Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

11 June 2026

MEDIA RELEASE

MB v THE KING		TW v THE KING	
(SC 114/2025)	[2026] NZSC 76	(SC 51/2025)	[2026] NZSC 77

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

An order in each judgment prohibits publication of the name, address, occupation or identifying particulars of each appellant until final disposition of retrial pursuant to s 200(2)(d) of the Criminal Procedure Act 2011 (CPA).

Publication of the complainants' names, addresses, occupations or identifying particulars is prohibited by s 203 or s 204 of the CPA.

Publication of details of TW's previous convictions is prohibited by s 199A of the CPA.

What these judgments are about

These judgments concern the use of counter-intuitive evidence—i.e., evidence used in trials to correct misconceptions possibly held by jurors in trials concerning sexual offending, especially against children—and judicial directions required to be given about that evidence.

The appeals were heard together in March 2026, after which the Court allowed both appeals, quashed the appellants' convictions and ordered retrials. Today, the Court provides its reasons for doing so.

MB's trial and appeal to the Court of Appeal

MB was alleged to have sexually abused C over a period of about three months in 2000, when he was 36 and she was 15. She brought it to police attention in 2020. MB accepted that he knew C and claimed that he chose to help her after she reported problems at home and threatened self-harm but denied any sexual conduct.

At MB's trial, the Crown offered counter-intuitive evidence in the form of a statement of agreed facts, covering, among other topics, delayed reporting, grooming and normalisation behaviours, coercive control and reasons why an abused adolescent may not report offending to a parent. The evidence was read to the jury towards the end of the Crown's case. The statement also explained the nature, purpose and limitations of counter-intuitive evidence—including that it does not prove or disprove offending in this case.

The prosecutor used the counter-intuitive evidence in MB's cross-examination, questioning him on the definition of "grooming" in the statement of agreed facts, and referring to the counter-intuitive evidence as to bribery, incentives, threats and intimidation when putting it to MB that he used such tactics to abuse C. The Judge did not intervene. The prosecutor also referred to the counter-intuitive evidence in his closing address, inviting the jury to use the counter-intuitive evidence when examining the evidence in the case. The Judge in summing up noted that delay was in issue and was in itself neutral. He also explained that the counter-intuitive evidence was compiled by experts not involved in the case, and they might disregard it, and directed the jury that they had to decide whether the allegations were proved beyond a reasonable doubt.

MB appealed to the Court of Appeal. On 24 September 2025, that Court dismissed his appeal, concluding that there was no error on the part of the Judge or prosecutor.

TW's trial and appeal to the Court of Appeal

TW was alleged to have sexually abused his young son for a period of years. At trial, the prosecution and defence admitted a statement of agreed facts under s 9 of the Evidence Act 2006 which addressed misconceptions about the behaviour of children who have been victims of sexual offending.

In his closing address, the prosecutor referred to the counter-intuitive evidence as to relationships between victims and perpetrators when discussing the type of allegation brought by TW's son. He referred to the counter-intuitive evidence as to why complainants might not complain when discussing the fact that the complainant never complained of the offending at the time. Finally, in discussing the complainant's demeanour, he referred to the counter-intuitive evidence as to delay and incremental disclosure. The Judge's summing-up contained a direction under s 127 of the Evidence Act as to delay and pointed jurors to the statement of agreed facts.

TW appealed his convictions to the Court of Appeal on the basis the prosecutor misused the counter-intuitive evidence and the Judge's directions were not adequate. On 1 May 2025, the Court of Appeal dismissed TW's appeal. It found the Judge's directions insufficient but held that error did not give rise to a reasonable possibility that the jury would have reached different verdicts.

Supreme Court

On 12 September 2025, this Court granted TW leave to appeal, and on 5 December, it granted the same to MB. The approved question in both appeals was whether the Court of Appeal was correct to dismiss the appeal against conviction.

MB's appeal

The Court unanimously allowed MB's appeal. In its judgment on this appeal, it restated what it said in its 2015 judgment in *DH v R* [2015] NZSC 35, [2015] 1 NZLR 625 and clarified the principles governing counter-intuitive evidence. The Court listed 13 principles (*MB v R* at [12]). They concern the purpose and limitations of counter-intuitive evidence; the need for trial judges to tell juries what the evidence is for and to direct them that they may not use it as evidence of the allegations before them; the need for prosecutors to exercise care when referring to counter-intuitive evidence; and the need for particular care when counter-intuitive evidence is expressed in detailed or probabilistic terms, and when it refers to the conduct of offenders. The Court confirmed that counter-intuitive evidence continues to serve an important purpose; it is in the interests of justice that jurors should be cautioned against adopting myths and stereotypes in cases where they may be at work (at [11]).

The focus in MB's appeal was not whether the jury were unaware of the purpose of the counter-intuitive evidence, but on whether the prosecutor misused it (see [79]–[81]). The prosecutor's use of the counter-intuitive evidence in closing was problematic, the evident purpose being to highlight for the jury a high degree of consistency between the counter-intuitive evidence and C's behaviour (at [82] and [87]–[89]). The Court said it was difficult to envisage circumstances in which counter-intuitive evidence could be used in cross-examination of a defendant (or when leading evidence from a complainant) without inviting improper use by the jury (at [89]).

In linking specific paragraphs of the counter-intuitive evidence to C's evidence in his closing, the prosecutor invited the jury to reason that her evidence was more likely to be true because of the similarities between them (at [83] and see [86]). Further, the prosecutor highlighted the frequency of some behaviours described in the counter-intuitive evidence. While that is ordinarily permissible, the evidence should not be emphasised more than is necessary to correct the relevant misconception (at [84]–[85]).

The Judge failed to direct the jury that they must not reason that the fact that C behaved in a way described in the counter-intuitive evidence was itself indicative that abuse had occurred. That omission was contrary to this Court's judgment in *DH*. It assumed greater significance at MB's trial because of the agreed statement's use of probabilistic language and references to the behaviours of abusers, and the use that the prosecutor made of the evidence (at [91]). It would not have sufficed for the Judge to give the standard *DH* direction because he failed also to set the necessary limits on the use of counter-intuitive evidence both during evidence and before closing addresses (at [93]). The Judge also erred by telling the jury that nothing should be read into the complainant's delay; the defence was entitled to use delay as a foundation for doubt (at [95]). The Judge's errors gave were likely to have affected the result of the trial (at [94]), and the appeal was therefore allowed.

That being so, the Court wrote briefly on the second ground of appeal, in which MB argued that C's evidence was needlessly repetitive, since she was asked questions by the prosecutor about matters already covered in her evidential video interview (EVI), which had been played to the jury. The Court accepted that it may be needlessly repetitive or unfair for the Crown to get the benefit of playing an EVI, which can be relied upon to bring out the details, and the jury impact of an account given viva voce (at [104]). However, the prosecutor's questioning

was not unfair or objectionable, designed as it was either to orient C to relevant topics or to elicit fresh detail to respond to whatever MB's defence would be (at [105]–[106]).

TW's appeal

The Court allowed TW's appeal by majority comprising Winkelmann CJ, Miller and Cooke JJ.

The majority held that the agreed statement itself correctly explained the evidence was educative. But its explanation that the counter-intuitive evidence does not "prove or disprove" the allegations might without more be confusing for jurors (*TW v R* at [36]). The statement discussed the normal behaviour of victims, but it was preferable for counter-intuitive evidence to expressly identify relevant misconceptions (at [38], [42] and [45]). Some of the evidence was framed in probabilistic terms or concerned the usual characteristics of abusers, creating a greater need for clear directions (at [39] and [42]), and the agreed statement incorrectly said that delay does not assist in determining whether a complainant is telling the truth (at [40]).

In closing, the prosecutor inappropriately linked the counter-intuitive evidence with the complainant's allegations. This gave rise to a risk of misuse by the jury, making it necessary to explain proper use (at [48] and see [49]–[51]).

The Judge failed to correct the prosecutor's misuse in summing up and did not give the direction required by *DH* as to the proper use of the evidence, meaning the jury were not told how to use the counter-intuitive evidence, and how not to use it, at any point (at [53]–[54]). He gave a direction as to delay complying with s 127 of the Evidence Act. He failed, however, to tell the jury that the counter-intuitive evidence did not mean the defence could not rely upon delay (at [56]–[59]). By pointing the jury to the statement of agreed facts, he raised again the issues in that statement (at [56] and [59]). He also linked the counter-intuitive evidence to the facts of the case, giving he jury permission to use the counter-intuitive evidence diagnostically (at [60]).

The errors gave rise to a reasonable possibility that a different outcome would have been reached, and so the majority allowed the appeal (at [64] and [65]). The majority accepted that the prosecutor's misuse could have been corrected by directions from the Judge as to proper use, but this did not occur (at [65]).

Ellen France and Kós JJ would have dismissed TW's appeal. They found the purpose of the counter-intuitive evidence was made clear to the jury, both by the statement itself and the prosecutor in opening (at [72]–[73]). They accepted it was not appropriate for the statement to say that children are "most likely" to be sexually abused by those well known to them, such as family members (at [74]). Nor was it appropriate for the prosecutor to draw on the generic counter-intuitive evidence directly to support the complainant's credibility (at [78]). Ellen France and Kós JJ considered the only material error in the Judge's summing-up was that it did not fully conform to the mandatory guidance in *DH*, and now to *MB* (at [81]–[82]).

However, the errors identified did not, individually or collectively, give rise to a real risk that the outcome was affected (at [82]). The defence made very little of the matters addressed in the statement of agreed facts, very properly not seeking to exploit misconception reasoning. The counter-intuitive evidence served its purpose in steering the trial away from

misconception reasoning, but in doing so ultimately assumed very little continued relevance (at [83]–[84]).

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