IN THE COURT OF APPEAL OF NEW ZEALAND

CA444/02

THE QUEEN

v

BRUCE THOMAS HOWSE

Hearing: 16 July 2003

Coram: Blanchard J
Tipping J
Anderson J

Appearances: G J King and B Blake for Appellant
S P France and G Burston for Crown

Judgment: 7 August 2003

JUDGMENT OF THE COURT DELIVERED BY TIPPING J

Introduction

[1] The appellant, Bruce Thomas Howse, was found guilty by a jury in the High Court at Wellington on two counts of murder. He appeals against his conviction and the order that his life sentence be subject to a minimum non parole period of 28 years. The victims were his two step-daughters, Olympia aged 11 and Saliel aged 12. The circumstances of the case were such that only two people could have committed the murders. They were Mr Howse and his partner, the mother of the two girls. Her name is Charlene Aplin. Mr Howse's defence at trial was that the children's killer was their mother.

[2] A number of grounds were advanced by Mr King in support of the appeal against conviction. The principal one was that the appellant's right to a fair trial had been fatally prejudiced by the admission in evidence of "a vast array" of illegitimately prejudicial material. An aspect of this submission was that evidence had been led before the jury which had both a hearsay and a non hearsay dimension, and there was no or no appropriate direction from the Judge as to the use which the jury could and could not make of it. We will mention certain additional matters raised by Mr King when we reach an appropriate point in our judgment.

Background circumstances

[3] We take the following account substantially from the helpful summary provided by counsel for the appellant. On the night of 3 December 2001 Olympia and Saliel went to bed in separate bedrooms in a sleep-out behind their family home in Masterton. Overnight the two girls were each killed by a single knife wound. Those also present at the family home on the night of 3 December were Ms Aplin, Mr Howse, and their two younger children. Apart from Olympia and Saliel the rest of the family slept inside the house.

[4] At 3.38am Ms Aplin made a 111 call to the police. She said she was calling on behalf of Mr Howse who said he had been attacked by four men who had since fled. During her conversation with the police Ms Aplin expressed concern for the safety of her two daughters in the sleep-out. She did not go outside to check on them. When the police arrived they found the two girls dead in their outside bedrooms.

[5] Mr Howse was interviewed by the police in Masterton. He described how he had been assaulted and dragged from his home by a group of Polynesian/Maori men. He suggested that they must have killed the girls at the same time. He gave details of previous threats that had been made against him and possible suspects, as well as other background matters tending to suggest that the girls had been killed by the same men as had attacked him. To support this version of events Mr Howse had inflicted some significant injuries on himself.

[6] Later the same day Mr Howse was interviewed again by a detective in Wellington. He was then returned by car from Wellington to Masterton and taken by the police to a motel. There he was spoken to by a senior detective. During the course of this interview Mr Howse confessed to having killed the children himself. He said he had done so at the behest of voices which he had heard in his head. It appears that Mr Howse's original statement concerning the attack on him by the four men was changed once it became apparent that the injuries which he claimed they had inflicted on him were in fact self-inflicted.

[7] After the interview at the motel, Mr Howse was taken to the Masterton Police Station where, during the course of a video interview, he reiterated that he had killed the girls himself. He also described with considerable precision how he had killed each girl. He described administering to each of them a single blow with a knife and demonstrated how each of the two blows had been administered. During the video interview Mr Howse was shown a diary allegedly kept by Olympia in which she claimed he had sexually abused her. He denied having been previously aware of the diary entry. He also denied that it was Olympia's handwriting. He did, however, accept that he was aware that Olympia had made allegations that he had been sexually abusing her. He pointed out, quite correctly, that these allegations had been investigated by the Department of Social Welfare which had decided they were false. In short, Mr Howse accepted he was aware that Olympia had made allegations of sexual abuse against him but disputed their truth.

[8] A week or so later, after Mr Howse had been charged with the murders and had been remanded in custody, he asked to make a further statement to the police. He did so in the presence of the lawyer then representing him. This interview was also recorded on video and in the course of it Mr Howse described in some detail how Ms Aplin had been responsible for the girls' deaths. He said that he had, by agreement with her, accepted blame so as to ensure that she could attend the girls' funeral. He said that his previous statements had been untrue and that he had lied in them and made up the previous versions in order to protect Ms Aplin. He contended that after she had killed the girls she returned to the house with the knife, which had blood on it. He then washed the knife in the kitchen sink and returned it to its

drawer. As noted earlier, it was Mr Howse's defence at the trial that Ms Aplin was the killer and not him.

Motive

[9] It was a significant part of the Crown case that Mr Howse had a motive for the killings whereas Ms Aplin did not. The motive ascribed by the Crown to Mr Howse related to the sexual abuse which it was said he had perpetrated on both girls. He was thus intent on silencing them so he could not be pursued for his sexual offending. Mr Howse's stance on this aspect of the case was that while he was aware that allegations of sexual offending had been and were being made against him by Olympia in particular, he was not guilty of such offending.

[10] It is material to note that his awareness of the allegations could itself have constituted a motive. The Crown, however, wished to strengthen its case by also asserting that the allegations were true, thus strengthening the motive. Hence there arose a clear conceptual distinction between the making of the allegations, which was not disputed, and their truth, which was. This distinction assumes central importance on the hearsay issues to be discussed below. We will first consider the allegations of illegitimate prejudice, aside from the hearsay dimension, after examining an argument by the Crown that these points were not open to the appellant.

Whether appellant can take certain points

[11] Mr France's argument to this effect was based on the fact that the admissibility of certain evidence pertaining to Mr Howse's past conduct and the allegations of sexual offending had been the subject of a pre-trial ruling. In that ruling the pre-trial Judge had admitted some of the evidence which Mr Howse is now contending should have been excluded. He applied for leave to appeal to this Court from the pre-trial ruling but abandoned his application on the day it was due to be heard. The matter was therefore never determined on the merits in this Court.

[12] Without wishing to press the matter, Mr France invited us to consider whether in these circumstances it was open to Mr Howse to challenge aspects of the pre-trial Judge's ruling. Mr France cited the decision of this Court in *R v Pellikan* [1959] NZLR 1319, 1320 where the Court said:

> It is, we think, clear beyond question that, once an appeal has been dismissed, a second appeal will not lie; and, in our view, it can make no difference whether the appeal is dismissed on its merits or consequent upon the abandonment of the appeal by the appellant himself. In our opinion, the only course open to an appellant is to apply for leave to withdraw his notice of abandonment. If leave should be granted, then the case is to be disposed of on the first notice of appeal.

[13] The principle stated in *Pellikan* was applied in *R v Shepherd* [1990] 3 NZLR 39 and *R v Elwin* CA292/97, 25 September 1997. *Pellikan*'s case involved an appeal against conviction and sentence which had been abandoned. The appellant wished to resurrect the sentence appeal and filed a second notice of appeal against sentence only. That was the context in which North J, for the Court, stated the principle noted above. The position in *Shepherd* and *Elwin* was the same, save that in those cases the previous appeals had been dismissed on the merits rather than pursuant to an abandonment. In that situation no second appeal will ordinarily lie. When a previous appeal has been dismissed following an abandonment, a second appeal can be brought only by means of an application for leave to withdraw the abandonment. This, if successful, resurrects the first appeal.

[14] The present case is different in that the first "appeal" was an application for leave to appeal from a pre-trial ruling. That application was abandoned. After trial there can be no question of reinstating an application for leave to appeal a pre-trial ruling by giving leave to withdraw its abandonment. Once a trial commences the possibility of appealing pre-trial rulings is spent. Following trial the focus shifts to the ultimate question whether a miscarriage of justice has actually occurred, to adopt the words of the proviso to s385(1) of the Crimes Act 1961. We do not consider an appellant can be precluded from demonstrating a miscarriage of justice simply because a pre-trial ruling appeal has not been pursued. That cannot be the case if no application for leave to appeal is ever made. Making such an application, and then not pursuing it, cannot in the present context make a crucial difference.

[15] Pre-trial rulings are always capable of being revisited at trial, albeit, as Mr France rightly pointed out, this should not generally be done unless there has been a material change in circumstances: *R v Hines* [1997] 3 NZLR 529 and *R v Gallagher* [1993] 1 NZLR 659. That embargo is, however, simply a salutary rule of practice; it is not a matter of jurisdiction. Ultimately the trial Judge has the responsibility for the proper conduct of the trial and is not jurisdictionally bound by any pre-trial ruling made by that Judge or any other Judge. The ultimate criterion on appeal is whether a miscarriage of justice has occurred. There cannot properly be any jurisdictional bar after trial preventing an accused from attempting to demonstrate such a miscarriage. Nor, for similar reasons, does it matter that evidence challenged on appeal was not challenged at trial. That does not jurisdictionally preclude this Court from addressing a point and giving effect to it if it has sufficient force.

[16] We also note, as Mr King pointed out, that in the present case the pre-trial Judge concluded his various rulings by saying that they were "naturally subject to review, variation (or different outcome) by the trial Judge". We further note and agree with Mr King's submission that if there were a jurisdictional bar in present circumstances that might lead to an undesirable increase in the number of appeals in which counsel's incompetence and radical error was asserted. To encourage points of the present kind to be addressed obliquely in that way would not be appropriate. It is far better to hold, as we do, that in circumstances like the present there is no jurisdictional bar preventing the appellant from raising evidential issues on appeal. The Crown acted appropriately in bringing the matter to the Court's attention. We cannot, however, accept the outcome for which the Crown contended.

Evidence of bad conduct and disposition generally

[17] Mr France appropriately urged us, when considering this aspect of the case, to bear in mind the realities of the trial and in particular the reality that the jury were presented with only two candidates for the murders, Mr Howse and Ms Aplin. It was therefore relevant, so Mr France submitted, for the jury to know how the family functioned generally. In the pre-trial ruling the pre-trial Judge determined how far

evidence of this kind should be allowed to go. His basic approach was to rule that evidence of previous violence and other misconduct on the part of Mr Howse was admissible if it concerned family members and was otherwise relevant to what the Judge called the family dynamics. Evidence of Mr Howse's behaviour to persons outside the family and unrelated to the family dynamics was excluded. The Judge gave specific directions relating to a number of individual witnesses in accordance with his primary ruling.

[18] Mr King, who was not counsel for Mr Howse at that stage or at the trial, suggested that the ruling was somewhat broad and should have been more tightly focused. He did not, however, attack the essence of the Judge's distinction. Rather he submitted that evidence was allowed to be led which did not qualify for admission under the ruling and, furthermore, whether certain evidence strictly qualified or not, its volume and repetitious nature created a pervasive atmosphere of prejudice of such a kind and extent that Mr Howse did not receive a fair trial. Counsel argued that so many unattractive facets of Mr Howse's life were exposed before the jury in detrimental terms, that the prejudice was overwhelming and made it virtually impossible for Mr Howse to give evidence, as he would otherwise have wished, without exposing himself to cross-examination on a large number of prejudicial aspects of his life.

[19] We have borne in mind Mr France's submission noted above, and his further point that a number of pieces of evidence which were challenged tended to slip out rather than being discretely led. We are nevertheless of the view that cumulatively there was an undesirable amount of evidence which was more prejudicial than probative. Mr King produced a 21 page schedule of evidence which the appellant claimed to be in this category. It is unnecessary to traverse the entries on the schedule in detail. Some of the evidence was hearsay, if led to prove the truth of what was asserted. We doubt whether it qualified for admission for that purpose. We can fully appreciate the Crown's difficulties when seeking to draw the line in relation to evidence of this kind. The Crown case was a strong one but the appellant was nonetheless entitled to a fair trial. Without going into further detail we consider that the cumulative and diverse weight and extent of the evidence of Mr Howse's past misconduct was apt to distract the jury from the need for a dispassionate

analysis of the evidence and an assessment of its true worth, the more so in the absence of any specific direction from the trial Judge as to the proper and limited scope of this kind of evidence which was relevant to motive but not disposition per se. On their own these points may not have raised a real risk of a miscarriage of justice; but they are relevant to our overall appraisal of this aspect of the case.

Hearsay

[20] The evidence in contention under this heading comprised statements made by the two deceased girls to various people alleging that Mr Howse had sexually abused them. A number of witnesses, including school friends of Olympia and Saliel, were called to recount statements made by the two girls to this effect. It is essential in any hearsay discussion to identify the purpose for which the evidence is led. Evidence of what A heard B say is not inadmissible as hearsay if led to prove only that B did speak the words which A narrates. If the fact that B spoke the words is relevant in itself, irrespective of the truth of what was said, then A is allowed to give evidence attesting to the fact that the words were said. A is, in these circumstances, giving evidence of a primary fact to which he is able to depose from his own direct knowledge. He has heard something with his ears. That is the same as seeing something with his eyes. The problem is that words can have a double significance. First, the fact that they were said or written may be significant in itself. But the words may also assert the occurrence of some event, the happening of which is in issue.

