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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 34/2025
[2026] NZSC 37**

BETWEEN	C (SC 34/2025) Appellant
AND	THE KING Respondent

Hearing:	19 February 2026
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
Judgment:	24 April 2026

JUDGMENT OF THE COURT

- A The appeal against conviction is allowed.**
- B The convictions entered against the appellant on charges 1, 2 and 13 are set aside.**
- C The Court will determine whether to order a retrial following consideration of submissions on that issue as provided for below at [58].**

- D Bail is continued on the terms currently applicable. Any application for variation to bail shall be addressed by the District Court.**
- E 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 or other publicly available database pending further order of this Court.**
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REASONS
(Given by Ellen France J)

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The appeal

[1] Following a jury trial the appellant, C, was convicted of eight charges of historical sexual offending in relation to three complainants, J, R and S.¹ He was acquitted of five other charges, which related to J. J had died prior to trial. Her evidential video interview (EVI) was admitted as a hearsay statement at trial. R and S gave evidence and were cross-examined at trial.

[2] C appealed against conviction to the Court of Appeal, on the ground that a miscarriage of justice had occurred. His appeal against conviction succeeded in part.² Five of the convictions, which concerned the complainant J, were set aside, without an order for retrial. The Court considered the barriers faced by the defence in

¹ We use the same letters of the alphabet to describe the appellant, the complainants and others as the Court of Appeal did in its judgment. This adopts the approach taken in *H v R* [2019] NZSC 69, [2019] 1 NZLR 675.

² *C (CA749/2023) v R* [2025] NZCA 47 (Cooke, Peters and Grice JJ) [CA judgment]. C also appealed against his sentence, but it was not necessary for the Court to decide this, given its conclusion on the appeal against conviction: see at [115].

defending those charges were such that the appellant did not have a fair trial. The Court of Appeal did not consider the obstacles for the appellant in defending the other charges concerning R and S were as significant. The Court found the trial was fair as it related to those charges. The appeal in relation to the convictions relating to R and S was accordingly dismissed. C was resentenced in the District Court on those charges, two concerning R and one with respect to S.³

[3] The appellant's case is that the unfair trial as it related to J's complaints tainted the trial with respect to the charges concerning R and S. The appellant says also that the obstacles highlighted by the Court of Appeal in relation to J's complaint applied equally to the case against C relating to R and to S. The respondent challenges that conclusion. Against that background, the principal issue on the appeal in this Court is whether, having determined that the trial in relation to the charges concerning J was unfair, the Court of Appeal was right to find the trial fair as it concerned the other charges.

[4] This issue was one of two issues highlighted by the Court in granting leave to appeal. The other issue was "whether J's evidence would have been admissible as propensity evidence in a trial involving only the charges relating to R and S".⁴ We address the second issue briefly below at [56].

The factual background

[5] The background is set out in detail in the Court of Appeal judgment.⁵ We need only note the following matters.

The complainants

[6] There were familial connections between the appellant and the complainants. The appellant is J's biological father. R, born in 1974, and S, born in 1980, are cousins. Their connections with J, who was born in 1978, arose via marriage as we shortly explain. R knew J because both would attend family events.

³ *R v [C]* [2025] NZDC 19120 (Judge Hollister-Jones).

⁴ *C (SC 34/2025) v R* [2025] NZSC 102 (Glazebrook, Ellen France and Williams JJ) at [1].

⁵ CA judgment, above n 2, at [15]–[25].

[7] C had a short-lived marriage to J's mother, MW, who began a relationship with another man, RT, around the time or shortly after J was born. MW took J with her when she left C. After MW and C separated, C began what became a 29-year relationship with MB. MB was an aunt of R and S. MB passed away in 2007. After her death, the appellant began a relationship with MK, who was R's sister and a niece of MB. The appellant and MK subsequently married and remained married at the time of the trial. As the Court of Appeal noted, it was common ground at trial that the families of R and of S were "strongly opposed" to this relationship.⁶

[8] On 4 August 2020, both R and J made complaints to the police about C's alleged offending against them. Both completed EVIs, although R's EVI was not played at trial. J was terminally ill when she gave her EVI, a matter referred to in that interview. J passed away some two years prior to trial, some months after completing her EVI. When arrested on 24 March 2021, on the charges of offending against R and J, the appellant made a brief denial of the allegations and then, having taken legal advice, declined to make a formal statement to police.

[9] S's complaint to the police was made in April 2021. She too completed an EVI. The single charge against the appellant in relation to S was laid on 24 June 2021.

[10] Overall, the charges were laid some 28 years after the most recent of the allegations, and some 40 years after the earliest in time.

[11] Prior to trial, the Crown sought leave to adduce J's EVI as hearsay evidence and to treat the evidence of the three complainants as cross-propensity evidence. The District Court allowed both applications and declined an application by the appellant for severance.⁷ These decisions were upheld by the Court of Appeal.⁸

The trial

[12] The trial took place over five days in June 2023.

⁶ At [21].

⁷ *R v [C]* [2022] NZDC 4459 (Judge Mabey KC).

⁸ *C (CA245/2022) v R* [2022] NZCA 326 (Miller, Lang and Cull JJ) [CA pre-trial admissibility judgment].

[13] R gave evidence of the incidents comprising charges 1 and 2. Those were, respectively, charges of performing an indecent act on a girl under 12,⁹ and of indecent assault on a girl under 12.¹⁰ The charges related to the period from 1981–1983. R said the appellant would come to the address in South Auckland where she lived with her grandmother. She said he would babysit her from time to time.

[14] R described an incident in around 1981 where C was lying on the bed. He called her into the room. He showed her a book with pornographic pictures in it and then placed a mint on his penis. C asked R to take the mint off and pulled her hand towards him. R said she did not do as he asked.

[15] R also gave evidence of a second incident which she said took place while C was babysitting. She had hidden in a cubbyhole behind a curtain in the hall of her grandmother's house. Her account was that the appellant grabbed her hand and thrust his penis into her hand in a rubbing motion before being interrupted by a family member.

[16] R told the jury that she was prompted to complain to the police after learning that her sister MK had left two grandchildren in C's care when attending a family event. R accepted that she had spoken to J about making a complaint and had sought J's "support". R also acknowledged that she had discussed her allegations with S prior to making her complaint to police.

[17] As we have indicated, J's EVI was played to the jury. She described various incidents giving rise to charges 3–7, which comprised four charges of indecent assault on a girl under 12,¹¹ and one charge of sexual violation by unlawful sexual connection¹² over the period from 1985–1988. C was acquitted of these charges at trial.

⁹ Crimes Act 1961, s 133(1)(b). Note that s 133 was repealed by s 7 of the Crimes Amendment Act 2005. It applies in the present case because the relevant events took place while the provision was still in force: see Crimes Act, s 414.

¹⁰ Section 133(1)(a).

¹¹ Section 133(1)(a).

¹² Section 128(1)(b).

[18] The incidents giving rise to charges 8–12 also related to J and were said to have occurred over the period from 1986–1993. These charges comprised three counts of sexual violation by unlawful sexual connection, one count of indecent assault on a girl under 12, and one count of sexual violation by rape.¹³ Charges 8 and 9 (sexual violation by unlawful sexual connection and indecent assault on a girl under 12, respectively) were both representative charges. In her EVI, J spoke about numerous occasions of being taken to the home in South Auckland where the appellant lived with MB. The sexual touching she described during those visits formed the basis of charges 8 and 9.

[19] J also said that, on one occasion between 1992 and 1993, C and J were at an Auckland address where C lived. J said that C ran her a bath, laid under her and touched her vagina. He then took her to the bedroom where he performed oral sex on her and raped her. These events gave rise to charges 10–12 (comprising two charges of sexual violation by unlawful sexual connection and one charge of sexual violation by rape).

