of either.

[70] Finally, we do not accept that Mr Watson erred in not calling Mrs C. While the written instructions refer somewhat opaquely to not calling her "for reasons which I have discussed with my counsel", those reasons are readily apparent from the evidence. In that context it is necessary to assess the relative benefits and detriments to C's defence.

[71] As for the benefits, Mrs C listed the evidence she claimed would have assisted her husband's defence. We have already discussed the limited relevance of C not wearing a belt, the testicular injury, C's absence from New Zealand and C's health issues. None would have been determinative. Nor when taken together does that picture materially change.

[72] As for the disadvantages in Mrs C giving evidence, it is obvious that she would have been cross-examined extensively on a wide range of topics adverse to the defence case. These may have included her children being taken into CYF care, the living arrangements at the family home and R's social isolation. Particularly damaging to the defence case would have been the inevitable probing into Mrs C's knowledge of the circumstances of R's pregnancies, her failure to disclose them and, ultimately, her acquiescence in permitting C to have sex with R and her failure to take protective steps. The decision not to call Mrs C was not, in our view, one which was finely balanced. Her evidence would have been damaging in our assessment.

[73] It follows we do not accept that Mr Watson failed to follow C's instructions by not calling these witnesses.

Inability to give instructions during the trial

[74] Next, we turn to consider C's complaint about the location of his wheelchair during the trial and his inability to effectively instruct counsel.

[75] C and Mr Watson disagreed about the configuration of the courtroom. This emerged particularly when C was cross-examining Mr Watson. C claimed that he was positioned over 15 feet away from Mr Watson during the trial. In contrast, Mr Watson recalled C being three to five feet away with no substantial obstacles dividing them. Mr Watson said that C could have spoken to him from this position.

In any event, he said that if C had instructions to convey, the prison escort would convey them to Mr Watson. He said he always ensured that defendants had pen and paper to do this.

[76] That description is consistent with our experience of usual Courtroom practice and we can find no reason to disbelieve Mr Watson's evidence on the point. It follows that we are satisfied C had the ability to convey his instructions to Mr Watson. This ground of appeal accordingly fails.

Did trial counsel fail to properly cross-examine CC?

[77] C's next complaint is that Mr Watson failed to properly cross examine CC on various topics. Under this heading there were several topics identified; the age range, the claim C had never owned a belt, a card CC had sent to C, reading a statement during her evidence in chief and the failure to cross-examine CC on her previous sexual experiences with a former boyfriend. We deal with each of these topics separately.

The age range

[78] First, Ms Dyhrberg submitted that Mr Watson should have questioned the "vast age bracket" proffered by CC for when the offending occurred. She criticises the cross-examination as not sufficiently "robust and thorough as was necessary to challenge that evidence and show it was not feasible or credible".

[79] We cannot agree. The criticisms under this head are not appealable errors. Mr Watson challenged CC's credibility and reliability throughout his cross-examination. At times he was appropriately robust and direct. He highlighted inconsistencies in her narrative and unequivocally put it to her that she was lying. On several occasions he had to suspend his cross-examination because she was crying.

[80] The cross-examination of sexual complainants involves a delicate balance between robust and legitimate challenge weighed against the perils of alienating the jury. Every trial is different. There can be no standard approach in these things. What is best in the particular circumstances of a trial comes down to the subjective

judgement and experience of counsel. That principle is reflected in observations of this Court which has commented that trial counsel must be given the benefit of "substantial latitude" when cross-examining witnesses.[16] Appellate courts will ordinarily be slow to second-guess defence counsel who must make immediate important decisions about the extent of cross-examination, often based simply upon instinct and experience.[17]

[81] While Mr Watson did not emphasise the almost six-year age range covered by the charges, he nevertheless elicited answers from CC that focused and highlighted the length of that period. He then questioned CC with a view to challenging the reliability of her memory, particularly because of the passage of time. His questions were focussed on and appropriately designed to challenge the reliability of her account.

The card

[82] Despite the suggestion that he did not, Mr Watson did in fact cross-examine CC about throwing away a card she wrote to C after it was handed to her in the witness box. That line of questioning culminated in Mr Watson putting to CC that she loved C, as she had written in the card, and that she made up the allegations of sexual abuse. It is difficult to apprehend what else Mr Watson should or could have done.

The belt

[83] The criticism under this head is similar. It is that while Mr Watson did cross-examine on the subject of the belt, it was inadequate and should have included detail such as the absence of belt loops on his trousers and the photographs referred to earlier. Mr Watson cross-examined CC extensively on C's claim that he did not wear a belt. CC said this claim was untrue. After conceding that C did not verbally threaten her with the belt, Mr Watson cross-examined her on the reliability of her evidence that C had threatened to beat her with it if she did not acquiesce to sexual abuse.

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16 *Loffley v R* [2013] NZCA 579 at [53].
17 *S (CA361/2010) v R* [2013] NZCA 179 at [60].

[84] In our view, given the equivocal utility of this line of questioning, Mr Watson went as far as he needed to.

Reading off papers during evidence

[85] It seems that during the course of giving evidence CC could be seen reading off a piece of paper. What the paper was remains unclear. Although this point was not developed in submissions, we apprehend that the criticism is that Mr Watson did not interrupt the examination to enquire into what the paper was. There is nothing before the Court as to the provenance or contents of the document. To have embarked on a line of questioning where the answer was unknown would likely to have been fruitless if not risky. Nor does it appear that the experienced trial Judge was concerned by this, as he did nothing about it. There is nothing in this point.

Previous sexual history

[86] Ms Dyhrberg submitted that, contrary to C's wishes, Mr Watson did not instruct a private investigator to question CC's boyfriend as to her sexual history. He also failed to explain to C why evidence of this sort would not usually be permitted or attempt to locate evidence that could support an application under s 44 of the Evidence Act 2006.

[87] Ms Hoskin submitted that such an inquiry would be pointless. There was no possibility of evidence of this nature being ruled admissible at trial. We agree for the reasons which follow.

[88] Section 44 of the Evidence Act prevents evidence being given about the sexual experience of the complainant with any person other than the defendant.[18] Such evidence may only be given with the permission of the Judge if the evidence or question is of such direct relevance to the facts in issue in the proceeding that it would be contrary to the interests of justice to exclude it.[19]

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18 Evidence Act 2006, s 44(1)(b).
19 Section 44(2).

[89] Evidence of CC's sexual experience with her boyfriend could be of no relevance to the facts in issue at the trial. The trial issue was whether she was sexually abused by her father as a child.

[90] Mr Watson has no memory of any discussion of the sort claimed by C. Despite the fullness of his file notes there is no record of any such discussion, which leads us to doubt whether C ever raised this point. In any event, whether Mr Watson explained the limits to adducing such evidence properly is peripheral. Any failure to do so could not have given rise to a miscarriage of justice.

Did trial counsel err by failing to instruct an independent DNA expert to examine and challenge the DNA evidence relied upon at trial?

[91] C next complains that Mr Watson failed to instruct an independent DNA expert to examine the DNA evidence presented by the Crown. Ms Dyhrberg submitted that C seeks an independent expert review of the legitimacy of how the DNA samples in his case were collected and analysed.

[92] Mr Watson's evidence is that the Crown's DNA evidence was peer reviewed by Dr Susan Pope prior to him being instructed. He annexed a copy of counsel's letter dated 15 December 2016 addressed to C which makes reference to and encloses Dr Pope's report. Mr Watson did not retain a copy of Dr Pope's report. Nevertheless, his letter summarises her conclusion that "C is most likely to be the biological father of the three children."

[93] At trial, given the convergence of the experts' opinions on this point, Mr Watson focussed his cross-examination of Ms Vintiner on whether it was possible that the children were fathered by one of R's brothers. The answer that it was "a possibility that should not be excluded" was a major concession of real significance in the context of the trial. As noted by Ms Hoskin, undertaking DNA testing of one of R's brothers may well have precluded the availability of this defence, particularly in light of the high degree of genetic similarity reported by the Crown's expert. However, absent such evidence, Mr Watson's strategy in eliciting such a favourable answer proved very fruitful.

[94] The jury returning guilty verdicts on the incest charges indicates that it must have rejected the reasonable possibility of R's brother being the father. That finding was well supported by the other circumstantial evidence tending to prove that C had the opportunities to offend and each time acted on them. We are satisfied that there was an evidential basis for conviction. Mr Watson nevertheless put an alternative theory of the case to the jury that could not be ruled out by the Crown's expert. We are satisfied there was no error on his part.

Should leave to admit fresh evidence of whether CC's genetic material exhibits increased DNA methylation be granted?

[95] Ms Dyhrberg's final submission is that this Court should grant leave to admit fresh evidence addressing whether CC's DNA is methylated in a manner consistent with childhood maltreatment. DNA methylation is a relatively new area of science founded upon the hypothesis that the DNA of victims of sexual abuse can reveal molecular scarring indicative of abuse. Ms Dyhrberg submitted that DNA methylation evidence is fresh, credible and cogent evidence of whether CC was in fact sexually abused.

[96] Ms Hoskin observed that the hypothesis on which this claim is based remains unproven. It follows that the present limitations on the theory of DNA methylation mean that the evidence is neither cogent nor credible.

[97] In *Lundy v R*, the Privy Council set out the following test for the admission of fresh evidence on appeal:[20]

> 120. The Board considers that the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of

[20] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273. See also *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [103] where the Privy Council commented that "[a] substantial miscarriage of justice will actually occur if fresh, admissible and apparently credible evidence is admitted which the jury convicting a defendant had no opportunity to consider but which might have led it, acting reasonably, to reach a different verdict if it had had the opportunity to consider it."

> the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[98] When considering the cogency of novel scientific evidence, the Board endorsed the following factors set out by the United States Supreme Court in *Daubert v Merrell Dow Pharmaceuticals Inc*:[21]

(a) whether the theory or technique can be and has been tested;

(b) whether the theory or technique has been subjected to peer review and publication;

(c) the known or potential rate of error or the existence of standards; and

(d) whether the theory or technique used has been generally accepted.

[99] The first, preliminary point we would make is that the proposed evidence, that is whether CC's genetic material exhibits increased DNA methylation, does not exist. It would require the compilation of a report by a suitably qualified expert following the examination of CC's DNA. Quite how this would operate in practice is unclear.

[100] Ms Dyhrberg seeks leave on appeal to adduce the scientific paper "Childhood maltreatment and DNA methylation: A systematic review".[22] The paper notes that DNA methylation is an epigenetic process which regulates gene expression.[23] It occurs when methyl molecules attach to specific DNA base pairs, primarily cytosine-guanine dinucleotides.[24]

[101] The hypothesis is that DNA methylation may represent a mechanism for the biological embedding of early traumatic experiences, including childhood maltreatment.[25] This is supported by empirical data measuring the degree of

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21 At [138] citing *Daubert v Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) at 593–594.
22 Cecil, Zhang and Nolte "Childhood maltreatment and DNA methylation: A systematic review", above n 13.
23 At 392.
24 At 393.
25 At 392.

methylation of participants' DNA.[26] For example, 17 of 23 studies concerning the NR3C1 gene reported increased DNA methylation in participants exposed to childhood maltreatment, including physical, emotional, and sexual abuse or neglect.[27] On that basis it is suggested that there is a causative nexus between childhood maltreatment and DNA methylation.

[102] In our view the proposed evidence of whether CC's genetic material may display increased DNA methylation is not cogent, for two reasons.

[103] First, we acknowledge that the paper is published in a peer reviewed journal and undertakes a comprehensive review of 72 studies on DNA methylation.[28] However, the paper acknowledges that:[29]

> While findings generally support an association between childhood maltreatment and altered patterns of [DNA methylation], factors such as the lack of longitudinal data, low comparability across studies as well as potential genetic and 'pre-exposure' environmental confounding currently limit the conclusions that can be drawn.

[104] Using the NR3C1 gene example, one study reported hypermethylation six months after the maltreatment, but decreased methylation levels over time, emphasising the importance of longitudinal designs, the need to consider the timing of epigenetic assessment and the presence of potential moderating environmental factors following maltreatment.[30] Despite "the strongest evidence implicating the NR3C1 gene", the authors commented that "the current evidence base is far from consistent, with the strength and direction of associations varying widely across studies".[31] This was to some extent attributable to differences in methodology.[32]

[105] The absence of a consistent methodology or longitudinal studies indicates that at present the science is unreliable. As the strength and direction of associations varies widely across studies, it is difficult to imagine a standard against which the degree of methylation of CC's DNA could be measured. It follows that there appears to be no

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26 At 394.
27 At 396.
28 At 392.
29 At 392.
30 At 396–397.
31 At 401.
32 At 401.

generally accepted techniques which could be employed to obtain reliable evidence of the kind sought by C. These factors thus operate against the admission of the evidence.

[106] Secondly, we consider that the proposed evidence would not assist the jury given the facts of this case. The selection criteria for the paper required, among other things, that studies examined "childhood maltreatment, such as abuse and/or neglect".[33] Abuse is broadly defined as including physical, emotional and sexual abuse.

[107] A negative result would be required for the proposed evidence to be capable of influencing the jury to reach a different verdict. But if it is accepted that DNA methylation is an indicator of childhood maltreatment, we consider it likely that trauma caused by CC's upbringing would be reflected in her genetic material. A positive result would not discriminate between different forms of abuse. Even if CC was not sexually violated as a child, it is known that she was taken into CYF care at a young age. This, in itself, is consistent with neglect and emotional trauma which might well be detected through DNA methylation. C also alleges that CC was abused while in CYF care (although we have found that there is no evidence before the Court to support this).

[108] We also note that the paper does not purport to elevate the utility of evidence of DNA methylation to prove whether a child complainant was abused in a criminal case.

[109] We do not accept the proposed evidence, such as it is, is cogent. Leave to admit the new evidence is declined.

[110] With each of C's grounds on his conviction appeal dismissed, we next turn to consider his sentence appeal.

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[33] At 394.

Did the Judge impose an end sentence that was manifestly excessive?

[111] Neither Ms Dyhrberg nor C made written or oral submissions on sentence. Ms Dyhrberg advised that she was not in a position to argue that the sentence was outside the available range.

[112] However, absent C expressly abandoning the sentence appeal, we consider it necessary to examine the sentence, how it was calculated and whether in all the circumstances it is manifestly excessive.

[113] The Judge referred to the guideline judgment *R v AM (CA27/2009)* in adopting a starting point of 13 years' imprisonment for the sexual violation charges.[34] He considered that in isolation the incest charges warranted a starting point of between six and eight years' imprisonment. Taking into account totality, the Judge set a total starting point of 15 years' imprisonment.[35] There were no mitigating factors personal to C which justified a discount.[36] He was sentenced to 15 years' imprisonment with an MPI of nine years.[37]

[114] We are of the view that the end sentence is not manifestly excessive. The starting point of 13 years' imprisonment for the sexual violation charge places it near the bottom of band three of *AM*. A starting point at the bottom of band three is appropriate given C's offending involved a vulnerable victim (who was less than five years old), a significant breach of trust including offending within the family home, mental harm to the victim and threats of violence.[38]

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34 Sentencing notes, above n 4, at [18]–[19] citing *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

35 At [19].

36 At [20]–[23].

37 At [28].

38 In *R v AM (CA27/2009)*, above n 34, at [105] this Court commented that "band three is appropriate for offending which involves two or more of the factors increasing culpability to a high degree, … or more than three of those factors to a moderate degree."

[115] The Judge was correct in his remarks that incest cases of this nature typically involve starting points of between six and eight years' imprisonment.[39] In that context, we agree that an uplift of two years' imprisonment for the three incest charges was justified. Given that there were three incidents of incest offending against a different victim the uplift of two years seems to us to have been at the lower end of the range available to the Judge. It could have been greater.

[116] We also accept Ms Hoskin's submission that in these circumstances an MPI was justified by orthodox sentencing principles.[40]

[117] We are satisfied that the Judge neither erred in principle nor that a different sentence should be imposed.

Result

[118] The application for an extension of time to appeal is granted.

[119] The application for leave to adduce further evidence is declined.

[120] The appeal against conviction is dismissed.

[121] The appeal against sentence is dismissed.

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[39] See for example *R v L (CA358/2005)* CA358/05, 7 March 2006 at [29] where this Court considered a starting point of eight years' imprisonment was at the top of the available range for consensual incest offending between a father and daughter where one child was born; and *Liddell v Police* HC Gisborne CRI-2004-416-22, 13 October 2004 where Laurenson J upheld a starting point of eight years' imprisonment for two offenders who together sexually abused their children over a 10-year period.

[40] Sentencing Act 2002, s 86 enables the court to impose an MPI if the period otherwise applicable would be insufficient to denounce the conduct in which the offender was involved and protect the community from the offender. In our view the Judge properly relied on these principles in imposing an MPI.