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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 34/2025
[2026] NZSC 115**

BETWEEN C (SC 34/2025)
Appellant

AND THE KING
Respondent

Court: Winkelmann CJ, Ellen France, Williams, Kós and Glazebrook JJ

Counsel: G H Vear and E E McClay for Appellant
F R J Sinclair and E P C Duckett for Respondent

Submissions on
Retrial: 11 May 2026

Judgment: 21 August 2026
(On the papers)

JUDGMENT OF THE COURT AS TO RETRIAL

We decline to order a retrial.

REASONS

Introduction

[1] In our judgment delivered on 24 April 2026, we allowed the appellant's appeal against conviction.¹ We said we would determine whether to order a retrial following

¹ *C (SC 34/2025) v R* [2026] NZSC 37 (Winkelmann CJ, Ellen France, Williams, Kós and Glazebrook JJ).

consideration of submissions on that issue.² Submissions have now been received. The Crown seeks an order for a retrial and the appellant opposes that course. We have decided it is not in the interests of justice to order a retrial. Our reasons follow.

Background

[2] To put our reasons in context, we need to say a little about the background. C was convicted after trial of eight charges of historical sexual offending in relation to three complainants, J, R and S. J had died prior to trial and her evidential video interview was admitted as a hearsay statement at trial. C appealed against conviction to the Court of Appeal, arguing that a miscarriage of justice had occurred. His appeal against conviction was successful in part.³ The five convictions concerning J were set aside without an order for retrial. The Court had decided that the barriers faced by the defence in defending the charges relating to J were such that the appellant did not have a fair trial. The Court found the trial was fair, however, as it related to the charges concerning R and S. The appeal in relation to those convictions was accordingly dismissed.

[3] On appeal to this Court, we accepted the appellant's submission that the unfair trial as it concerned J's complaints tainted the trial with respect to the charges as they related to R and S. It was on this basis that the appeal was allowed.

The approach to the retrial decision

[4] As discussed very recently in this Court's judgment in *Tamihere v R*, the correct approach to deciding whether to order a retrial requires "a factual inquiry as to where the interests of justice lie".⁴ Putting to one side the position where a conviction appeal is allowed on the basis that the verdict is unsustainable on the evidence, the relevant factors in assessing where the interests of justice lie include the seriousness or otherwise of the offence and its prevalence; whether the previous trial was prolonged and complex; the expense and length of time involved in a retrial; the ordeal a retrial

² At [58].

³ *C (CA749/2023) v R* [2025] NZCA 47 (Cooke, Peters and Grice JJ).

⁴ *Tamihere v R* [2026] NZSC 22 at [165] citing *H (SC 49/2021) v R* [2022] NZSC 42, [2022] 1 NZLR 21 at [38] and see at [36]; and *Reid v The Queen* [1980] AC 343 (PC).

may pose to the defendant; the unavailability of evidence; the length of time between the alleged offending and the new trial; and the strength of the Crown case.⁵

Application to this case

[5] We address each of the factors identified above in turn, beginning with the seriousness of the offence and its prevalence. As the Crown submits, sexual offending against children is both serious and prevalent, and the victim impact statements describe a long-term impact on the complainants. That said, the appellant is right that the charges relate to offending at the lower end of the scale in terms of seriousness. The sentence imposed reflects that fact.⁶

[6] The Crown emphasises that the original trial was not long or complex and submits that a retrial will be similar. If the allegations by J were admitted as propensity evidence, as it appears the Crown would seek to do, that would undoubtedly lengthen the trial and add to its complexity.⁷

[7] It is accepted that a retrial will be something of an ordeal for the appellant, who is now 70 years old with ill-health. More importantly, the appellant has served over 21 months of his sentence of two years and six months' imprisonment following what the Court found was an unfair trial. And, as the appellant says, he has also spent considerable time on bail over the course of which he was subject to restrictions, with the uncertainty of being subject to criminal charges a factor for an extended period of time. These matters assume importance in this analysis because, if convicted again on the remaining charges, and against the background, he is unlikely to be sentenced to a further term of imprisonment.

⁵ See *Tamihere*, above n 4, at [166] citing *Reid*, above n 4, at 350, in turn citing *Ng Yuk Kin v The Crown* (1955) 39 HKLR 49 (FC) at 60. See also *H (SC 49/2021)*, above n 4, at [32].

⁶ In relation to R there were two charges, one of performing an indecent act on a girl under 12 years and one of indecent assault of a girl under 12 years. In the District Court, C was sentenced to two years' imprisonment for this offending. In respect of S there was one charge of performing an indecent act with a girl under 12 years. For this, C was sentenced to a concurrent term of nine months' imprisonment: *R v [C]* [2023] NZDC 25092 (Judge Hollister-Jones).

⁷ We are not to be taken as making any comment on whether or not any attempt to have evidence of J's allegations admitted would be successful.

[8] The Crown argues that the issues in relation to the unavailability of witnesses will be much less acute on a retrial than they were in terms of the trial concerning J's complaints. Whatever the strength of that submission, it is relevant that R and S describe the earliest of the events giving rise to the charges as occurring some 44 or 45 years ago. The delay is prolonged. In the circumstances it seems highly likely there is a risk of prejudice to the appellant arising from what this Court in *CT v R* described as "the loss or diminution of what would, in the case of a prompt prosecution, be the opportunity to come up with evidence" contradicting the Crown case or providing some support for the defence.⁸

[9] Finally, the Crown submits that this is a reasonably strong Crown case especially where there would be cross-propensity evidence between the two complainants. The appellant's response, based on his defence at trial about the potential for collusion, raises issues that would be explored on any retrial.⁹

[10] Of these factors, the following features weigh clearly against an order for a retrial: the charges fall at the lesser end of the scale of seriousness; the appellant has served such a period of imprisonment that he is unlikely to be sentenced to any further term of imprisonment; and, given that the earliest of the incidents in issue dates back some 45 years, there is a risk that there will be questions about the ability of the appellant to advance his defence. The latter factor could have been addressed by an application for a stay. But, when that factor is viewed in conjunction with the other factors we have discussed, we are satisfied that it is not in the interests of justice to order a retrial.

[11] Given we have declined to order a retrial, the order we made 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 pending further order of this court now lapses.

⁸ *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465 at [14] per Elias CJ, McGrath and William Young JJ.

⁹ See *C (SC 34/2025)*, above n 1, at [22].

Result

[12] We decline to order a retrial.

Solicitors:

Public Defence Service | Ratonga Wawao ā-Ture Tūmatanui, Tauranga for Appellant

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