[20] S’s EVI was played to the jury. She described a single incident occurring between 1990–1992 while the appellant was babysitting her. This incident took place at an address of C and MB in South Auckland. She said C called her into the toilet to bring him some toilet paper. When she came in, his penis was exposed. He held out his penis and tried to pull her arm towards it. This gave rise to charge 13 (performing an indecent act on a girl under 12).

[21] S said in her evidence she had not intended to make a formal complaint, although R had asked her to do that. Her account was that she decided to complain having reconsidered “because [she] didn’t agree with [C] having children in his care”. S accepted she had exchanged messages with a family member when MK separated from C for a period. In those messages she acknowledged that she had said in a Facebook message “I f-n hope so” when she heard of the separation. She also accepted that there was probably “not a great deal of love for [C] within the [relevant] family”.

¹³ Section 128(1)(a).

[22] The appellant gave evidence and called other evidence in his defence. In responding to the charges relating to R, the appellant said R was lying. He went to the relevant address on limited occasions and never babysat R there. The latter point reflected the view of R's grandmother that babysitting was for women, not men.¹⁴ In relation to the charges concerning J, he said he had no contact with her from the time she was an infant until she was a young adult with a partner.¹⁵ He said J was lying and that he had not lived at the address referred to by J in the context of charges 3–6. Finally, in relation to S, the appellant's defence was that he and MB had relocated by the time this offending was said to have occurred. He also said the toilet rolls were kept in the toilet so the premise underlying S's evidence was false. She was lying and had been pressured by a family member into making her complaint.

[23] As we shall discuss, the trial Judge directed the jury about the use of propensity evidence and as to the ability to use that evidence on a cross-propensity basis, that is, as applying to the Crown case as it related to each of the complainants.¹⁶

[24] The Judge also directed the jury in terms of s 122 of the Evidence Act 2006. That section requires a judge to consider whether to give a warning about reliability where evidence is given about the conduct of the defendant if, as here, that conduct is alleged to have occurred more than 10 years previously.¹⁷ The Judge said this:

[16] In respect of the direction I have just given you about the need for caution arising from the passage of time, the central issue in the trial is not the reliability of the complainants' evidence, it is whether you can be satisfied the Crown have established they are telling the truth. The passage of time does not affect the defendant's position that all the complainants are lying and they had no relationship or contact with his daughter, [J], over the period of her allegations. However, it does affect his ability to call evidence to support that position bearing in mind of course that the Crown has the burden of proof.

[25] As we have said, the appellant was convicted on charges 1 and 2 which concerned R's complaint. On the charges relating to J, he was acquitted on charges 3–7 and convicted on charges 8–12. The appellant was convicted on charge 13 relating to S's complaint.

¹⁴ The jury heard evidence from both Crown and defence witnesses on this topic.

¹⁵ Two of his relatives gave evidence supporting C's account of lack of contact.

¹⁶ See below at [47].

¹⁷ Evidence Act 2006, s 122(2)(e).

The approach of the Court of Appeal on whether the trial was fair

[26] C appealed to the Court of Appeal on the ground that a miscarriage of justice had occurred because the trial was unfair.¹⁸

[27] Referring to this Court’s judgment in *CT v R*,¹⁹ the Court of Appeal said that whether the trial was unfair required the Court to:²⁰

... evaluate the circumstances as they were at the time of trial, and the likely prejudicial effects of delay, bearing in mind the operation of the burden and standard of proof and the steps taken by the Judge to mitigate the risk of prejudice.

