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

**NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF NAMES, DETAILS AND IDENTIFYING PARTICULARS OF APPELLANT AND HIS MOTHER REMAIN IN FORCE.**

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA251/2017**
**[2017] NZCA 595**

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| BETWEEN | T (CA251/2017)<br>Appellant |
| AND | THE QUEEN<br>Respondent |

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| Hearing: | 29 November 2017 |
| Court: | Winkelmann, Venning and Duffy JJ |
| Counsel: | R J Stevens and C F Dunne for Appellant<br>Z R Johnston and H G Max for Respondent |
| Judgment: | 15 December 2017 at 10.30 am |

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**JUDGMENT OF THE COURT**

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**The appeals against conviction and sentence are dismissed.**

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**REASONS OF THE COURT**

(Given by Venning J)

[1] Mr T was convicted of 30 charges involving a range of assaults on six children committed over four years. Judge David Sharp sentenced him to four years and six months' imprisonment.[1] Mr T appeals against conviction and sentence.

**Background**

[2] The complainants in each case were children living in a household with Mr T and his mother, Ms T. The oldest complainant A and his sister B went to live with Ms T while their mother was receiving extended medical treatment. Also at the home were four younger children from a related family — C, D, E and F, ranging in age between four and nine. They had been placed in Ms T's care by Child, Youth and Family Services because of ongoing issues in their own home.

[3] Mr T originally faced 43 charges. Three were dismissed pursuant to s 147 of the Criminal Procedure Act 2011 at the end of the prosecution case. Mr T was found not guilty on 10 of the charges. The jury convicted him on the remaining 30 charges. Twenty charges involved assault with a weapon, three were assault with intent to injure, six were assault on a child and one was for common assault. The weapons used included a belt, wooden spoon, jandal, plastic spatula and back-scratcher.

[4] Ms T was also charged with assaults on the children and was to face a joint trial with Mr T, although they were not jointly charged. Prior to trial she pleaded guilty to 41 charges. The Crown did not pursue the remaining 29 charges against her. Evidence of Ms T's convictions was led at Mr T's trial.

[5] Mr T gave evidence. He denied having any role in disciplining the children. He also denied seeing any assaults on the children. He said that while he had seen his mother growling at the children, she had never hit them in his presence. He denied seeing any signs of abuse such as bruises or marks on the children.

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1 *R v [T]* [2017] NZDC 7866.

**The conviction appeal**

[6] Both appeals are governed by the Criminal Procedure Act 2011. Mr T appeals his convictions on the grounds there was a miscarriage of justice which created a real risk the outcome of the trial was affected or which had resulted in an unfair trial because:

(a) the Judge erred in admitting Ms T's 41 convictions pursuant to s 49 of the Evidence Act 2006 (the Act);

(b) having admitted the evidence, the Judge failed to properly direct the jury as to the use that that evidence could properly be put to; and

(c) the summing-up lacked balance.

*Admission of Ms T's convictions*

Appellant's submissions

[7] Mr Stevens for Mr T challenged the basis on which Judge Sharp admitted Ms T's convictions. He submitted that while the violence perpetrated by Ms T provided some general background as to what was occurring in the home, it did not have a tendency to prove or disprove anything of consequence to the determination of the proceeding. The fact the complainants may have been subjected to violence by another person in the household was irrelevant. There was no link between Ms T's offending and Mr T. They were not jointly charged.

[8] Mr Stevens submitted the probative value of the convictions as background evidence of the nature of life in the household was minor, whereas the prejudicial effect was significant.

[9] Mr Stevens also criticised the way in which the Crown was permitted to use the evidence of the convictions. The Crown had used it to bolster the complainants' evidence and also to attack Mr T's credibility.

[10] Mr Stevens submitted that there was also a risk of guilt by association, referring to the decision of *R v Nguyen*.[2] He submitted the evidence of Ms T's convictions was effectively an invitation to the jury to find Mr T guilty by virtue of his relationship with his mother and also by the clear inference that the children had been telling the truth, at least in relation to Ms T.

