NOTE: ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF PROPENSITY WITNESSES R, S AND M PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF APPLICANT'S FATHER'S (A) NAME AND (B) NAME AND LOCATION OF BUSINESS REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 74/2019
[2019] NZSC 107

BETWEEN	PETER JAMES BROOKS Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: I M Brookie for Applicant
J E L Carruthers for Respondent

Judgment: 8 October 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed

REASONS

[1] In 2018, Mr Brooks was convicted, after a jury trial in the District Court, on two charges of sexual violation of the complainant, J, by unlawful sexual connection.

He applies for leave to appeal against two judgments of the Court of Appeal (one pre-trial[1] and one post-trial).[2] Both concern the admissibility of prior acquittal propensity evidence given by two witnesses, R and S. In both judgments, the evidence was ruled admissible under s 43 of the Evidence Act 2006 (the Act).

[2] In summary, Mr Brooks claims the Court of Appeal erred in finding:

(a) the probative value of the S complaint outweighed the risk of unfair prejudice, despite the absence of much of the records relating to the prior acquittal and the effect of the New Zealand Bill of Rights Act 1990; and

(b) the probative value of the R complaint outweighed the risk of unfair prejudice.

Background

[3] At the trial in 2018, the Crown alleged Mr Brooks performed oral sex on J and that he had inserted J's penis into his anus, both without J's consent. Mr Brooks contended that the oral sex was consensual and denied the latter allegation. Three other men (R, S and M) had previously accused Mr Brooks of sexual assault in 1990, 1995 and 2012 respectively. Each complaint went to trial and each resulted in acquittal. At the 2018 trial, the Crown called R, S and M to give propensity evidence.

[4] In the proposed appeal, Mr Brooks would challenge the admissibility of the R and S complaint evidence.[3] In summary:

(a) In 1990, R (then 16) and Mr Brooks (then 25) worked in a shearing gang. R became intoxicated at a party one night and went to bed. R alleged Mr Brooks came into his bed, groped and kissed R, and initiated anal intercourse. Mr Brooks attempted to stop R from moving and was

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1 *R v Brooks* [2017] NZCA 503 (Winkelmann, Wylie and Whata JJ) [Pre-trial CA judgment].
2 *Brooks v R* [2019] NZCA 280 (Miller, Simon France and Peters JJ) [Post-trial CA judgment].
3 It appears no challenge is mounted against M's evidence in the application for leave to appeal.

told to keep quiet. R managed to push Mr Brooks off and left his bedroom. (Mr Brooks denied the events ever occurred.)

(b) In 1995, S (then 18) and Mr Brooks (then 30) worked together in the fishing industry. S agreed to help Mr Brooks study for a qualification. One night while studying, Mr Brooks began massaging S's neck and abdomen. S asked him to stop, without success, and eventually left. A week later they ran into each other at a pub while drinking. S went to his friend's house alone and fell asleep on the couch. He was woken at 3.00 am to Mr Brooks fondling his genitals. (Mr Brooks denied the events ever occurred.)

The law

[5] This Court's decision in *Fenemor v R* is the leading authority.[4] The question before the Court in that appeal was whether prior acquittal evidence could ever be admissible in law. This Court held it was admissible propensity evidence if admitted under s 43 of the Act,[5] and there was "no room for an absolute exclusionary rule".[6] Further:

> [8] When a judge is considering the extent of any unfair prejudicial effect on the defendant [under s 43], the judge should examine whether the fact that the propensity evidence is prior acquittal evidence gives rise to any, or any additional, unfair prejudice. To the extent that it does, the judge should consider how that additional dimension affects the overall balance between probative value and unfair prejudice …
>
> [9] … the focus will be on whether it is unfair to expect the defendant to respond again to the evidence in question in light of the fact that it was not regarded as sufficient to result in a conviction on the earlier occasion.

[6] The Court held there was no general rule for when prior acquittal evidence would be unfairly prejudicial to a defendant: "[t]he necessary assessment will inevitably be very case-specific",[7] but there must be "something about the

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4 *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298.
5 At [4]: "It is axiomatic that such [prior acquittal] evidence must be relevant in terms of s 7 of the Act and must be within the definition of propensity evidence set out in s 40(1)."
6 At [5].
7 At [12].

circumstances of or leading to the acquittal which gives rise to prejudice that is unfair".[8]

[7] As to the absence of records (a videotaped interview with a prior complainant, and a record of the judgment in one trial), the Court in *Fenemor* said:

> [19] A second problem [with Mr Fenemor's argument] is that the presence of unfair prejudice from this feature of the case [missing information] can only be a matter of speculation. It is equally possible that the presence of the video tape may have been to Mr Fenemor's disadvantage. As it happened a written transcript of B's 1998 evidence was available.
>
> [20] Counsel relied further on the fact that no record of the judgment in the earlier trial, at which Mr Fenemor was acquitted, was available. This is unfortunate but it would again be pure speculation to conclude that had that judgment been available it would have given any support to Mr Fenemor's contention that there was something about the acquittal that made it unfairly prejudicial to allow the prior acquittal evidence to go before the jury.

Court of Appeal judgments

Pre-trial

[8] On 18 August 2017, the District Court had ruled the R and S complaints inadmissible and the M complaint admissible.[9]

[9] On appeal from that decision, the Court of Appeal held that the evidence of R and S was admissible. In summary, it recorded that the evidence had probative value because:[10]

(a) in terms of relevance, it was directly relevant to trial issues (whether J consented or whether there was reasonable belief thereof); and

(b) in terms of propensity reasoning, the three complaints (all independently made) suggested Mr Brooks had a tendency to engage in sexual activity with intoxicated young males known to him without their consent in the early hours of the morning while the complainant was sleeping.

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8 At [10].
9 *R v Brooks* [2017] NZDC 18026.
10 Pre-trial CA judgment, above n 1, at [33]–[35].

[10] The Court held "the level of coincidence between the sets of alleged offending is such that a tendency to act in a particular and unusual way, relevant to trial, had been clearly established for the purposes of admissibility pursuant to s 43".[11]

[11] As to the risk of an unfairly prejudicial effect, the Court considered it "small":[12]

> First, unlike the Judge we do not consider the absence of one transcript in the present case is a significant factor. The full police file, including S's statements, will be available to the defence. Conversely, we think it is speculative to suggest the missing transcript might contain information not included in the police file that may have a material effect on the outcome of the present trial.

[12] The risks in any event could be addressed by appropriate directions.[13]

Post-trial

[13] It transpired during the trial that most of the records relating to the S trial had been lost. The Court of Appeal considered this warranted revisiting its pre-trial ruling but, by majority, ruled the S complaint evidence was admissible at the 2018 trial;[14] and (unanimously) declined to review the admissibility of the R complaint evidence.[15]

[14] The majority (Miller and Simon France JJ) held that the S complaint evidence was still admissible because:

(a) Mr Brooks' counsel could not point to any additional prejudice despite the pre-trial ruling that the probative value outweighed the risk of an unfairly prejudicial effect.[16]

(b) In light of the S trial turning on whether the events actually occurred, it was speculative to suggest the details that had since been lost (and that S could not remember in 2018) explained the acquittal – they might equally have been adverse to Mr Brooks – and the verdict itself may

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11 At [35].
12 At [36].
13 At [42].
14 Post-trial CA judgment, above n 2, at [49] per Miller and Simon France JJ. Peters J dissented.
15 At [18] per Miller and Simon France JJ and at [54] per Peters J.
16 At [47].

have indicated only that S's evidence did not prove the offences beyond reasonable doubt.[17]

(c) The Supreme Court's decision in *Fenemor* was not distinguishable,[18] the upshot being a court would not assume the mere absence of a file is prejudicial without something more about the acquittal that is relevant and shows prejudice.[19]

[15] Peters J would have allowed the appeal and ordered a retrial.[20] She considered that the absence of most of the information relating to S was significant enough, in combination with other factors, to have created a risk of an unfairly prejudicial effect that outweighed the "moderate to strong" probative value of S's evidence.[21]

Our assessment

[16] The application does not meet the requirements of s 74 of the Senior Courts Act 2016. It attempts to re-argue the application of settled law to the facts of this case. There is thus nothing of general or public importance raised. Nor does anything raised suggest any risk of a miscarriage of justice.

Result

[17] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

17 At [47].
18 At [49].
19 See [43].
20 At [52] per Peters J dissenting.
21 At [58]–[75].