[21] This duality arose in the present case. Olympia tells school friends that her step-father is sexually abusing her. The fact of her saying this (ie. her making the allegations) has relevance to motive once it is established that Mr Howse was aware of the allegations. If evidence is led to prove the fact that allegations were made, consideration must necessarily be given to whether the same evidence can also be used before the jury to prove the truth of the allegations. Evidence is always admissible to prove the fact that words were spoken if that confined fact is relevant. Whether the evidence may also be used as proof of the truth of the words spoken engages the hearsay rule. The question becomes whether the evidence should be

admitted for that purpose also. If the evidence is not admitted as proof of the truth of what has been said, the Judge must direct the jury very carefully as to the use they may and may not make of the evidence. If the risk that the jury will use the evidence inappropriately, in spite of proper judicial direction, is too great, the primary evidence should be excluded as involving too much potential prejudice as against its probative force. If that issue arises its resolution will depend on the Judge's perception of the balance between the degree of probative force the evidence has as against its capacity for illegitimate prejudice.

[22] In his pre-trial ruling the Judge appropriately cited the following passage from this Court's judgment in *R v Manase* [2001] 2 NZLR 197:

> [30] … Whether to admit hearsay evidence under the general residual exception therefore turns on three distinct requirements: relevance, inability and reliability.
>
> > (a) Relevance. This is not strictly a requirement directed to this exception to the hearsay rule. Rather it is an affirmation and a reminder of the overriding criterion for the admissibility of all and any evidence. It is a self-contained issue. The evidence in question either has sufficient relevance or it does not. The same test applies as would have applied to the primary (ie non-hearsay) evidence.
> >
> > (b) Inability. This requirement will be satisfied when the primary witness is unable for some reason to be called to give the primary evidence. If the primary witness is personally able to give that evidence, it will seldom, if ever, be appropriate to admit hearsay evidence simply because the witness would prefer not to face the ordeal of giving evidence or would find it difficult to do so. To adopt that approach would be to tilt the balance too far against the accused or opposite party who is thereby deprived of the ability to cross-examine.
> >
> > (c) Reliability. The hearsay evidence must have sufficient apparent reliability, either inherent or circumstantial, or both, to justify its admission in spite of the dangers against which the hearsay rule is designed to guard. We use the expression "apparent reliability" to signify that the Judge is the gatekeeper and decides whether to admit the evidence or not. If the evidence is admitted, the jury or Judge, as trier of fact, must decide how reliable the evidence is and therefore what weight should be placed on it. If a sufficient threshold level of apparent reliability is not reached, the hearsay evidence should not be admitted. The inability of a primary witness to give evidence is not good reason to admit unreliable hearsay evidence.
>
> [31] As a final check, as with all evidence admitted before a jury, the Court must consider whether hearsay evidence which otherwise might

> qualify for admission should nevertheless be excluded because its probative value is outweighed by its illegitimate prejudicial effect.

[23] In the course of his discussion whether to admit evidence from those who had heard the two girls making sexual allegations against their step-father, the Judge did not expressly address the issue of the purpose for which the evidence was to be led. The Crown appeared to be saying that the primary purpose was to prove the allegations were made. It is apparent, however, that the Crown also intended to use the evidence to support the proposition that Mr Howse had indeed been abusing the girls. In terms of our earlier discussion it was only in relation to that second dimension that the evidence was inadmissible, unless it qualified for admission under the *Manase* criteria. The Judge simply observed at paragraph [81] of his ruling that "The evidence has prejudicial effect as it, if accepted, goes rather further than simply showing that the children had made statements, but that those statements were in fact true."

[24] The Judge then added:

> The Crown's position is that the threats of disclosure provided a motive for the accused to kill the girls so as to prevent disclosure of actual wrongdoing. The probative value of the evidence the Crown says is high, being directly relevant to show motive.
>
> The developing narrative or circumstances of complaints by Olympia, then retracted and later revived, and brought to the attention of CYPS to the knowledge of the accused – along with the documentary hearsay contained in her diary and exercise books – are all admissible so as to provide a comprehensive picture of developing events relevant to motive. These events naturally involved the accused acknowledging complaints were made, and denying the truth not only to counsellors but also to the detectives in interview. Additional to this is the evidence of Saliel's complaint to her sister, her threat to "nark" and the semen stain linked to the accused. It would be unrealistic to exclude such evidence because if accepted, it is relevant to the Crown's case that in fact sexual abuse had occurred on both girls, and disclosure was imminent with the accused's motive being to prevent further disclosure. Its probative value from the point of view of the Crown's case as to motive far outweighs its prejudicial effect.
>
> There are ample examples of previous conduct of an accused. *R v Fulcher* [1995] 2 Cr App R 251; and previous statements a deceased *R v Haig* (CA408/95, 17 October 1995) being admitted in evidence as being probative to establish motive. The hearsay statements, written and oral, of both Olympia and Saliel fit into that category and meet the tests of relevance and reliability. Prejudicial as such evidence may be, it is outweighed by its probative nature as to motive.

[25] There cannot be any doubt that the evidence was relevant. It was apt to establish the Crown's asserted motive. Similarly there can be no doubt that the primary witnesses were unable to give the primary evidence. They were dead. The crucial issues were reliability and the final probative/illegitimate prejudice check: see paragraph [22] above. Although expressing himself as satisfied that the evidence met the test of reliability, the Judge did not expand on that conclusion. The same applies with the prejudicial/probative balance.

[26] Mr King submitted that the evidence, particularly that relating to Olympia's allegations, did not meet the threshold requirement of sufficient apparent reliability and it should therefore have been excluded as evidence of the truth of the allegations. Indeed counsel argued that if this evidence did meet the threshold for that purpose, there would be little, if any, hearsay evidence which did not. We will deal first with the oral hearsay. Olympia's diary is in the different category of documentary hearsay.

[27] The reliability of Olympia's oral assertions must be viewed against the relevant background. Olympia appears to have been in the habit of making allegations of this kind against her step-father. On a previous occasion she retracted them. They had also been investigated by the relevant authorities who came to the view they were not well founded. Olympia made allegations of this kind to her school friends but was reluctant to repeat them to adults. When Ms Aplin was originally told of Olympia's allegations she refuted them. So did Olympia's older sister, who said that things could not have happened as Olympia alleged as she was there. During the course of the social worker's investigation, Olympia acknowledged she had been lying. She was known to have blamed Mr Howse for the death of her cat, and to have been generally on bad terms with him. She had argued with him on the morning her allegations resurfaced, just before the killings.

[28] There were additional features in the evidence, which it is not necessary or desirable to recount in detail, which suggest that Olympia's allegations were dubious. One further example will suffice. Olympia's grandmother overheard a discussion between Olympia and her younger half-sister, Destiny, during the course of which Olympia acknowledged her allegations against Mr Howse were untrue.

This piece of evidence is significant because Olympia's acknowledgement occurred in an environment not overlaid with connotations of adult inquiry or concern by persons in authority. When all the relevant material is examined, we are driven to the view that Olympia's oral allegations against Mr Howse did not satisfy the threshold requirement of sufficient apparent reliability in terms of *Manase*. Neither inherently nor circumstantially did this hearsay evidence justify admission notwithstanding the dangers against which the hearsay rule is designed to guard. The Judge, as the gatekeeper, should not have allowed the evidence to go before the jury as proof of the truth of the allegations.

[29] The necessary analysis in the case of Olympia's diary is different but, in our view, the result is the same. The admissibility of the relevant entry, whereby Olympia accused her step-father of sexual abuse, is governed by the Evidence Amendment Act 1980. Sections 3 to 6 constitute a code for the admission of documentary hearsay in criminal cases. Section 3(1)(a) of the Act renders the diary entry admissible, subject to other aspects of the section. This is because it represents a statement made by Olympia in a document, tending to establish facts of which direct oral evidence would have been admissible and Olympia, as the maker of the documentary statement, was unavailable to give evidence. Hence the diary entry was, prima facie, admissible. However, in the present case we consider that in terms of the combination of s18 and s3(2)(b) the statement should have been regarded as otherwise inadmissible because its prejudicial effect far outweighed its probative force in the light of Olympia's general unreliability, and the inability of Mr Howse to cross-examine on it. Hence, although the diary entry was, prima facie, admissible under s3(1)(a), it should have been excluded under ss18 and 3(2)(b): see *R v Mataa* CA282/99, 28 October 1999.

[30] The problems with Saliel's oral allegations are not quite as substantial as the problems we have identified with Olympia's allegations. Standing alone it is possible that the hearsay evidence derived from Saliel may have had sufficient apparent reliability to justify admission in *Manase* terms, particularly as there was evidence that a semen stain coming from Mr Howse was found on Saliel's bedding. If there was sufficient apparent reliability in her case, the probative/prejudicial balance would need to be addressed. In that respect there may have been difficulties

for the Crown. These points do not, however, require any final determination. Once Olympia's evidence is found to have been wrongly admitted for truth purposes, it matters little whether the same ought to be said in Saliel's case. Mr Howse's due process rights are already significantly compromised and, subject to the Crown's reliance on the proviso to s385(1)(c), a miscarriage of justice prima facie justifying a new trial has been shown.

[31] The position is compounded in that respect by the admission of the evidence of a close relative to the effect that she too had been a victim of Mr Howse's sexual attentions. The Judge was dubious about the admissibility of this evidence and regarded the matter as borderline on the probative/prejudicial balance. Ultimately he decided in his pre-trial ruling to let the evidence in. We understand the matter was not revisited in front of the trial Judge. What would otherwise have been quite a difficult point becomes straightforward once Olympia's hearsay evidence is excluded, and that of Saliel found to be of dubious admissibility at best. Once the relevance of the allegations made by Olympia and Saliel is confined, as it should have been, to the fact they were made, the close relative's so-called "similar fact" evidence both has no basis for admission and carries a great deal more prejudice than probative force. It could only be relevant to the truth of the allegations made by Olympia and Saliel. When that dimension is removed there is nothing for that similar fact evidence to support. Hence her evidence should also have been excluded, and its admission constitutes a prima facie miscarriage of justice.

[32] We should also add that the repetitious nature of the evidence recounting the allegations made by Olympia and Saliel (even if that evidence were limited to proof that the allegations were made), is difficult to reconcile with the rules relating to prompt complaint evidence in cases where sexual offending is directly charged. The admission of evidence from some ten witnesses, all testifying to the making of allegations either by Olympia or by Saliel on different occasions, would not have been admissible had Mr Howse been charged with sexual offending. By no stretch of the imagination could this evidence be regarded as simply recounting one complaint made over an extended period of time. It is clear law that consistency may not be enhanced by repetition. It is not immediately easy to see how evidence which would otherwise have been inadmissible, ought nevertheless to be regarded as

admissible when Mr Howse was not charged with the alleged sexual offending. The evidence was being led to establish a motive for the killings, and he accepted he was aware that allegations of this kind were being made.

[33] Ordinarily the complainants would themselves give evidence of sexual offending. Here they could not. It might be possible to argue that, other points aside, there was therefore an insufficient parallel with the ordinary prompt complaint rules. We do not propose to pursue this point any further. Nor do we have to examine in any detail Mr King's argument that the *Manase* principles should be administered consistently with cases in which deceased witnesses have previously made statements to the police and even given deposition evidence. Inability to cross-examine is an important aspect of whether that sort of evidence should be admitted at trial. We are inclined to agree that the approach which the Court takes in that kind of case should be regarded as relevant to the administration of the comparable *Manase* jurisprudence.

[34] Relevant cases in the deceased witness area are *R v Gera* [1978] 2 NZLR 500 (CA); *R v L* [1994] 2 NZLR 54 (CA); *R v Brooks* (1994) 11 CRNZ 670; and *R v Johnston* CA94/97, 6 October 1997. This line of authority may be helpful to the Court when it is necessary to decide whether evidence which satisfies the relevance, inability and reliability requirements of *Manase* should nevertheless be excluded at the final check stage involving probative value against illegitimate prejudice.