[11] Finally, Mr Stevens submitted that even if Ms T's offending could be said to be relevant as background, it should not have been presented in the form of convictions but rather it should have been led from the children.

Discussion — admission of Ms T's convictions

[12] The first issue is whether the admission of Ms T's convictions was an error or irregularity which affected the trial for the purposes of s 232(4) of the Criminal Procedure Act. If the convictions were properly before the jury, s 232 is not engaged.

[13] Convictions are only admissible under s 49 if they satisfy the test for relevance under s 7 and are not excluded by s 8 as unfairly prejudicial.[3]

[14] The evidence of Ms T's violence in the home satisfies the test for relevance under s 7 of the Act. It informed the jury of the circumstances in which the children were living. Without the evidence of Ms T's convictions the jury would have been drawn into speculation about why the complainants did not tell her about Mr T's assaults on them. The jury may have doubted the complainants' evidence that the abuse had occurred in the household by reasoning that it could not have occurred without Ms T noticing anything.

[15] There was also a connection between some of Ms T's actions towards the children and Mr T's assaults on them. There was an incident when A responded to Ms T calling him a shit by calling her the same thing. Mr T intervened and severely assaulted A. Next, several of the convictions established that Ms T had used a

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2 *R v Nguyen* HC Auckland CRI-2008-092-17198, 17 September 2010.
3 *R v Taniwha* [2012] NZCA 605 at [21].

back-scratcher as a weapon, the existence of which was in issue as Mr T had denied knowledge of such an implement.

[16] Importantly, evidence of Ms T's convictions was also a response to the defence case that the children had no visible injuries and that the children seemed unaffected. No one at school noticed anything before B spoke to a nurse at school. The convictions confirmed that the children had been subjected to assaults during the relevant period even though no one had noticed their injuries and the children had not complained.

[17] Further, once Mr T gave evidence that he never saw his mother assaulting the children, her convictions also became relevant to the assessment of his general credibility. The jury were entitled to use the evidence of her convictions to determine whether he could be telling the truth when he said he did not see Ms T being violent towards the children.

[18] The real issue is whether, as Mr Stevens submitted, the probative value of the convictions was outweighed by the prejudicial effect of the evidence so that it should have been excluded under s 8.

[19] As noted, Mr Stevens submitted there was a real risk of guilt by association, relying on the following comments of Priestley J in *Nguyen*:[4]

> [27] I conclude that the s 49(3) purpose with which the Crown wishes to bring evidence of the convictions of the six men would result in evidence being placed before the jury, which, although indisputably relevant, would have an unfairly prejudicial effect on the trial. Regardless of the strength of any direction I would give, the evidence would be tantamount to an open invitation to the jury to find the accused guilty (because of their communications with the convicted men) by virtue of that association alone.

[20] In that case the Crown sought to lead the evidence of others' convictions for drug offending at the trial of Mr Nguyen. The purpose was to confirm that certain parties to intercepted conversations had been guilty of drug dealing. While relevant, it was very general. This Court considered *Nguyen* and the application of s 49 in *Goffe v R*.[5] The Court distinguished *Nguyen* on the following basis:

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4 *R v Nguyen*, above n 2.
5 *Goffe v R* [2011] NZCA 186, [2011] 2 NZLR 771.

> [31] Priestley J concluded that the purpose for which the Crown sought to adduce evidence of the convictions remained at a level of generality. It would, in his view, be tantamount to an open invitation to the jury to find the accused guilty (because of the communications with the others who had pleaded guilty) by virtue of that association alone. The probative value was minimal, and the risk of prejudice high. By contrast, in the present case, the admission of the conviction provides specific and direct evidence as to the authorship of the first letter, and Mr McKay's purpose in writing the letter, both of which will be important issues at trial. The probative value of the conviction and its particulars is strong.
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> (Footnote omitted.)

[21] Similarly, in the present case the probative value of Ms T's convictions is strong. In addition to providing relevant background, the convictions provided an answer to an important part of the defence case that the offending did not happen as the children were unaffected and no one noticed anything wrong with them.

