IN THE SUPREME COURT OF NEW ZEALAND

SC 28/2009
[2009] NZSC 121

AARON MARK WI

v

THE QUEEN

Hearing:	18 August 2009
Court:	Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ
Counsel:	G J King and C J Milnes for Appellant J C Pike and N P Chisnall for Crown
Judgment:	27 November 2009

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Tipping J)

Introduction

[1] The issue in this appeal concerns the admissibility of evidence that a defendant, in a criminal trial, has no, or no relevant, previous convictions. In *Kant* the Court of Appeal held "tentatively" that such evidence was inadmissible.[1] This was because it did not qualify either as veracity or propensity evidence under the Evidence Act 2006 and was, in any event, irrelevant on the basis that it was "generally neutral",[2] as had been held by the earlier decision of the Court of Appeal in *Falealili*.[3] The trial Judge in the present case therefore excluded evidence that the appellant, Mr Wi, had no previous convictions for violence.[4] On Mr Wi's appeal to the Court of Appeal, following his convictions for wounding with intent to cause grievous bodily harm and assault with intent to injure, the Court of Appeal understandably elected to follow *Kant* and therefore dismissed Mr Wi's appeal. This further appeal is therefore effectively from the decision of the Court of Appeal in *Kant*.

The decision in *Kant*

[2] The Court in *Kant* recognised that it was common practice, prior to the commencement of the Act, for defence counsel to elicit from an appropriate police officer giving evidence for the Crown that the accused had no previous convictions, if that was the case. The question in *Kant* was whether evidence of this kind remained admissible under the Act and, if so, on what basis. The Court observed that one of the leading decisions on the purposes for which good character evidence was relevant prior to the Act, was the decision of the Full Bench of the Court of Appeal in *Falealili*. In that case the Court, following decisions in England and Australia, held that an accused's good character could be relevant both to credibility and to likelihood of guilt. In passages of some length, which it is nevertheless desirable to set out, the majority of the *Falealili* Court expressed their views in the

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1 [2008] NZCA 194 at para [41] (Chambers, Randerson and Winkelmann JJ).
2 At para [38].
3 [1996] 3 NZLR 664 at p 667.
4 He did have one previous conviction for driving with excess breath alcohol.

following way:[5]

> Historically, an accused has long been able to adduce evidence of good character. It is now accepted that its relevance may be to both the credibility of the accused and whether it is unlikely that he or she committed the offence charged. In many cases those two "limbs" as they have been described are in reality two facets of the same thing, and will almost always overlap. Any denial of the truth of the allegations of criminal conduct brings into issue the credibility of the denial, and by its very nature good character evidence will go to so-called propensity. Although the origin of the rule allowing character evidence predated the right of an accused to give evidence, there is no purpose in today's conditions in treating one or other of the two limbs as having primacy. As already mentioned in practice they will often be difficult to separate. Both are relevant to the ultimate question of proof of guilt, which is why the evidence is admissible.
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> …
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> It is necessary then to define what is evidence of good character in this particular context. In England the fact that an accused person has no previous convictions is regarded as being evidence of good character. This may well have led to some of the problems arising in that jurisdiction, still not entirely removed, as can be seen from the need recognised in *Aziz* to allow for an exception to the general rule where the result would be an affront to common sense. We think there are logical difficulties with the proposition that an absence of previous convictions is in itself evidence establishing a person's good character. It may be a factor in assessing good character, but standing on its own it is generally neutral. A person of bad repute may well have no convictions. We do not think it necessary for directions to be given merely because absence of previous convictions has been elicited. The need will arise where evidence relating to character has been adduced which, if accepted by the jury, could properly be relevant or probative in determining whether guilt has been proved. That after all is the basis of its admissibility. The evidence, which must be of a general rather than a particular nature, may be expressly directed to either credibility or propensity or both. Whether the evidence in any given case is of that description will be for assessment by the trial Judge.
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> When such evidence is adduced, an appropriate direction should be given as to its use. Generally that will cover both limbs of credibility and propensity. No particular form of words is necessary, and because of the variety in the circumstances in which the need will arise, the direction will no doubt be tailored to meet those circumstances. In general such evidence may be used in the overall determination of whether guilt has been proved, and to that end it may assist in assessing the credibility of an accused's pretrial exculpatory statements, evidence at trial, or both. It may also assist in diminishing the likelihood that the accused has committed the offence charged. As with any other evidence its weight will be a matter for the jury. The trial Judge may comment on the good character evidence (and any rebutting evidence) in a fair and balanced way, including its significance or lack of significance in the particular case.

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[5] At pp 666 – 667 per Henry J writing for Eichelbaum CJ, Richardson P, Neazor J and himself.

[3] After citing these passages, the *Kant* Court emphasised that in *Falealili* the lack of previous convictions was regarded as no more than a factor in assessing good character and, by itself, was "generally neutral". The expressed rationale was that a person of bad reputation might well have no convictions.[6] The *Kant* Court correctly observed that earlier cases needed to be treated with circumspection following the coming into force of the Act. The Court then discussed the veracity and propensity rules contained in the Act. We will be doing the same and will therefore not traverse the *Kant* Court's discussion here in any detail.

[4] Because of the *Falealili* Court's view that evidence of lack of previous convictions was generally neutral, the *Kant* Court held that such evidence was not admissible as propensity evidence. The *Kant* Court also held "with some diffidence" that "generally speaking" a lack of previous convictions would not be admissible as veracity evidence for two reasons:[7]

> First, it does not bear on the appellant's disposition to refrain from lying. A person with no previous convictions may be just as likely to lie or refrain from lying as one who has convictions (unless perhaps the convictions are for dishonesty or perjury). Secondly, even if evidence of a lack of previous convictions were regarded as veracity evidence, it could not have been admitted because it would not meet the substantial helpfulness test under s 37(1). It is essentially neutral in effect.

[5] The *Kant* Court's discussion of the issue concluded with these observations:[8]

> Under the previous law, evidence of the absence of previous convictions would have been relevant both to the appellant's credibility/veracity and to the unlikelihood he would have committed the offences charged. However we consider the position under the Evidence Act 2006 is materially different. The Act draws a clear distinction between veracity evidence and propensity evidence and defines both concepts in specific ways. While the Act recognises there may be some overlap between the two concepts, the legislation specifically provides that evidence that is solely or mainly relevant to veracity is governed by the veracity rules and the propensity rules do not apply: s 40(4).

The statements in the second half of this passage are correct as far as they go. They do not, however, constitute reasons why the position under the Act should be regarded as materially different.

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6 At para [17].
7 At para [39].
8 At para [37].

[6] That then is the background against which the issue arises for determination in this Court. We do not propose to discuss counsel's submissions as a separate exercise. It is more convenient to mention them, as necessary, during the course of the discussion which follows.

The Evidence Act 2006

Relevance

[7] It is helpful, for ease of reference, to mention here those provisions of the Act which are of particular importance to the issue in the appeal. Section 7(1) sets out the fundamental principle that all relevant evidence is admissible except evidence that is inadmissible under the Act or any other Act or is excluded under the Act or any other Act. Inadmissibility or exclusion does not render otherwise relevant evidence irrelevant. It simply means that for reasons of policy relevant evidence cannot be led. Section 7(2) expresses the corollary to s 7(1), namely that evidence that is not relevant is not admissible. Section 7(3) provides that evidence is relevant "if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding".

[8] This is not an exacting test: nor should it be. Any definition of relevance has to accommodate all kinds of evidence and in particular circumstantial evidence, individual pieces of which are often of slender, and sometimes very slender, weight in themselves. The question is whether the evidence has some, that is any, probative tendency, not whether it has sufficient probative tendency. Evidence either has the necessary tendency or it does not. As Lord Steyn said in *R v A*:[9]

> [T]o be relevant the evidence need merely have some tendency in logic and common sense to advance the proposition in issue.

The approach of the common law was not always consistent in this respect.[10] That inconsistency has now been resolved by the Act.

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9 [2001] 1 WLR 789 (HL).

10 See C Gallavin, *Evidence* (2008), para [2.2.1].

Veracity rules

[9] Section 37, which enacts the veracity rules, must be read with s 38(1) which provides that a defendant in a criminal proceeding may offer evidence about his or her own veracity. Section 37 is in these terms:

> **37 Veracity rules**
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> (1) A party may not offer evidence in a civil or criminal proceeding about a person's veracity unless the evidence is substantially helpful in assessing that person's veracity.
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> (2) In a criminal proceeding, evidence about a defendant's veracity must also comply with section 38 or, as the case requires, section 39.
>
> (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
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> (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
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> (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
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> (c) any previous inconsistent statements made by the person:
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> (d) bias on the part of the person:
>
> (e) a motive on the part of the person to be untruthful.
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> (4) A party who calls a witness—
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> (a) may not offer evidence to challenge that witness's veracity unless the Judge determines the witness to be hostile; but
>
> (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
>
> (5) For the purposes of this Act, veracity means the disposition of a person to refrain from lying, whether generally or in the proceeding.