[28] The Court dealt first with the effect of the inability to cross-examine J. The Court accepted the Crown submissions that the Crown case was a strong one where three complainants were alleging C committed sexual offending against them when they were young. The Court also noted that defence counsel was able to explore the difficulties arising from the complainants’ accounts, and the defence had evidence of its own. The Court did not place any weight on the pattern of verdicts.²¹

[29] The Court considered the appellant’s arguments were strongest in relation to the charges against J which resulted in guilty verdicts. Questions of reliability were significant in terms of those charges. The first issue the Court noted was that “[a]s it turned out at trial, the inability to cross-examine J did put the defence at a significant disadvantage”.²² The Court used the terminology “as it turned out” because the expectation in the Court of Appeal’s pre-trial decision admitting J’s EVI was that it would not have that effect.²³ The Court explained that the expectation of the Court in the pre-trial decision:²⁴

... could not be met on the critical issue of whether there had been any relationship between J and C when she was young. Important witnesses, and we include MB, MW, RT, and members of the C family, who could have given

¹⁸ Criminal Procedure Act 2011, s 232(2)(c) and (4)(b).

¹⁹ *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465.

²⁰ CA judgment, above n 2, at [79]. See also *CT v R*, above n 19, at [29] and [32] per Elias CJ, McGrath and William Young JJ.

²¹ The appellant argued that the acquittals reflected charges that were specific as to time, place and circumstance for which C had been able to adduce evidence confirming his account.

²² CA judgment, above n 2, at [102].

²³ See CA pre-trial admissibility judgment, above n 8, at [23].

²⁴ CA judgment, above n 2, at [103] (footnote omitted).

evidence on this critical point, were all dead by the time of trial, or possibly not called in the case of RT. In those circumstances, C had little choice but to give evidence himself. In the pre-trial ruling the Court expressly recorded that it had not been suggested by C's then-counsel that the circumstances would require him to do so.

[30] The Court accepted the submission for the Crown that it was not possible to know exactly what evidence the relevant witnesses would have given and whether or not it would have assisted the defence. But the Court said "it is inconceivable that MB, who lived with C for 29 years, and J's mother, MW, would not have been able to give relevant evidence".²⁵

[31] The witnesses that C was able to call were described as "more peripheral".²⁶ Further, those witnesses were also being asked to remember events occurring 30 or more years prior to trial, when many of the sorts of documents that might jog a memory, such as letters, photographs, birthday and Christmas cards, bank statements and so on, were not available.

[32] The second issue identified by the Court of Appeal was the approach taken in the reliability warning given to the jury by the trial Judge in terms of s 122 of the Evidence Act. The Court considered that the Judge had undermined the warning given by the directions which then followed. The Court said this:

[107] We consider that the Judge erred in qualifying the warning by saying that the "central issue in the trial is not the reliability of the complainants' evidence, it is whether you can be satisfied the Crown have established they are telling the truth". As we have emphasised, C faced particular allegations where questions of reliability as well as credibility were relevant. There is little point in giving such a warning if the jury is told immediately thereafter that reliability is not the issue. Credibility and reliability were both in issue.

[33] The third issue focused on by the Court of Appeal was the lack of specificity in charges 8 and 9. In terms of these charges, both relating to J, the time and place of what was serious offending covered by those charges "were relatively unspecific, making it difficult to respond".²⁷

²⁵ At [104].

²⁶ At [105].

²⁷ At [108].

[34] Finally, the Court referred to the approach of Crown counsel in challenging defence witnesses. The Court was concerned about challenges made by the prosecutor in cross-examination based on the fact the evidence being given was not corroborated by contemporaneous documents, “that is that those witnesses were asking the jury to ‘take [their] word for it’”.²⁸ The Court continued:²⁹

That is precisely what those witnesses were doing, because of the lapse in time. This line of challenge would have indicated to the jury that the evidence was of less weight as a result. Counsel ought to have refrained from it, whether of her own volition or as a result of defence counsel objection or judicial intervention.

[35] The Court’s summary of its reasons for concluding that the trial as it related to the charges concerning J was unfair is captured in this excerpt:

[110] Ultimately, carrying out the necessary backwards looking assessment, we have decided that the combined effect of the matters referred to above was that C did not have a fair trial on the charges pertaining to J. Whilst not one such matter on its own would have persuaded us to this end, the sheer number of obstacles the defence faced in defending those charges has brought us to this conclusion. This distinguishes this case from other historic sexual offending cases. This conclusion requires that we allow the appeal in relation to charges 8 to 12 concerning J. As the most important matters — the unavailability of J, of other critical witnesses, and documents — cannot now be overcome, we do not propose to order a retrial of those charges.