[22] The major risk of prejudice from admission of the convictions was the risk the jury might find Mr T guilty by association. That was dealt with in closing addresses.

[23] The issue of guilt by association was touched on by the Crown and was dealt with more directly by the defence. The Crown did not seek to argue any form of guilt by association. In closing the Crown made it clear that the issue for the jury was whether the appellant, Mr T, had assaulted the children as alleged:

> *As I say, the issue for you is did [Mr T] do these things.* Did he hit the children, did he kick the children, did he use belts? The brown belt, the black belt with the plastic bits on them, belts that without fail every single child mentioned him using on those four little girls. Did he use other weapons like the wooden spoon and spatula, a jandal, the backscratcher?
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> (Emphasis added.)

[24] More directly, in closing the defence made it clear that it was impermissible for the jury to find Mr T guilty by association. Defence counsel told the jury:

> What is important though to keep in mind is this trial is not about [Ms T]. This trial is about [Mr T]. He maintains he is not guilty of these charges and he has taken it to trial and you have heard the evidence both from the Crown and from the defence. *What I ask of you is for you not to find [Mr T] guilty by association. Just because his mother has pleaded guilty to some of the allegations made against her does not make [Mr T] guilty of the allegations that have been made against him. It would [be] wrong to think that way. It is wrong in law and it's wrong in logic*.

(Emphasis added.)

[25] The Judge also addressed the issue of guilt by association. In discussing the matter the Judge said in his summing-up:

> [133] *The issues in this trial are not what [Ms T] did, it is what [Mr T] did.* You know about what she did because you need to know that background. You need to know there was violence in the house. You need to know that the violence involved did happen, that the children are accurately reporting things that [Ms T] did to them. So you are entitled to know that, that is part of the reason you know about the convictions of another person, because *it would be totally wrong to convict one person because someone else has done something wrong and the Crown do not invite you to do that. The Crown do not suggest there is any guilt by association.* But the Crown says you can take into account the fact we know for sure that these children were not telling lies about what [Ms T] did.
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> (Emphasis added.)

[26] While Mr Stevens accepted the Judge directed the jury it would be wrong to find Mr T guilty by association, he submitted there was a further unfairly prejudicial effect in the direction because the Judge told them that as a result of the convictions they could be sure that there was violence in the home and that the children were reporting what Ms T had done to them. He submitted that that led to the inference that what they were saying about Mr T was correct as well.

[27] We do not accept that submission. When read in context it is clear that the Judge was referring to the Crown submission that the children were telling the truth when they said Ms T had assaulted them, as Ms T had accepted by her guilty pleas. Importantly, the Judge made it clear to the jury that the issue for them was whether Mr T had assaulted the children as alleged.

[28] It follows that we do not agree the jury was directed they could treat the evidence of Ms T's convictions as bolstering the complainants' credibility. Nevertheless, we accept that the production of evidence that showed their reports of offending by Ms T against them were truthful would have had the incidental effect of bolstering the complainants' credibility. That was inevitable. But as this Court observed in *R v Walker*, there is nothing wrong with that.[6]

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6 *R v Walker* [2007] NZCA 558.

[29] Mr Stevens also submitted that it was unnecessary for the Crown to produce the convictions as the Crown led evidence from the children concerning Ms T's offending. He argued for that reason the production of the convictions had little probative value and was highly prejudicial. However, as Mr Stevens conceded, without the convictions it would have been open for the jury to disbelieve the children's accounts of Ms T's actions.

[30] We also agree with the observation of this Court in *R v Taniwha* that:[7]

> It cannot reasonably be suggested that evidence of [the other party's] guilt could be more prejudicial if established through evidence of his convictions as opposed to proof through primary evidence.

[31] Further, as Mr Stevens acknowledged in reply submissions, the only direct evidence of Ms T's violence before the jury (apart from the convictions) was from the recorded evidence-in-chief of A and B. The video evidence of the four younger complainants regarding Ms T's assaults on them was not before the jury.

[32] Finally, we note that in his submissions in reply Mr Stevens suggested Mr T should have been allowed to challenge Ms T's convictions under s 49(2). That was not raised during trial for good reason. The detailed evidence of Ms T's assaults on the children was likely to be more prejudicial to Mr T's case than the admission of the convictions.

[33] We are satisfied Ms T's convictions were properly before the jury.

*The summing-up on the use of the evidence*

Appellant's submissions

[34] Mr Stevens next criticised the Judge's summing-up. He submitted the Judge did not give the jury any specific directions how to use the evidence of Ms T's convictions. He submitted the Judge was obliged to give the jury a direction on how they could and could not use the evidence and in the absence of such a direction there was a real risk the jury may have misused it.

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7 *R v Taniwha*, above n 3, at [46].

Discussion — use of evidence in summing-up

[35] In addition to the passage at [133] of the summing-up referred to above, the Judge dealt with the relevance and use of Ms T's convictions at [129]–[132]:

> [129] With the Crown closing address, the Crown position is that we know that six of the children … were assaulted with weapons in the time period we are talking about and we know this for sure. Their mother did not know that. [Ms R, the mother of C, D, E and F] did not know that, as far as her children were concerned and you can expect mothers of children are going to be interested in what's happening to their children, they did not know. The teachers of the children did not know. So we know for sure that there were assaults involving weapons going on that had gone unnoticed. The reason the Crown raise this is a lot of the defence points made are that there should have been injuries and there were not. Well we know that there were serious assaults going on to these children and no one saw anything and we know that for a fact.
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> [130] We also know that there were 41 convictions for [Ms T] and that she pled guilty. We know also that some charges against her were discharged and a significant number at that. But we know these as part of the facts and you have got them as admitted facts, so they are common to both sides, there is no question of that.
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> [131] The evidence that we have had from [Mr T] is going to be something that you need to consider. His account of events is that he knew nothing about violent acts going on in that home. He did not know that his mother was assaulting these children. The Crown says his evidence was oblivious but his evidence is he knew about growlings and he had spoken to the children himself sometimes. But that he acknowledged no violence.
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> [132] The Crown says that there was a distancing from these violent events, that Mr T was moving himself away, and the Crown says that is significant because some of the events, as described by the complainants involve both [Ms T] and [Mr T], that they are linked together. The Crown says the circumstances that these children talk about involve somebody who has acknowledged violent offending and those same circumstances include [Mr T]. So the Crown says it is not surprising when he gives evidence he says he does not know anything about that. The Crown says that that is unrealistic and that when you have seen the way the children talk about what [Ms T] did and what [Mr T] did, those things are linked in a way that you are entitled to take into account.

[36] In the above passages the Judge dealt with why the evidence of Ms T's convictions was relevant and how it could be used, namely as background and in response to the defence case that there were no noticeable injuries.

[37] Mr Stevens made the point that the directions were given in the context of how the Crown contended the evidence was relevant. We agree that it would have been

preferable if the Judge had given a separate direction to the jury on how they could use the evidence of Ms T's convictions rather than including the direction in the context of his discussion of the Crown case. However, the first part of [133] was the Judge's direction and, importantly, the Judge did explain to the jury the reasons for the admission of the evidence and how it could be used. Indeed, rather than dealing with the matter obliquely as he did in [131] and [132], the Judge could have gone on to more directly instruct the jury they could use the evidence of Ms T's convictions as a factor in assessing Mr T's credibility.

[38] Finally on this point, it is relevant that Mr T was found not guilty on 10 charges. That suggests the jury properly considered the evidence against Mr T on each charge as they were directed to do.

*Did the summing-up lack balance?*

Appellant's submissions

[39] Mr Stevens said the Judge gave an overview of the children's evidence in his summing-up from [28]–[64]. This was in addition to putting the Crown and defence cases. By giving the overview the Judge reinforced the Crown evidence and did not provide the necessary balance.

[40] Mr Stevens also submitted that when the Judge directed the jury to deal with the children's evidence, he effectively invited the jury to apply a lesser standard in relation to the evidence given by the child complainants than would normally apply.