Other items of evidence challenged

[35] Mr King also put in issue two other items of evidence. The first was evidence that Olympia was scared of Mr Howse and had written in her diary "my dad is going to kill me". We consider this evidence was relevant and admissible because it went to the state of Olympia's mind, as regards her step-father. It was therefore relevant to which of Mr Howse and Ms Aplin was the killer, both generally and in relation to the question of motive. The fact that Olympia was frightened of Mr Howse and not of her mother (there being no evidence to suggest that) tends to support the proposition that he was more likely to have been the killer than she. Obviously, as a strand of evidence on its own, it does not take matters very far. But

it cannot be said to be irrelevant to the jury's task. Nor can it be regarded, when kept in proper perspective, as more prejudicial than probative. Thus, we do not consider the admission of the evidence was in error; but we are bound to agree with Mr King's submission that the Judge did not focus the jury's attention on the proper use of this evidence. Rather, if we may respectfully say so, she tended to encourage a somewhat undisciplined use of the diary entry by saying to the jury: "The question is whether those words were truly prophetic or not." The words Olympia wrote in her diary were "truly prophetic" only if Mr Howse was the killer. It was necessary to be careful not to allow them to be used in a way which begged that ultimate question. We doubt the jury would have been materially misled but it must be accepted that the evidence was not the subject of a clear and firm direction as to its limited proper use.

[36] The second of these shorter points concerns the evidence of Dr Jeremy Skipworth, a consultant psychiatrist, called by the Crown. He had examined Mr Howse pursuant to a direction under s121(2)(b)(i) of the Criminal Justice Act 1985. Dr Skipworth had formed the view that Mr Howse had fabricated his claim to have heard voices, that being the reason why he had killed the girls, as he said in his second version of events. Mr King argued that as Mr Howse was no longer maintaining that version of events at trial and had admitted making up the hearing of voices, his earlier claim to have done so was irrelevant and the psychiatrist's evidence was therefore itself both irrelevant and prejudicial. Mr King pointed out that Mr Howse was not running any psychiatric defence. The submission made is that the Crown should have kept Dr Skipworth for rebuttal evidence if there was any unexpected change in Mr Howse's stance at trial. Having considered this issue we find ourselves in agreement with the Crown's argument that the evidence was relevant and did not carry sufficient capacity for illegitimate prejudice to require its exclusion.

[37] The trial Judge ruled this evidence admissible and we endorse her reasons:

> [6] I am satisfied however that Dr Skipworth's evidence is relevant to rebut any innocent explanation the accused might attempt to advance based on a fabricated mental health condition. On that basis the probative value of the evidence clearly outweighs any possible prejudicial effect.

> [7] In addition, a case with such dreadful features is seemingly inexplicable to the ordinary citizen. Any jury would naturally wonder about the psychiatric condition of a person accused of such crimes and will further wonder whether any professional examination of him was carried out and, if not, why not. As an examination has been carried out on the accused in this case, the jury are entitled to know the result.

[38] There is also the further point made by Mr France that Dr Skipworth's evidence provided a link to the accused's third version of events which he maintained at trial, and in which he claimed that Ms Aplin was the killer. In attacking that version the Crown was entitled to point out that, as with the self-inflicted injuries, the accused changed his version when the previous version (the hearing of voices) was closed off by expert evidence. Dr Skipworth told the jury that he had in effect indicated to Mr Howse that he, Dr Skipworth, did not believe his hearing of voices explanation. Not long after that Mr Howse put forward, in the presence of his solicitor, his third and final version placing the responsibility for the killings on Ms Aplin. The Skipworth evidence was therefore relevant and substantially probative for this reason also.

Summing-up

[39] We turn now to the trial Judge's summing-up and associated matters. Mr King submitted the Judge was wrong not to leave manslaughter to the jury. We reject that submission and endorse the Judge's reasons. There was no tenable basis in the evidence for a properly directed jury to find that Mr Howse was the killer but he lacked murderous intent. The nature of the blows which killed each of the girls, as described by the pathologist, permitted only one inference, namely that the person who inflicted them meant to kill or, at the very least, meant to cause bodily injury known to be likely to cause death, and was reckless whether death ensued or not. A manslaughter verdict would have been perverse. We do not propose to lengthen this judgment by saying any more on this topic save that, if manslaughter had to be left to the jury here, there would be few, if any, cases in which it could properly be withdrawn.

[40] We must, however, address an allied submission. Mr King argued that the Judge should not have included in her summing-up her detailed reasons for

withdrawing manslaughter. We consider this submission to be well founded but agree with Mr France that no miscarriage of justice is likely to have occurred on account of what the Judge chose to do. She told the jury that, as a matter of courtesy to them, she would explain why they were not being asked to consider manslaughter as an alternative to murder. The Judge was obviously and rightly concerned to let the jury know why what had presumably featured in earlier addresses was no longer a live issue. But, with respect, we consider she went further than was desirable. She started by saying that, simply put, the reason was that there was no evidence to support a consideration of manslaughter. This was an acceptable way of telling the jury that manslaughter was not a verdict properly open on the evidence. The Judge, however, went on, over about 2½ pages of transcript, to state quite vividly why manslaughter was not open. Some of the observations were, in context, rather more emotive than was desirable; but, as we have said, not to the point of causing any miscarriage of justice. Amongst other things the Judge said:

- Each child was thus completely defenceless when brutally attacked.

- I suggest you would have gained an appreciation of just how young, immature and vulnerable both of the victims were from the appearance of their little friends who came and gave evidence at the trial. Although now a year older, those friends must have brought home to all of us just how vulnerable and young Saliel and Olympia were. Also the size of the dead girls' bloodied clothing, which is now exhibited in the trial, is illustrative of their small size and relative defencelessness. Suggestions that they were precocious, difficult, abusive children, well able to stand up for themselves, must evaporate in the face of what actually happened to them. In the end they were not able to stand up to their killer or they were not given the chance to.

- The nature of that knife, its type and lethal properties, must also give rise to the strong inference that its selection and use is evidence of a murderous intent. On any account, it is a potentially murderous weapon, particularly when plunged into the torso of a victim with considerable force.

- A final and wrenching aspect is the fact that Olympia may have taken up to two hours to die from her wound. We know from the trails of her blood and her bloody footprints that this little girl wandered about in the sleepout while she literally bled to death. Dr Thomson's [the pathologist's] clear opinion was that during this time she would have been capable of calling out or going to the house for help before she grew gradually weaker and finally succumbed. But something or someone must have prevented her from doing so. Was it simply her fear of the dark? Or was it the presence of her killer? Is it likely that during the lengthy period it

> took her to die, her killer did not go back to the sleepout to check on the situation?

[41] All this was in the context of why manslaughter was no longer a live issue. In view of the Judge's ruling, defence counsel had been unable to address and had not addressed in favour of manslaughter. The issue for the jury was murder or nothing: essentially, who was the killer? In that context the Judge's directions could be seen as somewhat gratuitous. We simply add that in a case such as the present it would have been better to have given a very short and neutral explanation to the jury why manslaughter was not a live issue and left it at that. But we cannot say that what happened, in the circumstances of the case, occasioned a real risk of a miscarriage of justice.

[42] The Judge summed up on the basis that the hearsay evidence of the two girls' allegations of sexual abuse by their step-father was admissible as proof of the truth of their allegations. We have ruled that it should not have been admitted on that basis. On her view of the purpose of the evidence the Judge was not required to direct the jury that it could be used only for the more confined purpose of establishing that allegations had been made. But, on the basis that the evidence was not admissible as proof of the truth of the allegations, the Judge should have given a clear and firm proper use direction. In not doing so the trial Judge was no doubt following the pre-trial Judge's ruling. It would have been open to her, as noted above, to differ from it, but it is understandable she did not and, furthermore, we understand she was not asked at trial to differ from it. We must say, however, that even if the evidence was admissible as proof of the truth of the allegations, we consider the Judge should have invited the jury to exercise considerable caution before accepting it for that purpose. Even if the apparent reliability threshold and the probative/prejudicial balance were regarded as satisfied, there were still obvious problems, particularly as regards Olympia, in accepting the evidence as proving the truth of the allegations. We consider, with respect, the jury should have been given more assistance in this respect than they were.

[43] But of course this aspect is relatively much less significant than the problem deriving from the understandable absence of a clear and firm direction that the evidence was properly before the jury only for the confined purpose of proving the

making of the allegations, a fact the accused did not in any event dispute. The jury should have been warned in strong terms not to use this evidence as proof that the allegations were true, and not to treat the evidence as having been led for that purpose. As we have earlier indicated, this dimension must be regarded, prima facie at least, as having occasioned a miscarriage of justice.

The proviso

[44] It follows from all the matters we have discussed that the appellant has demonstrated a case for a new trial, unless the Crown's request for the application of the proviso to s385(1) of the Crimes Act is sustained. By that proviso Parliament has instructed this Court to dismiss an appeal, in spite of the appellant's success in demonstrating a valid ground of appeal, if the Court considers that no substantial miscarriage of justice has actually occurred. The leading authority on the application of the proviso is now *R v McI* [1998] 1 NZLR 696 (CA) at 711-713. Three citations from that case are apposite.

[45] First at 711 the Court said (Thomas J not dissenting at this point: see page 701 line 15):

> But it is important to recognise that the Court is not thereby invited to come to its own view about whether the appellant was in fact guilty of the crime or crimes alleged. Rather, the Court is required to assess whether, without the error or deficiencies of process, the jury would still have convicted. It is what the jury would have done without the errors or deficiencies which is the issue, not what the Court thinks of the ultimate merits of the conviction. If, in spite of the errors or deficiencies, the jury would have convicted anyway, there can be no prejudice to the appellant from those errors or deficiencies.

Then at 712 the following appears:

> On this basis, in order to achieve a satisfactory fusion of the two formulations, the test for application of the proviso should be framed as follows. Before the proviso may be applied, this Court must be sure that the jury would without doubt have convicted had the matter or matters giving rise to the initial miscarriage of justice not been present.

And at 712 it was said:

> People accused of serious crimes are entitled, under our system of justice, to trial by jury. If there has been an error, or series of errors, in the trial process which could have affected the jury's verdict, the accused person has not had the benefit of due process. That omission should be waived by this Court only if the lack of due process could have made no difference to the verdict. This is a high standard …

[46] The most powerful individual point raised by the Crown in support of applying the proviso is that only the killer could have known exactly how each of the girls had been killed. Mr Howse had that knowledge. He did not claim to have obtained it from Ms Aplin and, in any event, the idea she could have passed on the details to him with the precision involved and he had remembered them with equal precision, is little short of fanciful.

[47] The pathologist, Dr Thompson, described how the girls had been killed. Saliel died from a single downward thrust of a knife, so powerful that it penetrated her whole body and punctured the sheet below. Olympia died from blood loss caused by a single knife wound delivered by means of an underarm thrusting blow that went through her arm and entered her body. The knife thrust was 160mm in total depth.

[48] When giving his evidence-in-chief Dr Thompson was asked whether the wounds he had observed matched the description Mr Howse had given to the police as to how he had killed the girls. Dr Thompson's evidence was as follows:

> Counsel: I am going to put to you some evidence that will be given as to a demonstration of a blow with a knife given by the accused Mr Howse to Detective Senior Sergeant Oxnam in the early morning of Wednesday 5 December 2001. In speaking of going into Saliel's room and standing over her bed Mr Howse demonstrated a single stabbing motion using his right arm, fist clenched, lifting his hand up above his head and then plunging it downwards onto the table top. Could you tell us please how that demonstration of a stabbing motion corresponds to your post-mortem examination of Saliel on the following day, Thursday 6 December?
>
> Dr Thompson: That downward motion was exactly the type of stab wound that Saliel had. From the body injuries and the nick in the bottom sheet it was clear she was lying on her back in bed and was stabbed vertically downwards from above.
>
> Counsel: Until you carried out your post-mortem examination on the Thursday were you aware of the nature and direction of the injury to Saliel?

> Dr Thompson: No the body was still clothed and in a body bag until the late Wednesday afternoon at which stage a limited examination was made only of the genital area so the nature of Saliel's injury was not identified until about 10.30am on Thursday 6 December.
>
> Counsel: I am now going to put to you a further demonstration about which evidence will be given, a demonstration given by Mr Howse again in the early hours of the morning of Wednesday 5 December where when speaking of going into Olympia's room he demonstrated a single stabbing motion with right arm thrust by drawing his extended arm backwards and bringing it forward to underneath the table. Can you tell us please how that demonstration of a stabbing motion corresponds to your post-mortem examination of the wound to Olympia's body?
>
> Dr Thompson: Corresponds exactly. Olympia was stabbed as she lay on her face on the bed and the knife travelled parallel to the floor across through her body.
>
> Counsel: Were you aware of the way in which the knife wound to Olympia had been inflicted until you carried out your post-mortem examination of her body on the afternoon of that day?
>
> Dr Thompson: No I had no idea where or what injuries would be when we removed the clothing and the body bag.

[49] This evidence was not materially shaken in cross-examination. Indeed, in relation to Saliel it was not questioned at all. The way counsel for the Crown put the matter to Dr Thompson was an entirely fair representation of the way Mr Howse had described how he killed the girls in his interview at the motel with the police. Mr King appropriately did not suggest otherwise.

[50] In the course of his evidence Detective Senior Sergeant Oxnam described Mr Howse's account of how he had killed the girls in the following terms. He said that Mr Howse had told him "I went into Saliel's room, I stood over her bed, I was crying. I stood there for a few minutes. I knew I couldn't do it but I closed my eyes." The Detective Senior Sergeant then said that Mr Howse had demonstrated a single stabbing motion "like this", above the table straight down into the table top. Mr Howse then said "I don't know how but I went to Olympia's room, I stood there, I closed my eyes." The Detective Senior Sergeant then said that Mr Howse had demonstrated once again a single stabbing motion by drawing his arm back "like this", and then plunging it as far as the table. In order to get the "like this" evidence into the record, the Detective Senior Sergeant added to his earlier evidence that

Mr Howse had demonstrated a stabbing motion using his right arm, fist clenched, lifting his hand above his head and then plunging it down onto the table top.

[51] As regards the killing of Olympia, the Detective Senior Sergeant indicated that Mr Howse had demonstrated a single stabbing motion with a right hand thrust by drawing his extended arm backwards and bringing it forwards underneath the table. The Detective Senior Sergeant added that he had a vivid memory of these demonstrations, observing "You don't forget a man describing how he's killed two children."

[52] We do not consider it reasonably possible that Mr Howse was able to give such a precise demonstration of how he killed the girls coinciding exactly with the wounds they actually suffered, unless he was the person who wielded the knife. As noted earlier, he did not suggest he had obtained these details from Ms Aplin; nor did he suggest he had obtained this information from having seen the girls' dead bodies. Furthermore, we note that the Detective Senior Sergeant was not cross-examined as to the accuracy of his descriptions, nor to suggest he had any other means of knowing the nature of the wounds at the time of the interview. It would therefore be stretching credulity beyond breaking point to entertain the possibility that, by an amazing coincidence, Mr Howse happened to have fabricated or guessed the nature, number and precise details of wounds inflicted in differing ways by someone else.

[53] In the context of a case necessarily confined to whether the killer was Mr Howse or Ms Aplin, it should also be noted that there was absolutely no evidence to support Mr Howse's out of court assertion that Ms Aplin was the killer. While Mr Howse had no onus and, as the Judge aptly said, he should be acquitted if the jury thought it reasonably possible that Ms Aplin was the killer, there was in evidentiary terms literally no support for what Mr Howse claimed to be a reasonable possibility. His three wholly different explanations of what occurred that night can hardly have assisted the jury to place credence in his final version. It is also clear that Mr Howse had a motive for the killings in the fact that the sexual allegations against him had resurfaced. Ms Aplin had no motive.

[54] During his second interview Mr Howse was able to draw a diagram of the pattern of blood left by Olympia as she moved about the sleep-out prior to her death. It is hard to see how he could have done this on a basis which coincided substantially with the blood pattern as found, unless he was involved in administering the wound to Olympia and its aftermath. In his third version he claimed to have made a very brief visit to the sleep-out, as he said, to see if Ms Aplin's "confession" was true. The only illumination he had was a cigarette lighter. We agree with the Crown's submission that in these circumstances accurate recall of blood patterns would have been an extraordinary feat.

[55] Furthermore, Mr Howse had Olympia's blood on his trousers. At no time during his last statement to the police, made in the presence of his lawyer, when he claimed Ms Aplin had confessed to the killings, did Mr Howse say anything which might explain why Olympia's blood came to be on his trousers when she was the killer. Indeed at one point, when referring to the knife, Mr Howse expressly said he had told Ms Aplin he had no blood on him. No sufficient evidential foundation was laid for any suggestion the blood had got on to his trousers by innocent means. Finally, Mr Howse's reason for his attempt, later withdrawn, to take the blame for something Ms Aplin had done, ie. his suggestion he had done this to enable her to go to the girls' funeral, can only be regarded as beyond belief.

[56] We have considered all Mr King's submissions on this aspect of the case. We appreciate the point he made about fair trial considerations, natural justice and the presumption of innocence. All these matters are recognised in the jurisprudence concerning the proviso and the high threshold which is necessary for its successful invocation. We have borne that very much in mind. We are nevertheless satisfied by reason of the matters we have discussed that the Crown has established the criteria for the application of the proviso. We are sure that even if the problems with the trial we have identified had not occurred, the jury would without doubt have convicted Mr Howse on the two counts of murder. The combination of the points noted above leads to an irresistible inference of guilt, which the jury must have recognised. We therefore consider that no substantial miscarriage of justice has actually occurred in this case. For these reasons the appeal against conviction is dismissed.

Sentence appeal

[57] Mr Howse's appeal against sentence concerns whether the minimum non parole period of 28 years imposed on him is excessive. The offending took place prior to 30 June 2002 when the Sentencing Act 2002 came into force. In terms of s154 Mr Howse was to be sentenced under the Act but the provisions of s104 did not apply. The case was therefore governed by s103 without any reference to the 17 year mandatory minimum non parole period prescribed by s104 for cases coming within its terms. It is important to make that point clear from the start, albeit we are not suggesting the Judge fell into error in this respect.

[58] There is no dispute that the case fulfils the sufficiently serious criterion prescribed in s103(3) and justified a longer minimum period than the period of ten years referred to in s103(1). Mr King argued that the 28 year period was too long and out of line with comparable levels of culpability in other cases. The purpose of a minimum period order is to achieve greater punishment, denunciation and deterrence than would be achieved by the normal period of ten years: see *R v Brown* [2002] 3 NZLR 670, which held that culpability was at the heart of this issue. The same point was also made in *R v M & D*, CA296/02 & CA299/02, 30 July 2003. Once it is determined that the instant case justifies an increase above ten years, the question becomes how much additional punishment, denunciation and deterrence is appropriate. That depends on the level of culpability involved in the crime or crimes for which the additional period is being imposed.

[59] In support of his submissions, Mr King produced a schedule of cases in which minimum periods of imprisonment had been imposed following murder convictions. These included *R v Bell* CA80/03, in which the judgment of this Court is also being delivered today. Other cases in Mr King's schedule were *R v Watson* CA384/99, 8 May 2000; *R v Hotene* HC Auckland S23/00, 9 October 2000; *R v Alder* CA430/01, 25 June 2002; and *R v Lundy* (2002) 19 CRNZ 574.

[60] At the time the 28 year period was imposed on Mr Howse in the High Court, the *Lundy* case was the most recent relevant decision of this Court. Mr Lundy had killed his wife and young daughter in circumstances which need no detailed

description here. The report of the case mentioned above contains a full description. The minimum period of 17 years imposed by the trial Judge on Mr Lundy was increased to 20 years by this Court, on an appeal by the Solicitor-General. As Mr France rightly pointed out, a longer period, had it been imposed in the High Court, might well have been upheld had Mr Lundy appealed it. The 20 year term imposed by this Court was subject to the constraints involved in a Solicitor-General's appeal.

[61] Counsel's reference to other cases leads us to examine the proper role of relativities in this area of sentencing. The primary focus of the sentencing court should be to compare the culpability of the case in hand with the culpability inherent in cases which are within the range of offending which attracts the statutory norm of ten years. The primary question is how much more than the statutory norm the instant offending requires in order to achieve the necessary additional punishment, denunciation and deterrence.

[62] Section 103 of the Sentencing Act indicates that the statutory norm is designed for the ordinary range of offending of the particular kind. There are difficulties in determining the extent of that range; see *R v M & D* (supra). But it is necessary for the Court in a broad and realistic way (for that is all that can be achieved) to assess how much additional culpability is involved in the instant offending when compared with the culpability involved in offending which is within the ordinary range. In broad terms a minimum period of 20 years implies that the culpability of that offending is twice that of offending within the ordinary range. But, as was accepted on both sides in argument, it would be inappropriate for present purposes to adopt too mathematical an approach, whether by reference to number of victims or otherwise. Yet it is entirely reasonable to regard the number of victims as relevant to overall culpability. The greater the number of victims the more people will usually be traumatised by the offending. The exercise upon which Judges are required to embark is at one level an exercise in comparing incomparables. Nevertheless Parliament's broad purpose must be recognised and the necessary comparisons must be undertaken.

[63] So far we have been concentrating on how the instant offending relates in terms of culpability to the culpability inherent in offending within the ordinary range; in other words, how the present case compares against the statutory datum point. That, as we have said, is the primary focus of the sentencing court and it can properly be regarded as introducing a measure of restraint against the use of other cases as springboards. By the same token, while the instant case against datum comparison is the primary one, it is still necessary for there to be reasonable relativities between individual cases themselves. It would be wrong if one case could reasonably be regarded as seriously inconsistent with another.

[64] In short, the proper approach is to apply the primary comparison between instant offence and datum as the first step, and then to use any relevant individual comparators as a check. If the relativity between the instant case and the datum is seen as appropriate, after using individual comparators as a check, the relativities between individual cases should themselves be satisfactory. We conclude this general discussion by pointing out that where there is a floor but no ceiling, the **c**ourt can only work from the bottom upwards. There is no capacity to work from the ceiling downwards as a check, as there is in a case where the offending attracts a finite maximum sentence.

[65] In this case the minimum period of 28 years imposed on Mr Howse implies that his culpability is nearly three times greater than that involved in a single "ordinary range" murder. The comparison with Mr Lundy's sentence of 20 years suggests that Mr Howse was 40% more culpable than Mr Lundy. These arithmetical comparisons are, as earlier noted, not particularly helpful. But at least they provide some kind of framework which it is difficult to get from any other source.

[66] Mr Howse was 39 at the time of sentencing. He will not therefore be eligible to be considered for release on parole until he is 67. Mr King argued that this left him with no hope for the future, and very little prospect of rehabilitation. Against that we point out that his crimes left Saliel and Olympia with no future at all.

[67] We note next that under s8(f) of the Sentencing Act the Court must impose the least restrictive outcome that is appropriate in the circumstances. But that

statutory principle must obviously be reconciled with the purpose of s103(3). Other sentencing principles, such as those in paragraphs (a) and (e) of s8, must come into the balance as must the purposes of sentencing as set out in s7, and the potentially aggravating features set out in s9.

[68] Mr King also submitted that the 28 year period breached Mr Howse's right, under s9 of the New Zealand Bill of Rights Act 1990, not to be subjected to cruel, degrading or disproportionately severe a punishment. That proposition was based on the likelihood of his having to be kept in solitary confinement for his own protection. That may be the consequence of the realities of prison life. But we are unable to see that manifest excess in the non parole period, if such be shown, occasions a breach of s9. If the period is excessive it will be reduced. If it is not excessive it will have been imposed according to law and for a proper duration. In either event, the invocation by Mr Howse of s9 is unpersuasive.

[69] In the end whatever analysis or set of comparisons may be invoked, the question whether the duration of a minimum period order of the present kind is or is not excessive can only be a matter of almost intuitive judgment. Assessment of the degree of culpability inherent in any particular offending is not an exact science. The relationship of the instant offending to a statutory datum based on the concept of the ordinary range of murders of the particular kind, is capable of no more than imprecise determination.

[70] We have considered all the matters urged upon us both by the Crown and by the appellant. There is no doubt that these were appalling crimes, committed by a step-father on his step-daughters who were lying defenceless in their own beds. Olympia was not killed outright and bled slowly to death. It can reasonably be inferred that her step-father's presence prevented her from seeking help. This was callousness of a very high degree. But given all these features, and indeed all the relevant circumstances of the case, we cannot accept the Crown's submission that this sentence was within the Judge's discretion. We consider the period of 28 years imposed by the Judge was higher than was justified on the primary comparison with the ten year statutory datum, and was similarly too high when its relationship with the 20 years imposed on Mr Lundy is brought to account as a check.

[71] It therefore falls to us to fix what we consider to be an appropriate period. Having weighed up carefully all the difficult and competing issues involved, we have come to the view that 25 years is the proper period in this case. The appeal against sentence is accordingly allowed. The 28 year minimum period order is quashed. In its place we order that Mr Howse serve, in respect of each of the life sentences imposed upon him, a minimum period of imprisonment of 25 years. As is implicit in what we have said, these periods are to run concurrently.

Solicitors:
Crown Law Office, Wellington