

**ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.**

**NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF PROPENSITY COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.**

**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: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT 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 90/2019  
[2019] NZSC 116**

<b>BETWEEN</b>	<b>LEE KALSO PERI THOMPSON</b> Applicant
<b>AND</b>	<b>THE QUEEN</b> Respondent

**Court:** Glazebrook, O'Regan and Ellen France JJ

**Counsel:** R J Stevens and T-A Singh for Applicant  
M J Lillico for Respondent

**Judgment:** 23 October 2019

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## JUDGMENT OF THE COURT

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- A The application for leave to appeal is dismissed.**
- B Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of the trial. Publication in a law report or law digest permitted.**
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### REASONS

[1] The issue in this proposed pre-trial appeal relates to the admission of propensity evidence under ss 40 and 43 of the Evidence Act 2006.

#### **Alleged offending**

[2] Mr Thompson faces one charge of attempted sexual violation under s 132(2) of the Crimes Act 1961 and four indecency charges under s 132(3) of the Crimes Act, one being a representative charge. The male complainant, called “V” by the Court of Appeal,<sup>1</sup> was between three and four years old at the time of the alleged offending, which on the Crown case occurred between 2006 and 2008.

#### **Proposed propensity evidence**

[3] The Crown had sought to introduce propensity evidence as follows: a 1997 summary of offending against a complainant (called “P” by the Court of Appeal), which Mr Thompson had pleaded guilty to;<sup>2</sup> and a statement made in 2018 by P expanding on the summary of facts.<sup>3</sup> P was aged 14 at the time of the offending, but was described as having the mental capacity of a person well below his chronological age.<sup>4</sup>

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<sup>1</sup> *Thompson v R* [2019] NZCA 385 (French, Collins and Wild JJ) [CA judgment] at [1].

<sup>2</sup> *R v Thompson* HC Auckland S69/97, 17 September 1997.

<sup>3</sup> For more details see CA judgment, above n 1, at [3]–[5].

<sup>4</sup> CA judgment, above n 1, at [3].

[4] The District Court had admitted both the 1997 summary and P’s 2018 statement as propensity evidence.<sup>5</sup> The Court of Appeal allowed Mr Thompson’s appeal in part, admitting the 1997 summary of offending as propensity evidence but excluding P’s 2018 statement as unfairly prejudicial under s 43 of the Evidence Act.<sup>6</sup>

### **Grounds of Appeal**

[5] Mr Thompson wishes to argue in essence that one-off offending against a 14 year old is so different in kind from offending against a three or four year old that the 1997 summary should also have been excluded, particularly as there are only two complainants and the alleged offending against V was separated by some ten years from the offending against P. Mr Thompson also wishes to argue that the Court of Appeal erred in ruling that sexual offending against a child is unusual for the purposes of s 43(3)(f).

### **Material before the Court of Appeal**

[6] Before the Court of Appeal, Mr Thompson produced statistics that were said to show low re-offending rates for sexual offenders and that sexual offending against children is more common than sexual offending against adults.<sup>7</sup>

[7] The Crown produced statistics that it submitted showed that sexual offending against children is rare in comparison to offending more generally. It also referred the Court of Appeal to academic studies suggesting a number of factors must co-exist before an adult sexually offends against a child.<sup>8</sup>

[8] In addition, the Crown referred to the characterisation of sexual offending against children as a “paraphilic” (mental) disorder in the *Diagnostic and Statistical Manual of Mental Disorders: DSM-5*.<sup>9</sup> According to the *DSM-5*, paedophilic disorder

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<sup>5</sup> *R v Thompson* DC Manukau CRI-2017-012-2523, 24 September 2018 (Judge McGuire) [DC judgment] at [10].

<sup>6</sup> CA judgment, above n 1, at [38]–[39].

<sup>7</sup> See CA judgment, above n 1, at [29(a)].

<sup>8</sup> At [33]. See also David Finkelhor *Child Sexual Abuse: New Theory & Research* (Free Press, New York, 1984).

<sup>9</sup> American Psychiatric Association *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* (5th ed, American Psychiatric Publishing, Arlington (VA), 2013) at 685.

is a paraphilia characterised by: the individual experiencing recurrent, intense sexual behaviours involving sexual activity with a pre-pubescent child (generally aged 13 or younger); the individual acting on these urges or these urges causing marked distress or interpersonal difficulties to the individual; and the individual being at least 16 years old and at least five years older than the child.<sup>10</sup> The *DSM-5* also notes that the highest possible prevalence for paedophilic disorder in the male population is three to five per cent.<sup>11</sup>

### **Our assessment**

[9] We accept that the application raises issues of general and public importance<sup>12</sup> as to the proper approach to propensity evidence relating to sexual offending against children, particularly where there is a large age gap between the complainants. However, we do not consider there is currently sufficient material before the Court for this to be properly assessed. In our view expert evidence would be required.

[10] It would not be appropriate, however, for this evidence to be proffered for the first time before this Court. It would mean this Court would be considering this evidence without the benefit of the assessment of the courts below. The application for leave to appeal must therefore be dismissed.

[11] We accept, however, that it would be preferable for this issue to be dealt with before the trial takes place. The most practical way of resolving this would be for another application in relation to the proposed evidence to be made to the trial judge, this time including expert evidence from both parties.

### **Result**

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

[13] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet

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<sup>10</sup> At 697.

<sup>11</sup> At 698. See also CA judgment, above n 1, at [32].

<sup>12</sup> Senior Courts Act 2016, s 74(2)(a).

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