[36] The Court saw the position in relation to R and S as different. That was because they both gave their evidence and were cross-examined. For them, the absence of witnesses such as MB was seen as less important given that their allegations related to “isolated and opportunistic offending”.³⁰ The Court also referred to the fact that although defence counsel at trial had sought a stay on charges 3–13, a stay was not sought on the charges relating to R, that is, charges 1 and 2. The Court also said this:

[112] We acknowledge, of course, that all of the complainants’ evidence was treated as cross-propensity evidence. However, even if no charges had been laid in relation to J, it is quite possible that her EVI would have been admitted as propensity evidence at a trial in respect of the R and S charges only.

²⁸ At [109].

²⁹ At [109].

³⁰ At [111].

[37] For these reasons, the appeal was allowed in part in relation to the convictions concerning J's complaints but not in relation to the convictions concerning the complaints from R and S, which are the subject of the present appeal.

Was the trial as it related to R and S fair?

The submissions

[38] The essential point made for the appellant before this Court is that the unfairness of J's trial meant that the trial as it related to R and S was also unfair, because the jury was invited to utilise J's evidence for cross-propensity reasoning. In addition, the appellant says that a number of the grounds relied on by the Court of Appeal to establish the trial in relation to J was unfair applied equally to the charges concerning R and S. For example, the complaints made by R and S were also historical and required a s 122 warning. This meant the problems identified by the Court of Appeal in relation to the s 122 warning as it affected the trial concerning J's complaints applied equally to the charges relating to R and S.

[39] The respondent was given permission to support the Court of Appeal's judgment on other grounds.³¹ The respondent argued that the Court of Appeal erred in concluding that the trial as it related to the charges concerning J was unfair. Revisiting that conclusion, it was submitted, showed that there was no unfair effect on the trial relating to the other two complainants.

[40] It was accepted by the respondent that if the trial as it related to J's complaint was unfair, J's evidence would not have been admissible as propensity evidence in the trial as it related to the charges concerning R and S. The position would be different on a retrial of the charges relating to R and S.

Our approach

[41] We need to address first the respondent's submission that we should revisit the Court of Appeal's conclusion that the trial as it affected the charges relating to J was unfair. We put to counsel that the approach being taken by the respondent was in

³¹ See Supreme Court Rules 2004, r 20A.

fact a direct challenge to the Court of Appeal's decision to set aside the convictions relating to J and not order a retrial. As counsel accepted, it is not open to this Court to set aside that decision given the Crown had no right of appeal.³²

[42] The response to our question was that the respondent sought, rather, to demonstrate that any prejudice to the trial as it concerned R and S was not significant. Counsel submitted that the position equated with that taken by the Court of Appeal in *R v Armitage*.³³ That submission, however, misconstrues the passages in *Armitage* relied on. The issue in that case was whether a stay of charges precluded the admission of propensity evidence founded on the same allegations, that is, evidence about the incidents encompassed by the stayed charges. It was in this context and on the particular facts that the Court of Appeal, in the passage relied on by Crown counsel in the present case, determined that the extent of prejudice to the defendant was not as great as the District Court had determined. The Court of Appeal took the view that the District Court's conclusion on the facts was speculative.³⁴

[43] As we have indicated, we see the decision in *Armitage* as turning on its facts. The essential point is that, to reach the conclusion contended for by the respondent in this case, this Court would have to find that the Court of Appeal was wrong in its conclusion the trial was unfair as it concerned J's complaints. The logical conclusion of that finding is that the Court was wrong to set aside the convictions, a conclusion not available to this Court. As such, we say no more about this argument.

[44] We turn then to the appellant's argument the unfair trial as it concerned J tainted that relating to the other two complainants.

[45] It may be possible to effectively sever and maintain some convictions where a trial involving more than one complainant is found to be unfair. That will be a factual question to be resolved on the particular facts of a case. But, in the present case, particularly given the problems identified with the trial relating to J, it was not possible to separate out the parts of the trial affected by the complaints relating to J from those

³² See Criminal Procedure Act, subpt 8.

³³ *R v Armitage* [2017] NZCA 63.

³⁴ At [22].

parts relating to the other charges. We say that because the jury was permitted to use J's evidence as propensity evidence to support the Crown case as it related to the other two complainants. Propensity evidence is evidence tending to show here, C's "propensity to act in a particular way".³⁵ So, in very general terms, the risk is that the jury may have reasoned that, because C acted in a particular way towards J, that supported the allegations he acted in the same way towards R and S. If this line of reasoning is applied, on the facts of this case, the unfairness the Court found in reliance on J's evidence is likely to have affected the outcome of the case against C on the other charges.

[46] To put the impact of the propensity evidence in context, we note that the prosecutor submitted the evidence showed a pattern of behaviour in both the opening and closing addresses. For example, in closing, the prosecutor suggested the jury could "be sure" the complainants' accounts of discrete incidents showed "a pattern of behaviour" on the appellant's part.

[47] The matter was also addressed by the trial Judge. In an orthodox direction on the use of propensity evidence, the Judge directed the jury that the Crown's argument there was a pattern of behaviour was "legitimate" only if first accepted there were similarities or a pattern, and there was no collusion between the three complainants. The similarities relied on by the Crown were identified, as was the defence response to these matters. The jury were told that, if they accepted there was a pattern of behaviour, "you can give such weight to that as you consider appropriate in relation to all the charges".

[48] It follows, as the Crown essentially accepts, that unless it is possible to conclude that the jury worked on the basis there was no pattern or that the complainants had colluded, we cannot be sure that the jury ignored J's evidence in considering the case as it related to R and S. We cannot therefore be sure the jury must have put to one side J's evidence which was adduced as part of an unfair trial. We see this risk as exacerbated by the fact that the s 122 reliability warning applied to the charges concerning all three complainants. The flaw identified by the Court of Appeal

³⁵ Evidence Act, s 40(1)(a).

in relation to that warning affected all of the charges as questions of reliability arose in respect of all the charges.

[49] Comparable appellate authority supports this conclusion. Two examples suffice.

[50] First, we see the position here as equating with that taken by the Court of Appeal in a similar factual context in *N (CA410/2019) v R*,³⁶ a case relied on by the appellant. The appellant in that case faced sexual offending charges in relation to four complainants. He was acquitted of three charges relating to the first complainant and a single charge in relation to the fourth. He was convicted of the remaining eight charges concerning the first, second and third complainants.

[51] The convictions in *N (CA410/2019) v R* were relevantly challenged on the basis that a miscarriage of justice resulted because of the failure to give a reliability warning under s 122 of the Evidence Act. The Court of Appeal agreed that reliability was an issue in relation to all three remaining complainants. The Court was satisfied that the failure to give a reliability warning caused the guilty verdicts on all of the charges relating to all three complainants to miscarry. The Court also saw risks arising because of the use of cross-propensity evidence, as is apparent from this passage:

[44] Further, we note that the Judge directed the jury on the availability of the evidence of each complainant as cross propensity evidence to support the evidence of other complainants on other charges. Thus, we cannot exclude the possibility that the guilty verdict the jury reached on charge 12 was influenced by the views they had formed on the evidence of N to support the charges involving them. Indeed this reasoning applies here to any cross propensity use of one complainant's evidence in this trial to support that of another once doubt about the soundness of one or more of the verdicts is raised, which also confirms that miscarriage has occurred.

[52] Similarly, in *O (CA441/2021) v R*,³⁷ another of the cases relied on by the appellant, the defendant was convicted of 21 charges relating to five different complainants who had alleged abuse while in his care. There were various challenges made to the safety of the convictions in that case.

³⁶ *N (CA410/2019) v R* [2020] NZCA 279.

