

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 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 103/2025
[2026] NZSC 21**

BETWEEN MERVYN JOHN HEINEMANN
Applicant

AND THE KING
Respondent

Court: Williams, Kós and Miller JJ

Counsel: M L Dillon for Applicant
H G Clark for Respondent

Judgment: 26 March 2026

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Heinemann applies for leave to appeal a Court of Appeal judgment dismissing his appeal against conviction on two charges of sexual conduct with a child

under 12 (one charge being representative).¹ Mr Heinemann had earlier been found guilty by a jury of those charges and was sentenced in the District Court to 20 months' imprisonment (cumulative on a previous sentence of three years and three months' imprisonment).²

[2] The Court of Appeal summarised Mr Heinemann's offending as follows:³

[4] On five to 10 occasions between 12 December 2012 and 17 December 2015, when showering with the complainant, Mr Heinemann had her put her hand on his penis to masturbate him under the guise of having her wash his penis while he had an erection. On one occasion within the same time period, Mr Heinemann gave the complainant lacey lingerie-type underwear, told her to put it on and took photographs of her in sexualised poses on his bed. At the time of the offending the complainant was aged between six and nine years old.

[3] When the complainant disclosed Mr Heinemann's offending, the police executed a search warrant at Mr Heinemann's address and located over 20,400 images of child exploitation material on different devices. Mr Heinemann pleaded guilty to possessing objectionable publications and received for this offending the sentence of three years and three months' imprisonment mentioned above.

[4] Of those 20,400 images, 19 shared strong similarities with Mr Heinemann's offending. When Mr Heinemann was tried for the sexual conduct offending against the complainant, the Crown was permitted to adduce evidence in relation to the 19 images. Mr Heinemann had objected and sought leave to bring a pre-trial appeal against the admissibility ruling, but leave was refused.⁴ In the District Court, Judge Marshall had directed that the most appropriate course was to adduce the evidence by way of a written description rather than admission of the images themselves.⁵ In light of this, a written statement containing a general description of the 19 images was admitted by agreement pursuant to s 9 of the Evidence Act 2006. This emphasised the similarity between the acts shown in the selected images and

¹ *Heinemann v R* [2025] NZCA 412 (Campbell, Venning and Eaton JJ) [CA judgment]. Mr Heinemann also appealed his sentence at the Court of Appeal but does not apply to do so at this Court.

² *R v Heinemann* [2024] NZDC 30412 (Judge Cocurullo).

³ CA judgment, above n 1.

⁴ *Heinemann v R* [2024] NZCA 356 (Mallon, Fitzgerald and Jagose JJ).

⁵ *R v Heinemann* [2024] NZDC 5522 at [55].

those alleged by the complainant. It also noted that the device containing the images was likely in use over the period of the offending.

[5] Mr Heinemann denied the allegations at trial, suggesting the complainant had been encouraged to fabricate them. He admitted showering with the complainant, but said this was to administer lice shampoo. Mr Heinemann did not deny finding the 19 images attractive, but said “there’s a big difference between looking at a picture and doing something to someone”.

Court of Appeal

[6] At the Court of Appeal, Mr Heinemann submitted the propensity evidence suggested he had a narrow, specific paedophilic interest in the exact acts with which he was charged. This, he submitted, was misleading because his actual paedophilic interest was much wider in scope, as demonstrated by his large collection of child exploitation material.

[7] The Court of Appeal considered that Mr Heinemann’s interest in a broader and more serious range of child exploitation material did not undermine the proposition that the propensity evidence demonstrated a particular interest in conduct similar to that with which he was charged. The Court endorsed the observation in *R v W (CA55/02)* that an accused who takes a strong interest in child exploitation material may be more likely to sexually offend against a child than one who exhibits no such interest.⁶

[8] Distinguishing the authorities relied on by Mr Heinemann,⁷ the Court reasoned that the propensity evidence established Mr Heinemann’s sexual interest in the very kind of activity alleged by the complainant, so it had a “high degree of probative value as to the central trial issue of [the complainant’s] credibility”.⁸ The Court considered the risk of unfair prejudice had been addressed by the agreement to admit the evidence in written form and by the Judge’s “full and careful” direction.⁹

⁶ CA judgment, above n 1, at [31] citing *R v W (CA55/02)* CA55/02, 16 May 2002 at [9].

⁷ *R v Hurring* [2008] NZCA 245; and *MNA v Western Australia* [2020] WASCA 84.

⁸ CA judgment, above n 1, at [40].

⁹ At [41].

[9] The Court observed that the prosecution had not argued that Mr Heinemann had an “exclusive or highly niche” interest in the acts shown in the 19 images.¹⁰ Nor had the prosecution suggested, or the written statement implied, that the 19 images were the only objectionable images on Mr Heinemann’s devices.

