NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 85/2018
[2018] NZSC 114

BETWEEN	ANTHONY DONALD GROOBY Applicant
AND	THE QUEEN Respondent

Court: William Young, O'Regan and Ellen France JJ

Counsel: E Huda for Applicant
P D Marshall for Respondent

Judgment: 26 November 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Following his trial before Judge Ruth and a jury, the applicant was found guilty of sexual offences against three young girls. The prosecution relied on propensity evidence from a fourth person who alleged that the applicant on an earlier occasion had engaged in conduct which, in one respect, was similar to that alleged by two of

the complainants. The applicant's appeal against conviction was dismissed by the Court of Appeal[1] and he now seeks leave to appeal to this Court.

[2] The argument which counsel for the applicant wishes to advance in this Court is that where the Crown relies on evidence to the effect that the defendant has a propensity to commit offences of the kind alleged, the jury should be told not to rely on propensity reasoning unless satisfied that the propensity has been proved beyond reasonable doubt. Judge Ruth did not direct the jury in that way.

[3] The recent decision of the United Kingdom Supreme Court in *R v Mitchell* supports the applicant's argument; albeit that it was decided in the context of a particular evidential code.[2] And it is also possible to derive support for the argument (and the slightly different/overlapping argument that the other offending to which the propensity evidence relates must be proved beyond reasonable doubt) from certain Australian decisions, most particularly *HML v R*.[3]

[4] The law in New Zealand has taken a different course, as illustrated by *R v Holtz*,[4] the general reasoning in the minority judgment in *Mahomed v R*[5] (which was adopted in *Taniwha v R*[6]) and our willingness to allow in evidence relating to an allegation in respect of which the defendant has previously been acquitted, as in *Fenemor v R*.[7]

[5] The submissions for the respondent note that: (a) *HML* has attracted a good deal of criticism in Australia (including legislative reversal in Victoria[8]); and (b) an argument which overlaps with the one that succeeded in *Mitchell* has been rejected in Canada.[9] As well, the *Mitchell* approach is not consistent with the approach taken in respect of circumstantial evidence.[10]

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1 *Grooby v R* [2018] NZCA 344 (Williams, Brewer and Thomas JJ).
2 *R v Mitchell* [2016] UKSC 55, [2017] AC 571.
3 *HML v R* [2008] HCA 16, (2008) 235 CLR 334.
4 *R v Holtz* [2003] 1 NZLR 667 (CA).
5 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.
6 *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [64]–[65].
7 *Fenemor v R* [2011] NZSC 127, [2011] 1 NZLR 298.
8 Jury Directions Act 2015 (Vic), ss 61 and 62.
9 *R v Arp* [1998] 3 SCR 339.
10 See, for example, *R v Guo* [2009] NZCA 612.

[6] Although the applicant's argument raises a legal issue of public importance, it is inconsistent with what is now the settled law in New Zealand and it has insufficient prospects of success to warrant the grant of leave.

[7] The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent