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

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 120/2022
[2023] NZSC 50

BETWEEN	W (SC 120/2022) Applicant
AND	THE KING Respondent

Court: O'Regan, Williams and Kós JJ

Counsel: A J Bailey for Applicant
W P So for Respondent

Judgment: 12 May 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against a Court of Appeal decision dismissing his conviction appeal in relation to violent and sexual offending against a single complainant.[1] The applicant was sentenced to 11 years imprisonment.[2]

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1 *[W] v R* [2022] NZCA 474 (Gilbert, Brewer and Moore JJ) [CA judgment].
2 *R v [W]* [2021] NZDC 21772 (Judge M A Crosbie).

Background

[2] The complainant brought these matters to the notice of the Police in 2018. The first charge — causing grievous bodily harm with reckless disregard — arose out of an incident in 2003 when the complainant was six. The applicant fractured the complainant's femur while pulling her out of bed. The other five charges on which the applicant was convicted comprised rape (x2), unlawful sexual connection (x2) and the doing of a single indecent act on a young person under 16. These arose from events between June 2010 and June 2015, beginning when the complainant was around 13 or 14 years old.

[3] The jury found the applicant not guilty of three other charges: rape, unlawful sexual connection, and indecent assault.[3] The sexual violations were alleged to have occurred between April 2012 and May 2014 when the complainant was around 15 or 16 years old. The indecent assault was alleged to have occurred in April 2018.

Relationship evidence

[4] The focus of the proposed appeal to this Court is the relatively extensive evidence given at trial about the nature of the relationship between the complainant and the applicant. That evidence suggested that the complainant was ill-treated by the applicant during her childhood. The first source of this relationship evidence was the complainant's EVI, made four days after the last of the alleged incidents (the second indecent assault, on which the applicant was found not guilty). The second source of relationship evidence was the complainant's older stepsister. The ill-treatment allegations were generally as follows:[4]

> (a) Verbal threats.
>
> (b) Attempting to force the complainant to get her to eat her own vomit (when she was five years of age).
>
> (c) Putting a block of soap in the complainant's mouth and trying to make her eat it.
>
> (d) Locking the complainant in a cupboard with spiders.

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3 Two other charges were dismissed.

4 As summarised by the applicant's counsel in the CA judgment, above n 1, at [10].

(e) Hitting her with an alkathene pipe.

(f) Preventing her from having contact with her mother.

(g) Ripping the complainant's hair out (regularly).

(h) Threatening to hit the complainant.

(i) Having a bad temper.

(j) Beating the complainant for wetting herself.

(k) Making the complainant remain in her wet bed.

(l) Kicking the complainant so hard she fell to the ground and threatening to kick her again if she did not get up.

(m) Verbal psychological abuse.

(n) Spitting in the complainant's food.

(o) Throwing the complainant onto the ground.

Summing up

[5] The trial Judge gave a standard prejudice and sympathy direction both in his opening comments and in summing up. At the beginning of the summing up he said:

> You must reach your decision on the verdicts uninfluenced by prejudice or sympathy. You may have sympathy for a man on trial, for a complainant, you may have heard things about the way that people lead their lives that you do not lead your lives [sic] but judges can never allow decisions to be influenced by feelings of prejudice against or sympathy for any witness in a trial and you are the judges in this case. So I am simply saying to you, you must strive to put feelings of prejudice or sympathy to one side and be as dispassionate and clinical as possible.

[6] And then at the end of the summing up:

> … ultimately this case is going to revolve around your assessment of [the complainant] and of the other witnesses, their credibility. Look at all that evidence clinically, dispassionately, put aside feelings of sympathy or prejudice for either [the complainant] or [W]. Do not speculate, do not guess, use your experiences of life in considering what evidence you accept and reject and what weight you attach to any part of it.