[10] The Court accepted the Crown’s submission that Mr Heinemann could have elected to make reference to his broader paedophilic interest, including by adducing evidence of the scope of his full collection of child exploitation material, to combat any prejudicial effect flowing from the scope of material presented to the jury. The Court commented that in electing not to do so, Mr Heinemann faced a dilemma “very much of his own making”.¹¹

Applicant’s submissions

[11] In line with submissions in the Court below, Mr Heinemann says the propensity evidence was adduced to show he had a particular interest in the acts depicted in the 19 images. This he submits, was misleading. Those images were less than 0.1 per cent of his collection, so they could not have demonstrated the alleged particular interest. Mr Heinemann also submits the Court of Appeal was wrong to find that the risk of unfair prejudice was adequately addressed by the trial Judge’s directions and the fact that the propensity evidence was adduced in written form. Mr Heinemann says these measures cannot have removed the “actual unfair prejudice” arising from the misleading impression given about his state of mind.

[12] As to the Court of Appeal’s suggestion that Mr Heinemann made a strategic election not to adduce evidence of his full collection, he says such evidence “would have been devastatingly prejudicial” at trial. He submits that he should not be required to adduce even more material prejudicial to the defence to address prejudicial evidence that should not have been admitted in the first place. In any event, he submits, his full

¹⁰ At [43].

¹¹ At [46].

collection only showed a general sexual interest in children and this lacks the necessary direct link to satisfy the requirements of s 43 of the Evidence Act.¹²

[13] Finally, Mr Heinemann submits that the issue sought to be ventilated on appeal involves a matter of general public importance and that, in any event, the decisions of the Courts below caused a substantial miscarriage of justice such that leave should be granted.

Respondent's submissions

[14] The Crown submits that Mr Heinemann's proposed appeal does not engage a matter of general or public importance. Instead, it is said to turn on the application of well-settled propensity principles to particular and unusual facts. The Crown also submits that there has been no miscarriage. It says the lower Courts were correct to find that the probative value of the 19 images was high since they demonstrated Mr Heinemann had an interest in sexual conduct that was strikingly similar to the conduct alleged. Further, it says there was no risk of unfair prejudice because evidence of a limited number of images was adduced, it was in written (rather than photographic) form, and the jury was cautioned against improper reasoning in relation to it.

[15] The Crown emphasises that Mr Heinemann accepted at trial that he found the 19 images attractive and says there is nothing misleading about calling evidence of a defendant's particular sexual interest where the Crown is aware he has other sexual interests. The Crown submits further that the cases cited by Mr Heinemann are distinguishable because they lacked the specificity of the propensity evidence in this case.

¹² Mr Heinemann refers to the following authorities to support this submission: *D (CA863/2012) v R* [2013] NZCA 260 at [39]; *Parry v R* [2016] NZCA 72 at [25]; *S (CA541/2022) v R* [2022] NZCA 572 at [32]; *McPhillamy v R* [2018] HCA 52, (2018) 361 ALR 13 at [27] per Kiefel CJ, Bell, Keane and Nettle JJ; *MNA v Western Australia*, above n 7, at [66] and [173]; and *ABR v R* [2020] NSWCCA 33 at [32].

Assessment

[16] The proposed appeal does not raise a matter of general or public importance.¹³ The issue identified in the application is whether evidence of a small selection of objectionable images is properly admissible as propensity evidence when it does not represent the whole collection and is therefore misleading. However, it is well-settled that evidence that will mislead the fact finder is not admissible. Among other problems, misleading evidence will unfairly prejudice the defence and therefore fail the assessments in ss 8 and 43(1) of the Evidence Act. Mr Heinemann's complaint is that the Court of Appeal was wrong to conclude that the evidence of the 19 images was not misleading in the circumstances of the case. Whether that is so turns on the application of settled principles to specific facts. No issue of principle arises.

[17] Nor are we satisfied that a substantial miscarriage of justice is in prospect if leave is not granted. The 19 images tended to show Mr Heinemann had a sexual interest in children that extended to the particular acts depicted—acts which were similar to those alleged by the complainant. He conceded at trial that he found those images sexually attractive. As the Crown submits, these factors increase the probative value of the evidence in terms of linkage and coincidence, and distinguish Mr Heinemann's case from the category of cases that hold evidence of a general sexual interest in children carries too much risk of unfair prejudice. Added to this is the factual context at trial—Mr Heinemann admitted showering with the complainant on a number of occasions and the device containing the images was in use over the period of the offending.

[18] Given the specific and unusual context of this case, we see no reason to depart from the assessment of the Court of Appeal that the form in which the evidence was admitted and the directions given by the trial Judge adequately mitigated any risk of unfair prejudice.

[19] We conclude therefore that it is not necessary in the interests of justice for this Court to hear and determine the proposed appeal.¹⁴

¹³ Senior Courts Act 2016, s 74(2)(a).

¹⁴ Section 74(1).

Result

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

Solicitors:

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