[10] It is not necessary for present purposes to set out ss 38(2) and 38(3). Three features of the veracity rules are of particular relevance to the present issue. First, a defendant may offer evidence about his own veracity. Secondly, veracity means the disposition of a person to refrain from lying whether generally or in the proceeding.

Thirdly, veracity evidence may not be given unless it is substantially helpful in assessing the veracity of the person concerned. The substantially helpful test is the Act's way of dealing with the issues that used to be addressed at common law by the collateral evidence rule, sometimes referred to as the collateral issues rule.[11]

[11] It is debateable whether evidence that a defendant has no previous convictions, either generally or of a particular (dishonesty) kind, tends to prove that the defendant has a disposition to refrain from lying. It is not, however, necessary to review the previous authorities on the point because even if that issue were resolved in favour of admissibility, it cannot be said that such evidence is substantially helpful in assessing the defendant's veracity. The factors set out in s 37(3) which the Judge may consider in assessing substantial helpfulness are all of a negative kind. That is, they all tend to show lack of veracity. No matters are set out pointing affirmatively towards veracity. Despite that, the simple fact that a defendant has no previous convictions cannot sensibly be regarded as having the heightened probative force required by the substantially helpful test. As a matter of logic and experience, this kind of evidence tends only marginally, if at all, to prove a disposition to refrain from lying. Hence we do not consider that evidence of lack of previous convictions qualifies for admission under s 38(1) as veracity evidence offered by the defendant about himself. In this respect we consider the Court of Appeal was right. We are therefore unable to accept Mr King's submission that the evidence in question was admissible as veracity evidence.

Propensity rule

[12] We come next to Mr King's submission that the evidence is admissible under the propensity rule. The first step is that under s 41(1) a defendant in a criminal proceeding may offer propensity evidence about himself or herself. Propensity evidence is defined by s 40(1) and various related matters are covered in the rest of s 40 as follows:

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[11] For fuller discussions of this point see C Gallavin, *Evidence* (2008), para [7.7.1], and Mahoney, McDonald, Optican and Tinsley, *The Evidence Act 2006: Act & Analysis* (2007), p 143.

40 Propensity rule

(1) In this section and sections 41 to 43, propensity evidence—

(a) means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but

(b) does not include evidence of an act or omission that is—

(i) 1 of the elements of the offence for which the person is being tried; or

(ii) the cause of action in the proceeding in question.

(2) A party may offer propensity evidence in a civil or criminal proceeding about any person.

(3) However, propensity evidence about—

(a) a defendant in a criminal proceeding may be offered only in accordance with section 41 or 42 or 43, whichever section is applicable; and

(b) a complainant in a sexual case in relation to the complainant's sexual experience may be offered only in accordance with section 44.

(4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.

[13] It is not necessary to examine ss 42 (propensity evidence about co-defendants) and 43 (propensity evidence offered by prosecution about defendants). The following points are important, for present purposes, about the propensity rule. We are concerned with propensity evidence which a defendant wishes to offer about himself. Propensity evidence does not have to be substantially helpful in order to be admissible, as is the case with veracity evidence. The definition of propensity evidence must accommodate the fact that the propensity evidence regime contemplates defendants offering propensity evidence about themselves. In that situation the propensity evidence will normally be of a lack of propensity rather than a propensity to do something unlawful or to the defendant's discredit. A defendant is unlikely to offer about himself the kind of evidence to which the definition of propensity evidence seems primarily to be directed.

[14] Hence when, as here, the Court is addressing the offering of propensity evidence by a defendant, the definition must implicitly be read in the negative along the following lines: propensity evidence means evidence that tends to show a person's lack of propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events or circumstances with which the person is alleged not to have been involved. This negative (exculpatory) rendering of the definition, particularly the second half, is somewhat awkward but the concepts involved in the statutory definition must be adjusted as best one can to reflect the Parliamentary contemplation that propensity evidence can be helpful to the defendant as well as to the prosecution. Why else would express provision have been made for defendants to offer such evidence about themselves?

[15] Lack of previous convictions can fairly be regarded as a circumstance within the composite expression "being evidence of acts, omissions, events or circumstances". The next question is therefore whether a lack of previous convictions can be regarded as a lack of propensity to act in a particular way. Mr Pike, for the Crown, emphasised the connotations of the word "particular" and submitted that an absence of convictions, either generally or of a relevant kind, could not be regarded as evidence of sufficient particularity to satisfy the statutory criterion. But when the propensity evidence is of an exculpatory kind, that is, of a kind which is said to demonstrate lack of propensity, what must be shown is a propensity not to act in a particular way. Evidence which is capable of showing that exculpatory kind of propensity, even if general in itself, does have, negatively, the same kind of particularity as that to which the definition is primarily directed.