[41] The Judge said:

> [29] As [A] described an incident where he called [Ms T] shit in response to what he said had been said to him, he said [Mr T] had beaten him for speaking to [Ms T] in that way. You have got to consider whether that situation is one where you feel an angry and, potentially, violent response might be incurred for speaking that way to [Ms T]. It is in the context of what is happening in the household. You have to consider what the consequences would have been for [A] being cheeky or being disrespectful in the context of the way things were in that home.
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> …

> [31] He said that he felt shame about what was happening and he had not wanted people to know about the beatings that he got. You can reflect on how he said that in the DVD interview. You can wonder what it would have been like for somebody of that age. Again, this is something where you have got to consider the age and developmental stage. It is a question where you have got to consider whether that is something which looks to you to be honestly said by him. Whether it is something which look reliably said by him. Those are assessment you have got to make about him. As with all of the complainants, credibility and reliability are significant factors for you to determine.

[42] The Judge also directed the jury how they might deal with aspects of the children's evidence, for example:

> [53] She may not have demonstrated a full knowledge of truth or lies when gave her evidence in Court. But you have seen in the evidential video when she was asked by the specialist interviewer, she was taken through events and she seemed able then to be able to give the evidence. So you have got to measure what she says. And her evidence need not be taken in isolation. Although there are certain concessions which she made her evidence can be set aside the evidence of other witnesses. You may find consistency with other witnesses and you may find consistency with other aspects of the evidence. If you do you are entitled to use that. But, of course, you must confront the difficulty that is presented by her answer in cross-examination and it would be wrong to overlook those because they are significant. But again, this is not an adult witness who is able to give an adult account of events and you have to take into account her age and developmental stage when you are looking at the way she responds. That is not to say that you need accept or reject any part of her evidence, that remains entirely up to you.

[43] Mr Stevens submitted that the overall effect would have been that the jury would be left with the impression the Judge viewed the evidence of the complainants favourably. Mr Stevens submitted that the failure to deliver a balanced summing-up created a real risk that the outcome of the trial was affected and the trial was unfair.

Discussion — balance in summing-up

[44] In *Nathan v R* this Court approved its earlier comments regarding the requirements for a summing-up:[8]

> [20] The primary requirements of a Judge's summing up to the jury were summarised by this Court in *R v Keremete*.
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> > [18] … A judge's summing up must identify the fundamental facts in issue, be balanced in its treatment of opposing contentions with

[8] *Nathan v R* [2011] NZCA 578 at [20] (footnote omitted) citing *R v Keremete* CA247/03, 23 October 2003 at [18]–[19].

> respect to those facts, and leave the jury in no doubt that the facts are for them and not for the judge. Rival contentions with respect to the factual issues will normally be summarised (*R v Maratana*, 4 December 2002 CA102/02) but there is a wide discretion as to the level of detail to which the judge descends in carrying out that task. Treatment of matters affecting the cogency of evidence is not required as a matter of law: *R v Foss* (1996) 14 CRNZ 1 (CA) at p 4.
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> [19] The judge need not, and should not, strive for an artificial balance between the rival cases if the evidence clearly favours one side or the other: *R v Hall* [1987] 1 NZLR 616 (CA). A judge is entitled to express his or her own views on issues of fact, so long as it is made clear that the jury remains the sole arbiter of fact (*R v Hall*, supra, at p 625). Any comment on the facts should be made in suitable terms without use of emotive terms or phrases which could lead to a perception of injustice. But provided the issues are fairly presented, the comment may be in strong terms: *R v Daly* (1989) 4 CRNZ 628 (CA). Inevitably these are ultimately matters of degree and judgment.

[45] It is true that the Judge described the complainants' evidence. But this was in the context of his summary of both the Crown and defence witnesses. In a case involving numerous charges it can be helpful for the Judge to sum up the evidence for the jury. Importantly, before summing up the evidence, the Judge emphasised that what followed was his summation of the evidence and the jury was not to substitute his view for their view.

[46] It is also true that the Judge's description of the Crown's evidence was longer than the description of the defence evidence, but that was because there was more Crown evidence. However, this was balanced by the Judge including the defence contention in relation to the Crown witness. For example, regarding A's evidence:

> [32] You saw [A] cross-examined, he was challenged. It was put to him that what he had said had not occurred and you have seen his response to the cross-examination, how he reacted when it was said that things that he was saying had happened had not happened. So, the defence put to him that things he said were not true and you have his response to those suggestions. You can look at that when you are considering his evidence as a whole.

[47] Regarding B's evidence:

> [41] Now the defence case as far as she was concerned that her evidence was untrue and things that she was saying were something which had been said, despite these events not occurring; that is something that you will need to consider, and you are entitled to consider the way which she gave her evidence when you measure that against the defence case that these events never happened.

[48] Regarding C's evidence:

> [45] Now, we know the defence position is that [Mr T] did not wear jandals. The jandal which is shown in the photographs was not identified by [C] or anyone else as being the jandal used, but she talks about a jandal being used, and that is something that you will assess. She described threats that a remote might be thrown at the children. She did not say that the remote was thrown. Again, there is a limitation on what she says about those things. She said she did not want to talk about what had happened because this might start trouble, and the police might be involved, "And [Mr T] might be gone to jail," were the words that she said. Again, that is a limitation she is describing on her willingness to disclose these things and you take that into account given her age and developmental stage. Is that something which you could accept or is that something which is outside the range that you think would be available to someone of her age when you are assessing her evidence?
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> [46] She was cross-examined on the basis that the violent incident she described did not happen. Her response was that they had. Again, you have got to measure whether she is prepared to stand up to cross-examination and maintain a story that she tells. You will have seen the process of cross-examination, some of it is putting that events did not happen and directly challenging the children. You see the children's response to that and you see that the idea of cross-examination is so that the witness is aware that what they are saying is not being accepted. So that is something that you measure when you are looking at the quality of a witness' evidence.

[49] Regarding D's evidence:

> [50] In cross-examination she contradicted what she had said in the evidential video interview which you saw played. You can refer to the cross-examination but she said that [Mr T] had not thrown her against a wall. She had not seen [Mr T] pull [C's] ears. She was not hit with an ice-cream. She had not seen [Mr T] choke [E]. She could not remember [Mr T] smacking [F]. She had not seen [Mr T] punch [J — another child]. [Mr T] had not kicked her. That [Mr T] had not slapped her or the other girls. She said that [Mr T] had hit her with a belt but it was on a single occasion after she had been in the shower.
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> [51] Re-examination, she said she had not told the truth about the backscratcher in her evidential video as this had not happened and there were some other areas that were not true but she could not remember which parts.
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> [52] So with her evidence you will need to consider the contradictory parts of her evidence, the way she gave her evidence, questions about credibility and reliability. And the standards you have got to apply are high. So you have a witness who makes concessions. But you also have a witness who is young. A witness who you can reflect on, her body language and the way she was coping with the questions and the difficulties she has in expressing herself.

[50] In the course of the summation of the evidence the Judge also included reference (at [60]) to Ms R (mother of C, D, E and F) who was called by the defence

to give evidence she had not noticed any injuries on the children. He also later correctly referred to the way the jury could approach Mr T's evidence and in doing so discussed Ms R's evidence again.

[51] The Judge then concluded the summing-up by setting out the respective Crown and defence cases. Taken overall the defence case was fairly put. We are satisfied that the summing-up addressed the facts in issue, fairly outlined the defence case and when read in context provided proper balance.

[52] That leaves Mr Steven's criticism of the way the Judge dealt with the children's evidence. While we agree that the Judge's comments at [29] and [31] of his summing-up were not helpful (particularly the suggestion the jury might "wonder what it would have been like"), in context they are not so prejudicial to have created a risk that the outcome of the trial was affected.

[53] D was eight years old when she made her evidential video and was nine years old when she gave evidence at trial. Regulation 49 of the Evidence Regulations 2007 did not apply to her. Nevertheless, it was open to the Judge to direct the jury as in [53], for example, how they might approach her evidence. It is always open to a judge to tailor directions in order to assist the jury to better understand a witness' evidence.

[54] Again, a further response to the suggestion there was a lack of balance in the summing-up and to the criticism of the way the Judge dealt with the children's evidence is that Mr T was acquitted on 10 of the charges he faced, a number of which relied on D's evidence. That shows the jury undertook their task carefully and were not overly influenced by the directions Mr Stevens complains of.

[55] The grounds for the appeal against conviction are not made out.

**Sentence appeal**

[56] Mr T was sentenced to a total of four years and six months' imprisonment. The Judge arrived at that sentence by taking two years' imprisonment for the charges of assault with intent to injure, adding a cumulative sentence of two years'

imprisonment for the charges of assault with a weapon, assault on a child, and common assault, and then imposed an uplift of six months for Mr T's previous convictions.

*Submissions — sentence*

[57] Mr Stevens submitted the sentence imposed was manifestly excessive because:

(a) the Judge adopted a starting point on the lead charges of assault with intent to injure that was too high;

(b) the cumulative sentence imposed was excessive; and

(c) the uplift of previous convictions was excessive.

*Discussion — sentence*

[58] We agree with Mr Stevens' observation that the Judge appears to have fallen into error when referring to the assault with intent to injure offending as being in the third band of *Nuku v R*.[9] That case involved a discussion regarding the appropriate sentencing bands for offending with intent to injure which carried a maximum penalty of five to seven years. The assaults with intent to injure in the present case carried a maximum sentence of three years. Importantly, however, as this Court has said on a number of occasions, the issue is the end sentence, not the process by which it is reached.[10]

[59] The circumstances of the three offences of assault with intent to injure were serious:

(a) The first occurred when Mr T threw A onto a bed. A hit the corner of the bed and then fell to the ground. Mr T then punched him continuously causing A to curl up into a ball. While A was on the floor Mr T continued to punch and kick him.

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9 *Nuku v R* [2012] NZCA 584, [2013] 2 NZLR 39.
10 *Tutakangahau v R* [2014] NZCA 279, [2014] 3 NZLR 482 at [36].

(b) The second incident involved Mr T grabbing A by his hair and throwing him onto the ground, hitting and kicking him in the back.

(c) The final incident occurred in a wash house where Mr T grabbed A by his hair and threw his head into the wall. There was evidence of damage to the wash house wall. He then pulled A's head to the ground and punched and kicked him.

[60] The maximum penalty in each case was three years' imprisonment. Taking the aggravating features of the incidents and accounting for the three incidents, a starting point of two years' imprisonment was open to the Judge.[11]

[61] An uplift was required to reflect the balance of the offending which included the 20 charges of assault with a weapon. While the weapons involved were domestic items such as a belt, jandals, spatula, wooden spoon and a back-scratcher, they were capable of inflicting serious harm on the children. In addition there were the six charges of assaulting a child and one charge of assault. Given the extent of the offending, the length of time over which it occurred and the impact on the six children, again we are satisfied that an uplift of two years was well open to the Judge.[12]

[62] That leaves the six-month uplift to reflect the previous convictions for violence. There is a danger of double-punishment when applying an uplift for previous convictions, but an uplift may still be appropriate where the previous convictions show a propensity for certain types of offending.

[63] The evidence in the present case was of such a propensity. While there was no evidence for the Judge's comment that some of the offending was against children, an uplift was nevertheless justified.[13] Mr T has two previous convictions for common assault (family violence), one of assault with intent to injure (family violence), and two counts of male assaults female. That displays a clear propensity for offending in a domestic setting.

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11 *Tiplady-Koroheke v R* [2012] NZCA 477.
12 *M (CA823/09) v R* [2010] NZCA 94.
13 *R v [T]*, above n 1, at [17].

[64] The previous convictions for family violence and for assaults on a female warranted an uplift of four to six months. While the uplift of six months was stern, it was open to the Judge. We are satisfied that the end sentence of four years and six months cannot be said to be manifestly excessive.

**Result**

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

Solicitors:
Public Defence Service, Auckland for Appellant
Crown Law Office, Wellington for Respondent