[7] In the Court of Appeal, the applicant's counsel argued that some of the relationship evidence was inadmissible. The argument was that the vomit incident, making the complainant stay in her wet bed, spitting into the complainant's food, and

the soap incident crossed the point at which unfair prejudicial effect exceeded any probative value.[5]

[8] The Court of Appeal considered that once it was accepted that evidence showing the relationship between the applicant and the complainant was bad and that he was unkind to her was admissible generally, there was no reason to exclude those aspects that illustrated just how bad and how unkind. This would be to risk falsely sanitising the picture.[6]

[9] The applicant's primary argument in the Court of Appeal related to the lack of tailored directions about the potential prejudicial effect of the relationship evidence. The Court rejected this, taking the view that the directions given to the jury were adequate in the wider context of the trial.[7] The relationship evidence was not over-emphasised by the prosecutor either in his addresses to the jury or in the evidence adduced. A reliability warning (under s 122(2)(e) of the Evidence Act 2006) was given about the age of the evidence relating to the complainant's childhood and this, the Court found, could apply to the relationship evidence as well as the allegations directly relevant to the earlier charges.[8]

[10] The Court of Appeal did conclude however:[9]

> ... that it might have been better if the Judge had provided additional assistance to the jury on the relevance of this evidence and the use to which it could properly be put in their deliberations. However, we consider the relevance of the evidence was adequately explained and would have been obvious to the jury. The reliability warning given by the Judge concerning the evidence of historical events coupled with his prejudice and sympathy directions were sufficient. We are satisfied there is no real risk that justice miscarried because no further tailored directions were given by the experienced trial Judge.

Applicant's submissions

[11] In summary, the applicant seeks to reprise the argument advanced in the Court of Appeal: that the trial Judge failed to give the jury tailored directions regarding

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5 CA judgment, above n 1, at [11].
6 At [15].
7 At [30].
8 At [27].
9 At [31].

the purpose of the relationship evidence and the use to which it could properly be put. Secondly, he argues that the Court of Appeal was wrong to place reliance on the lack of an objection from "experienced trial counsel" and the experience of the trial Judge when assessing whether failure to provide such directions caused a miscarriage of justice.

Analysis

Tailored directions

[12] The admissibility and treatment of relationship evidence was dealt with by the minority judges in *Mahomed v R* and whose views were endorsed by this Court in *Taniwha v R*.[10] The applicable principles are settled. While it would have been preferable if the trial Judge had referred to the relationship evidence specifically when giving a prejudice and sympathy direction, the failure to do so does not raise an issue of principle, nor does it give rise to any risk of miscarriage.[11] The jury returned a number of not guilty verdicts involving both serious and less serious charges. The lack of directions do not appear to have caused the jury to view the applicant in a prejudicial light for all purposes.

'Experienced trial counsel'

[13] The applicant argues that the experience of counsel or judge are irrelevant, and to give weight to such matters is to abdicate the appellate function.

[14] What the Court of Appeal said was:[12]

> All of this likely explains why experienced trial counsel did not consider that any specific direction from the Judge was needed as to the legitimate use of this evidence. While obviously not determinative, an appeal court is entitled to bear this in mind when assessing whether the omission of a direction that is generally not required and was not sought at the time, was nevertheless of such importance as to have caused a miscarriage of justice.

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[10] *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [57(b) and (d)] per McGrath and William Young JJ; and *Taniwha v R* [2016] NZSC 121, [2017] 1 NZLR 116 at [65].

[11] Senior Courts Act 2016, s 74(2)(a) and (b).

[12] CA judgment, above n 1, at [30] (footnote omitted).

[15] An appellate court must assess the adequacy of trial directions for itself. Whatever the experience of trial counsel, their acquiescence is not a sufficient basis on its own for rejection for an appeal ground. But the stance taken by trial counsel may bring an air of trial reality to the picture and so affirm the appeal court's analysis. That analysis must, of course, and in any event, stand on its own feet. We do not read the Court of Appeal's decision as saying anything different. We therefore see no risk of miscarriage on this ground.[13] Nor does any matter of public importance arise.[14] The same applies to the Court of Appeal's reference to the experienced trial Judge.

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent

13 Senior Courts Act, s 74(2)(b).
14 Section 74(2)(a).