³⁷ *O (CA441/2021) v R* [2024] NZCA 73.

[53] Relevantly, there was an argument that the propensity evidence of one complainant, R, was wrongfully admitted. That propensity evidence, which related to a single incident, had been used to justify the submission for the Crown that the appellant “had an enduring, ‘longstanding’ tendency to sexually offend against teenage boys”.³⁸ Once other charges in relation to another complainant were dropped, R’s evidence was the only basis for this submission. The Court of Appeal expressed some reservations as to whether R’s evidence could in fact “fairly be seen as bearing the weight of that contention” but, in any event, the Court considered that this propensity evidence was not admissible.³⁹ That was because its probative value was outweighed by its unfairly prejudicial effect.⁴⁰

[54] In that case, various other problems had emerged at trial which are not present in the current case. That said, the Court’s conclusion bears some similarities to the concerns we have identified here. The Court said this:

[147] There can be little doubt that the Crown case [against] Mr O was heavily dependent on the jury being prepared to engage in propensity reasoning. All the irregularities we have just summarised bear in some way upon the scope or legitimacy of such reasoning. So while we have concluded that the Judge was right, at the time, not to abort the trial once it was learned that [two of the complainants] could not be found, we consider that the combination of the jury’s exposure to the details of the alleged offending against them, together with the wrongful admission of R’s propensity evidence and R’s inadmissible disclosure of other alleged offending against P mean there is a reasonable possibility that another verdict would have been reached [had those] things (in combination) not occurred.

Conclusion

[55] It is simply not possible to be sure that the trial as it related to the charges concerning R and S was a fair one, given the reliance on propensity evidence sourced in the unfair trial as it concerned J’s complaints. We accordingly find that the unfair trial in relation to the charges concerning J tainted the trial of the remaining charges in relation to R and S. In light of this conclusion, it is unnecessary for us at this point to address any further the appellant’s argument that each of the irregularities identified by the Court of Appeal applied with equal force to the trial as it concerned R and S.

³⁸ At [117].

³⁹ At [117]–[118].

⁴⁰ At [118].

We have already noted that the problem identified with the s 122 warning applied equally to the case as it related to R and S.⁴¹ And it may be that, if a retrial is ordered, we will have to reach a view in that context on the impact of the other matters relied on by the appellant.

[56] In terms of the second issue identified in the leave judgment,⁴² it follows from our conclusion that the trial in respect of all complainants was unfair, that the evidence in relation to J was not admissible as propensity evidence concerning the charges on R and S's complaints in that trial.

[57] As to whether J's evidence may still be admissible in any retrial of the charges concerning R and S, we simply observe that the finding of the Court of Appeal as to unfair trial, which is sustained by this Court, cannot now be challenged, nor undermined. Whether different circumstances would enable J's evidence to be admitted, is a matter that would need to be decided by a trial court seized of the retrial, if ordered and pursued.

[58] We did not hear full submissions on whether, in these circumstances, a retrial in relation to the charges concerning R's and S's complaints should be ordered. The respondent is to file submissions on this issue by 4 May 2026 and the appellant by 14 May 2026. The submissions should address the factors discussed by this Court in *H (SC 49/2021) v R*.⁴³ Pending receipt of these submissions and a decision as to whether to order a re-trial, for fair trial reasons, we will make an order prohibiting publication of this judgment until further order of this Court.

Result

[59] The appeal against conviction is allowed.

[60] The convictions entered against the appellant on charges 1, 2 and 13 are set aside.

⁴¹ See above at [48].

⁴² See above at [4].

⁴³ *H (SC 49/2021) v R* [2022] NZSC 42, [2022] 1 NZLR 21 at [29]–[39].

[61] The Court will determine whether to order a retrial following consideration of submissions on that issue as provided for above at [58].

[62] Bail is continued on the terms currently applicable. Any application for variation to bail shall be addressed by the District Court.

[63] 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 or other publicly available database pending further order of this Court.

Solicitors:

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