[16] While it can always be said that there is a first time for everything, evidence that a defendant has never been convicted of any, or any relevant, offence tends to show he has never committed any such offence. Its tendency to show that may be slight but, logically and as a matter of experience, this kind of evidence does have some tendency in that direction. Once this point is reached, the remaining question is whether evidence which tends to suggest a defendant has never previously committed any, or any particular, crime tends to show that the defendant did not do so on the occasion or occasions charged. Again, the tendency of the evidence to show this is slight, perhaps very slight, but we do not consider it can properly be said

that this kind of evidence has no such tendency whatever.

[17] As already indicated, the Court of Appeal in *Falealili* held that such evidence was "generally neutral". The qualification "generally" may have represented judicial caution, in the form of an understandable hesitation to speak in absolute terms in relation to what this kind of evidence tends to prove. Be that as it may, we do not consider that *Falealili* should be viewed as holding that evidence of a lack of previous convictions is wholly irrelevant. If that is what their Honours meant, we consider they went too far, at least from the point of view of adopting that conclusion as a proper construction of the Act.

[18] When the current statutory regime is addressed, it can be seen that the expression "tends to show" in s 40(1)(a) mirrors the expression "tendency to prove" in s 7(3). The ultimate question under the Act is therefore twofold: is evidence of lack of previous convictions propensity evidence at all? And, if so, is it relevant propensity evidence? Section 40, read with s 7, requires it to be both.

[19] For the reasons given, we consider evidence of lack of previous convictions is both propensity evidence and relevant propensity evidence. In the case of inculpatory propensity evidence, the references to acting in a particular way or having a particular state of mind serve as internal controls within the definition, ensuring that the propensity evidence is relevant to the acts or state of mind involved in the alleged offending. In the case of propensity evidence of an exculpatory kind, the necessary adjustment to the definition tends to interweave the concepts of propensity and relevance. But, in the result, lack of previous convictions demonstrates a lack of propensity to commit the offence or offences charged. This lack of propensity is relevant to the determination of the issue of guilt. In terms of s 7(3), it is evidence which has a tendency, if only a slight tendency, to prove something of consequence to the determination of the proceeding. It does this by tending to prove that the defendant, on account of the lack of previous convictions, is the less likely to have committed the offence or offences with which he is charged. This conclusion is supported by an examination of the history of the Act and the common law background against which the Act was passed.

[20] Before moving to these topics we should add, for completeness, that there is no basis upon which this kind of evidence should be excluded under s 8. Its probative value is not outweighed by the risk that it will have an unfairly prejudicial effect on the proceeding; nor by the risk that it will needlessly prolong the proceeding. The latter is self evident. The former conclusion requires an assessment of prejudicial effect upon the prosecution. There is no unfair prejudicial effect of this kind, and, in any event, the Crown may call rebuttal evidence, with leave, under s 41(2). Hence, if a defendant were to claim lack of previous convictions, contrary to the true position, the Crown would clearly be entitled to permission to contradict that claim. If, as we would hold, this kind of evidence is admissible in favour of the defendant, it cannot reasonably be said that it is unfairly prejudicial to the prosecution to admit it.

Legislative history

[21] As is well known, the Act was a long time in gestation. We will pick up the history at the point when, in August 1999, the Law Commission published its Report 55, entitled *Evidence: Reform of the Law*. This report was published in two volumes. Chapter 8 in Volume 1 is headed "Evidence of truthfulness (credibility) and propensity (character)".[12] This heading is significant for its equation of propensity with character. What used to be called character evidence is now being called propensity evidence. We mention in passing that what was then being referred to as truthfulness later came to be referred to as veracity. This is because the expression "truthfulness" was thought to be capable of including both truthfulness and accuracy or reliability, whereas veracity was more clearly descriptive of truthfulness alone, upon which the veracity rules are focused.

[22] In its introduction to Chapter 8, the Commission cited a passage from Roberts[13] stating that over the last 150 years the common law rules governing character evidence had grown incrementally, sometimes contradictorily, and rarely with fully-articulated rhyme or reason. The subject was therefore ready for

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12 At p 44.

13 P Roberts, "All the Usual Suspects: A Critical Appraisal of Law Commission Consultation Paper No 141" [1997] Crim LR 75, p 91.

fundamental review. The veracity and propensity rules were the product of that review. The Commission was of the opinion that veracity and propensity were the only aspects of character that were relevant in civil or criminal proceedings. The Commission considered that it was also important to establish a clear boundary between these two aspects of character as different admissibility rules were to apply to each.[14] The Commission made it clear that the substantially helpful test was intended to apply to veracity evidence generally, whether that evidence was offered or elicited by the prosecution or the defence.[15]

[23] In its discussion of propensity evidence the Commission observed that such evidence was to be admissible "when relevant".[16] Hence the propensity rule was implicitly subject to the overriding requirement of relevance. The Commission also made it clear that the propensity rule was designed to govern the admissibility of what previously would have been viewed as evidence of "good" character as well as evidence of "bad" character.[17] There was, however, no accompanying discussion of what would qualify as good character evidence, except the observation that such evidence would "usually be to the effect that the defendant has a propensity to act in an upright fashion, or at least in a manner other than that exemplified by the charge he or she faces".[18] In its commentary on the draft legislation, contained in Volume 2 of its 1999 report, the Commission also observed that one common form of propensity evidence was "good character" evidence. Admissibility, it said, would in this respect be governed by relevance.[19]

[24] The discussion of propensity evidence in these two volumes tends to confirm the view naturally flowing from the language of the propensity provisions as ultimately enacted, that to be admissible "good" propensity evidence must satisfy two requirements; first, it must satisfy the definition of propensity evidence appropriately interpreted and, secondly, it must satisfy the general relevance test.

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14 At p 45.
15 At pp 45 – 46.
16 At p 48.
17 At p 48.
18 At p 49.
19 New Zealand Law Commission, *Evidence: Reform of the Law* (NZLC R55, 1999), p 115.

For the reasons given earlier, we consider evidence of lack of previous convictions does satisfy both these requirements. It is evidence of a lack of propensity, and it is evidence which is materially probative, thus answering to both the "tendency to show" and "something of consequence" limbs of the statutory definition of relevance. The fact that the evidence may carry little weight in itself does not mean that it has no probative force or that lack of previous convictions has no materiality to the ultimate issue of guilt.

The common law background

[25] Before examining the common law background, we should say something about its relevance. One of the expressed purposes of the Act is to help secure the just determination of proceedings by providing for facts to be established by the application of logical rules.[20] Determining relevance is not, however, solely an exercise in pure logic. Experience and commonsense play their part as well. The experience of the common law should not in this respect be completely ignored.

[26] This view is supported by s 10 of the Act which provides guidance for the interpretation of the Act. First the Act must, as is conventional with all statutes, be interpreted in a way which promotes its purpose and principles. Secondly, the Act is not subject to any rule that statutes in derogation of the common law should be strictly construed. This point is a companion to the first and was presumably included to emphasise that the Act marked a new departure in the law of evidence and Judges should not interpret it restrictively on account of any hankering for the old common law or instinctive resistance to change. Thirdly, however, s 10 provides that the Act may be interpreted having regard to the common law, but only to the extent that the common law is consistent with its provisions, the promotion of its purpose and policies, and the application of the rule in s 12. That rule requires the common law to be taken into account, subject to stated conditions, if any evidential issue arises which the Act does not cover or covers only in part.

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[20] Section 6(a).

[27] The significance of these matters is that at common law evidence of lack of previous convictions was undoubtedly admissible. *Falealili*'s case, concerned as it was primarily with directions to the jury, affirmed that longstanding proposition. The Law Commission was presumably well aware that this was the position at common law. There is, however, nothing we have been able to find, nor did counsel point to anything, in the Commission's published material or in the Parliamentary materials which suggests that the Act was intended to alter this longstanding common law position. Yet the *Kant* Court held that this is what the Act had done. Of course the Act may well have done so without this change having been expressly heralded, but the lack of any suggestion that the law was to change in this significant respect is surprising if that is what was intended.

[28] It is important also to recognise the established common law practice, both in New Zealand and in England, that equated lack of previous convictions with good character. In the parlance of the criminal courts, a defendant was conventionally described and regarded as being of good character if he had no previous convictions.[21]

[29] The decision of the House of Lords in *R v Aziz*[22] exemplifies this practice. Lord Steyn, who delivered the principal speech, with which all the other Judges sitting concurred, said:[23]

> It has long been recognised that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question. That seems obvious.

In elaboration his Lordship referred to the decision of the Court of Appeal in *R v Vye*,[24] noting that it was not directly concerned with a description of what is meant by good character. But he nevertheless accepted that Lord Taylor CJ in *Vye* had in mind not only the case of a defendant possessing what Lord Steyn referred to as positive good character but also the "usual case" of a defendant with no previous convictions. That was just as much good character evidence and "of probative

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21 See C Gallavin, *Evidence* (2008), para [7.3].
22 [1996] 1 AC 41.
23 At p 50.
24 [1993] 1 WLR 471.

significance".[25]

[30] In *Falealili* our Court of Appeal recognised that in England lack of previous convictions was regarded as evidence of good character but considered there were "logical difficulties" with the proposition that an absence of previous convictions was in itself evidence establishing a person's good character.[26] *Falealili* was a case of indecent assault. The propensity evidence called by the defendant was entirely negative – lack of previous convictions and lack of any complaints when he was acting as a supervisor of staff, the majority of whom were women. Both these pieces of evidence were of the same kind, yet the Court seemed to be of the view that the evidence of lack of complaint was of some probative force whereas the evidence of lack of previous convictions was not:[27]

> The mere absence of previous convictions was a neutral factor as we have said. The absence of complaints by women against the appellant in his previous working environment some time previously could not have been given weight of any real substance.

Distinctions of this rather subtle kind on a point of admissibility should, if possible, be avoided.

[31] In his separate judgment in *Falealili*, dissenting on the question of jury directions, Thomas J said:[28]

> I have already agreed that the fact the accused lacked previous convictions is, in itself, unlikely to be sufficiently probative to merit a good character direction. But, for myself, I would not preclude such evidence from constituting evidence of good reputation entirely.

Thomas J went on to suggest that such evidence might be admissible in some cases but not necessarily in all.

[32] The kind of distinction evident in the approach of the majority, and the uncertainty inherent in Thomas J's approach, are both somewhat unattractive prospects for the administration of the Evidence Act 2006. They are also

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25 At p 51.
26 At p 667.
27 At p 667.
28 At p 672.

inconsistent with our view that this kind of evidence does have a tendency to support the defendant's case. The English approach to the admissibility, at common law, of evidence of lack of previous convictions has the advantage of both simplicity and consistency with longstanding criminal trial practice. For the reasons already given we consider the Act can and should be construed to the same effect. The position at common law in New Zealand, as generally understood before the uncertainties introduced by *Falealili*, is consistent with the way the Act should be interpreted. The common law approach in England fortifies the appropriate construction of the Act.

[33] Munday captured the common law position succinctly when he wrote that persons with no criminal record are treated as being of good character "in a legal sense".[29] He added that the notion of treating defendants who have no previous convictions as persons of good character enjoys a pedigree at common law, certainly antedating the Criminal Evidence Act 1898, under which defendants were for the first time able to give evidence in their own defence.

Admissibility/summary

[34] It follows that, for the reasons given, evidence that a defendant has no, or no relevant, previous convictions is admissible under the Evidence Act 2006 as propensity evidence.

Jury directions

[35] As the evidence which Mr Wi wished to adduce of his lack of previous convictions was ruled inadmissible, the question of jury directions did not arise. Our conclusion means that this evidence should have been admitted. We will therefore take this opportunity to consider what, if any, directions should have been given to the jury had this evidence been before them. This is not, however, an appropriate occasion to conduct a general review of this area of the law if for no other reason than the absence of submissions on the wider aspects of the topic. The following

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[29] "What constitutes a good character?" [1997] Crim LR 247, p 249.

discussion is confined to evidence of a lack of relevant previous convictions.

[36] In *Falealili* the Court of Appeal said that there was, at that time, no established practice in New Zealand governing the directions to be given to a jury when good character evidence was adduced. The Court recorded that it was then mandatory in England to direct the jury as to the relevance of good character evidence in some circumstances. That relevance was to credibility and also to likelihood of guilt. The Court then addressed the position in Australia and observed that as the issue had surfaced recently in other appeals, it was appropriate to articulate what should be the standard practice in this country. The Court canvassed the three choices open. The first was to say that a direction was never required. The second was to leave whether and how to direct to the discretion of the trial Judge. The third was to require an appropriate direction to be given in most, if not all, cases. The majority of the Court opted for the third approach. Thomas J preferred the second.

[37] Because the majority of the Court regarded "mere absence" of previous convictions as a neutral factor, and hence not probative of good character, they did not have to address the necessity for a direction if that was the only evidence adduced of good character. Without prejudice to what the position should be if the good propensity evidence before the jury is of a more extensive nature, we consider that, when evidence is confined to lack of previous convictions, it should not be mandatory for the trial Judge to give a specific direction as to the relevance of that evidence.

[38] It must be obvious to a jury that evidence that the defendant has no previous convictions is adduced for the purpose of suggesting that he or she is thereby the less likely to have committed the offence charged. Defence counsel will almost certainly have addressed them to that effect. It hardly needs the Judge to remind them of the point. To be balanced, a reminder might well have to be accompanied by an invitation to compare the weight (stated implicitly or expressly to be slender) of this evidence with the weight the jury finds in the evidence adduced by the Crown. Such a direction might not be particularly helpful to the defendant and, in any event, the jury might consider that the Judge, by directing on such a small and obvious point,

was somehow suggesting it had more force than it deserved.

[39] There is also the difficulty mentioned by Lord Steyn in *Aziz* if specific directions are mandatory when the defendant has no previous convictions. It is the:[30]

> problem whether a defendant without any previous convictions may "lose" his good character by reason of other criminal behaviour. It is a question which was not directly before the Court of Appeal in *Vye* [1993] 1 W.L.R. 471. It is a complex problem. It is also an area in which generalisations are hazardous. Acknowledging that a wide spectrum of cases must be kept in mind, the problem can be illustrated with a commonplace example. A middle-aged man is charged with theft from his employers. He has no previous convictions. But during the trial it emerges, through cross-examination on behalf of a co-defendant, that the defendant has made dishonest claims on insurance companies over a number of years. What directions about good character, if any, must the judge give?

The House of Lords dealt with this issue by saying that the trial Judge had a "residual discretion" not to give the otherwise mandatory direction if the Judge considered it would be an "insult to common sense" to give that direction.[31] Both Munday and Thomas J criticise this outcome.[32]

[40] We are of the view that in principle mandatory directions should be reserved for cases in which they are essential to ensure the defendant has a fair trial. It is generally better to leave the extent and content of directions to the trial Judge who has the feel of the case. We recognise it was said in *Falealili* that this approach might tend towards uncertainty and inconsistency. We are not, however, persuaded that this is likely to be a significant problem.

[41] Summings-up should be tailored to the particular case. Specimen directions are helpful when they are required. A very important part of a trial Judge's function is to give the jury as much help as possible by identifying the issues presented by the case and the evidence which is relevant to those issues. The summing-up should also, to the extent necessary, explain to the jury in what way evidence should and should not be used. Directions should not be mandatory unless, without them, there is a real risk that the jury will approach the matter in an inappropriate way or in a

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30 At p 52.
31 At p 53.
32 Munday, paras [251] – [252] and Thomas J in *Falealili* at pp 669 – 670.

way which does not do the defendant's case justice.

[42] We do not consider there is any real risk of either of those situations occurring if the Judge does not direct on the significance of a defendant's lack of previous convictions. The trial Judge may, of course, give such directions on the subject as are considered appropriate.

[43] There is one further issue which should be addressed before we come to the circumstances of the present case. It concerns the effect of s 41(2) which provides that if a defendant offers propensity evidence about himself, the prosecution or another party may, with the permission of the Judge, offer propensity evidence about the defendant. In terms of s 41(3) this may be done without the constraints normally placed on prosecution evidence of this kind by s 43. Section 41(2) is designed to deal with the position which, at common law, was colloquially known as the defendant putting his character in issue. A body of common law and statutory rules[33] hitherto existed whereby the Judge could permit the prosecution to show the defendant was not of good character if he claimed he was. That, in substance, is what s 41(2) is designed to allow. A defendant should not be permitted to claim a good character if that claim is not legitimately made. But at common law the ability of the prosecution to rebut the claim was under the control of the Judge in the interests of fairness to the defendant. An example of rebuttal evidence not being allowed under the previous law can be found in *Anderson*.[34] The point of our addressing this subject is to indicate that rarely, if ever, would it be appropriate to exercise the discretion in s 41(2) in favour of the prosecution if the only propensity evidence offered by the defendant is evidence of lack of previous convictions.

The present case

[44] The factual background to Mr Wi's convictions for wounding a police constable with intent to cause him grievous bodily harm and assaulting another

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33 See s 5(4)(b) of the Evidence Act 1908.
34 [2000] 1 NZLR 667 (CA).

constable with intent to injure him can conveniently be taken from the Court of Appeal's summary:

> [3] Senior Constable Bennett and Constable Horler were on patrol in a police car in the Papamoa area on the evening/early morning of 15/16 November 2003. As they were checking a car park adjacent to a restaurant sometime after midnight they heard someone yelling. The voice was that of a male. He was directing invective at them. They decided to check what was happening. Both were in uniform. They left the car and walked to where the noise was coming from.
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> [4] The appellant, his mother, his partner, his two brothers and the partner of one of them had been guests at a wedding function held at the restaurant. When the function finished shortly after midnight on 16 November they were the only guests left. They were standing outside an exit from the restaurant. Three female staff members were tidying up in the restaurant. The appellant's group had watched a delayed telecast of a rugby game, which New Zealand had lost. The appellant was apparently upset by the result and was aggressive and abusive towards members of his family, who were attempting to calm him down.
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> [5] Constable Bennett approached the group by walking up a grass bank. As he came to the top of it, he heard a woman screaming and the sound of a struggle. He ran to the top of the bank. He saw the group, but could not see clearly what was happening. As the constable approached, the appellant's mother interposed herself between him and the appellant. The constable pushed her aside. The Crown said that the appellant ran at the constable, hitting him on the head with a beer handle. Constable Bennett then grabbed the appellant in a rugby tackle. The appellant continued to hit him on the head with the beer handle, striking him somewhere between six and ten times in total. One of the appellant's brothers, Varian, was also swinging punches at Constable Bennett.
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> [6] At this point Constable Horler arrived to assist Constable Bennett. He struck Varian Wi with his torch in an effort to stop him swinging punches at Constable Bennett. With the assistance of the restaurant staff, Constable Horler managed to move the members of the appellant's family inside the restaurant. Constable Bennett continued to struggle with the appellant outside. Constable Horler came to his colleague's assistance and, in an effort to subdue the appellant, pepper-sprayed him. The appellant then lashed out at Constable Horler, gouging his face.
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> [7] Ultimately, the constables were able to subdue and handcuff the appellant, and take him into custody.
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> [8] Broadly, the defence theory of the case was that the appellant was the victim of a sustained and vicious beating at the hands of the constables, which had begun without provocation. The appellant accepted in evidence that he was intoxicated and abusive, but said that the Crown witnesses were lying when they said he had attacked Constable Bennett. He said that Constable Bennett had attacked him with his torch. The appellant said he had no recollection of how Constable Horler received the scratches to his face.

[45] The Court of Appeal described the Crown's case as a strong one, as indeed it was. The jury no doubt took the view that the proposition both constables and the other witnesses who observed what happened were lying was highly improbable. The jury also clearly rejected the evidence of Mr Wi's brother, Adam, that it was he who attacked Constable Bennett. The prospect that the jury's appreciation of the matter may have differed if Mr Wi had been able to elicit evidence that he had no previous convictions for violence, strikes us as extremely remote. In *Matenga* this Court held that a miscarriage of justice for the purposes of s 385(1) of the Crimes Act 1961 will occur if something which was capable of affecting the result of the trial has gone wrong.[35] Only if that is shown need the Court go on to consider whether that potentially adverse effect on the result may actually, that is, in reality, have occurred.

[46] The first question is therefore whether the absence of evidence that Mr Wi had no previous convictions for violence was capable of affecting the result. Mr King submitted that in this particular case that was a distinct possibility. He contended that in the light of the evidence and the way the Crown had addressed the jury, its members may well have had the impression that Mr Wi was a person who bore a strong grudge against the police. Hence Mr Wi should have been allowed to rebut that impression. We do not find that submission persuasive. Mr King also drew particular attention to the Crown's reference to Mr Wi's brother as not being "an aggressive kind of person". The implication was said to be that Mr Wi was being portrayed as an aggressive sort of person and he was entitled to rebut that.

[47] Mr King's argument was well presented and he made as much of the available material as he could. We are not, however, persuaded that the evidence which was wrongly ruled inadmissible was capable of affecting the result. There is no reasonable possibility that it might have done so. The clarity and strength of the prosecution evidence was such that there cannot be any doubt that the jury would have found Mr Wi guilty, even if they had been informed that he had no previous convictions for violence.

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[35] [2009] 3 NZLR 145 at para [31].

[48] Indeed, Mr Wi's position in that respect was not as straightforward as we have so far presented it. Although at the time of the events in question he had no such previous convictions, by the time of his trial he had acquired a conviction for violence. Mr King advised the Court that Mr Wi nevertheless wished to be able to elicit evidence on any re-trial that would recognise that fact. The point is, however, that if the evidence ruled inadmissible had been before the jury, it could not properly have been before them on the unvarnished basis that Mr Wi had no previous convictions for violence. He would have been obliged to say that at the time of the events which formed the basis of the charges he had no previous convictions for violence. The Crown would undoubtedly have been able to elicit the existence of the later conviction, if Mr Wi, unwisely, had not volunteered it.

[49] Bearing in mind this factor, as well as the points made earlier, we are in no doubt that although the evidence should have been allowed to go before the jury, its absence cannot have affected their verdict. There was therefore, in the result, no miscarriage of justice and, for that reason, the appeal must be dismissed.

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