NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE NATURE OF THE COMPLAINANTS' RELATIONSHIP WITH THE APPLICANT, THE DATES OF THE OFFENDING, THE LOCATION OF THE OFFENDING AND THE AGES OF THE COMPLAINANTS REMAINS IN FORCE.

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 PERSON UNDER THE AGE OF 18 YEARS WHO IS A COMPLAINANT OR 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 O AOTEAROA

SC 17/2026
[2026] NZSC 167

BETWEEN	ANDREW MURRAY TOVEY Applicant
AND	THE KING Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: C J Lange for Applicant
K B Bell for Respondent

Judgment: 4 November 2026

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant applies for leave to appeal from a decision of the Court of Appeal dismissing his appeal against conviction.[1] The issue raised by the proposed appeal is whether, in light of this Court's judgments in *MB v R*[2] and *TW v R*,[3] the use of counter-intuitive evidence at trial may have given rise to a miscarriage of justice.

Background

[2] The applicant was found guilty after trial of nine charges of sexual offending against two young girls.[4] The offending was said to have occurred over two separate periods of time; the first period, early 2011 to early 2014 involving one complainant, and the second involving the other complainant, slightly later in 2014.

[3] Z did not make a complaint until 2020. Y made a note in her diary a few months after the incidents giving rise to the charges. The note was intended to be secret but, unbeknown to Y, it was read by an adult in her home. The applicant was interviewed about her allegations later in 2014 and denied the offending. Y's complaint was then reactivated in 2020 when Z complained.

The counter-intuitive evidence

[4] The counter-intuitive evidence was before the jury by way of a statement of admitted facts under s 9 of the Evidence Act 2006. The applicant says there are errors in the s 9 document which reflect concerns identified in *MB* and *TW*. Amongst other matters, the applicant refers to two paragraphs of the agreed statement which refer to delay and ongoing contact in probabilistic terms, a feature this Court noted increased the risk of improper use by the jury and raised a greater need for clear directions on proper use.[5]

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1 *Tovey v R* [2025] NZCA 685 (Collins, Fitzgerald and Robinson JJ) [CA judgment].
2 *MB v R* [2026] NZSC 76.
3 *TW v R* [2026] NZSC 77.
4 *R v Tovey* [2024] NZDC 1515 (Judge Gilbert). One of the complainants was aged six when the offending began and the other nine.
5 *MB*, above n 2, at [12(k)] and at [91]; and see *TW*, above n 3, at [39], [42] and [50].

[5] The applicant submits that the closing address of the prosecutor impermissibly linked the counter-intuitive evidence with the complainants' allegations. Further, the applicant wishes to argue that the Judge's directions were not sufficient. This is in part because he says the Judge did not correct, and in fact implicitly endorsed, the improper use of the counter-intuitive evidence by the prosecutor. It is also said that the directions as to the use to be made of the counter-intuitive evidence were insufficient. The applicant submits that these errors went to the jury's assessment of the complainants' credibility and may have given rise to a miscarriage of justice.[6]

Our assessment

[6] Dealing first with the s 9 statement, as the respondent submits, that document did identify the limits in the research and concluded by noting that "[t]here is no predictable or recurrent pattern of responses and therefore a child's behaviour neither proves or disproves that he or she has been sexually abused." Those qualifications were important.

[7] Second, we turn to the use of counter-intuitive evidence in the Crown's closing. The arguments on this aspect reprise those made in the Court of Appeal. The Court of Appeal explained that in the closing:[7]

> … the counter-intuitive evidence was deployed … to counter an anticipated submission from the defence challenging Y's credibility (namely that it was impossible or implausible for this offending to happen while [the applicant's wife] was at home), rather than simply a (potential) misconception on the part of the jury.

The Court of Appeal said that the same comments applied to the prosecutor's submissions about delay and a continuing relationship with the applicant. The Court continued that, "[f]or example, the prosecutor linked Z's delayed complaint with the counter-intuitive evidence that 'reporting is most commonly delayed'".[8]

[8] The Court of Appeal correctly accepted that these submissions could have been perceived as an, impermissible, statement that because the complainants had behaved

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6 Senior Courts Act 2016, s 74(2)(b).
7 CA judgment, above n 1, at [52].
8 At [52].

in the manner described in the s 9 statement, their evidence was more likely to be true. The Court went on to say that, nonetheless, there was no "real risk" that the jury would not have understood the proper purpose of the counter-intuitive evidence, its limits, or would have used it in an impermissible way.[9] That was essentially because of the directions given by the trial Judge. We see no error in that assessment.

[9] Finally, in terms of the directions to the jury, it is relevant that, as the Court of Appeal noted, the trial Judge in his opening remarks directed the jury to be careful about any assumptions and stereotypes that they brought to their task. The Judge then continued to note "the obvious", namely that:

> … what I have just said says nothing at all about the defendant['s] … guilt or innocence in this particular case. I mention those comments now to encourage you to bring an open-mind to your task … .

As he had foreshadowed in the opening remarks, the Judge also gave directions about the use that could be made of the s 9 statement when that statement was given to the jury.

[10] Against this background, nothing raised by the applicant calls into question the following observations of the Court of Appeal:[10]

> [54] We also consider the Judge's counter-intuitive directions in his summing up were sufficient. … The Judge made it clear that the purpose of the evidence was educative only, and that it did not say anything about whether the complainants were telling the truth, or not. And while the Judge did not *expressly* caution the jury against reasoning from the fact that the complainants behaved in one or more of the ways described by the counter-intuitive evidence that the sexual abuse was more likely to have occurred, this was plainly the overall messaging of his summing up directions (as well as the Judge's earlier directions immediately after the s 9 admitted facts document had been read, and the content of the s 9 admitted facts document itself).
>
> [55] Accordingly, while an express direction to the effect of [51(e)] [in *DH v R*] would have reinforced the clear messages already given in the Judge's directions and the s 9 admitted facts document, we do not see its omission as material. On the question of a delayed complaint — a key issue in this case — the Judge properly directed the jury that the mere fact of there being a delay in complaint, and the length of that delay, should not itself be taken as evidence that the abuse either occurred or did not occur. …

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9 At [53].

10 CA judgment, above n 1 (emphasis in original) referring to *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625.

[11] The application for leave to appeal is accordingly dismissed on the basis that nothing raised by the applicant gives rise to the appearance of a miscarriage of justice arising from the use of counter-intuitive evidence. We accept the submission for the respondent that this case is distinguishable on its facts from *MB* and *TW*.

Result

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

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent