

NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html>

NOTE: ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANT'S FAMILY MEMBERS WHO WERE WITNESSES AT THE TRIAL PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html>

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 WITNESSES UNDER 18 YEARS OF AGE 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

**SC 70/2019
[2019] NZSC 102**

BETWEEN	K (SC 70/2019) Applicant
AND	THE QUEEN Respondent

Court: Winkelmann CJ and Glazebrook J

Counsel: L A Andersen for Applicant
R K Thomson for Respondent

Judgment: 26 September 2019

JUDGMENT OF THE COURT

A An extension of time for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] Mr K was convicted of serious sexual offending against the young daughter of his then-partner. His appeal against conviction was dismissed by the Court of Appeal on 27 June 2019.¹ Mr K now seeks leave to appeal to this Court.

[2] The application is out of time. No objection was taken by the respondent and the delay was only a few days. An extension of time to appeal is granted.

[3] The grounds on which Mr K seeks leave to appeal are:

- (a) Evidence related to the family dynamics should not have been admitted. Essentially, the evidence was that Mr K was a “dominating and controlling figure prone to angry outbursts, abusive language and, on occasion, violence”;² and
- (b) The trial judge’s failure to give a specific relationship evidence direction caused a miscarriage of justice.

Court of Appeal decision

[4] The Court of Appeal agreed with Mr K’s counsel that the relationship evidence was propensity evidence. Citing *Mahomed v R*, the Court accepted that, although the evidence was not orthodox propensity evidence and not led for the purpose of coincidence reasoning, it fell within the definition of propensity evidence under s 40 of the Evidence Act 2006.³

[5] However, the Court of Appeal did not accept the submission that the evidence should have been excluded. The evidence was relevant because it provided context to the offending, a possible explanation for the complainant’s passive and uncomplaining

¹ *K (CA445/2018) v R* [2019] NZCA 264 (French, Miller and Lang JJ) [CA judgment].

² At [14].

³ At [18], citing *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

behaviour and an explanation as to why Mr K may have targeted the complainant.⁴ It also bore on the complainant's delay in disclosing the offending, a matter the defence had put in issue. The Court considered that to have excluded the evidence would have provided a "sanitised and quite misleading picture of the household".⁵

[6] The Court of Appeal noted the trial Judge gave the standard general direction on prejudice and sympathy.⁶ The Court considered that there was no general rule in the authorities requiring a more specific propensity direction whenever there is relationship evidence and traditional propensity reasoning is not relied upon.⁷ It concluded "a specific direction would have been desirable"⁸ but, ultimately, the absence of a direction did not occasion the risk of a miscarriage of justice.⁹ This was because:¹⁰

- (a) the evidence was directly relevant to trial issues;
- (b) the Crown had explained in closing why it had been called;
- (c) its limitations were self-evident; and
- (d) the summing up was structured in a way that focused the jury's attention on the complainant's evidence regarding Mr K's sexual conduct and not on the other conduct.

Parties' submissions

[7] Mr K submits that the Court of Appeal decision goes further than previous decisions on relationship evidence because in this case the evidence was not directly related to the offending, and the allegations of violence admitted by consent were not necessary to explain the context in which the alleged incidents occurred. Mr K also submits that a specific direction was required as the limitations of the evidence were

⁴ At [19].

⁵ At [19]. See also the further discussion at [20]–[23].

⁶ At [25].

⁷ At [27].

⁸ At [30].

⁹ At [32].

¹⁰ At [31].

not “self-evident”,¹¹ the relationship evidence was a significant part of the trial and the direction regarding prejudice and sympathy did not mitigate the risk of prejudice as it was the significance and use of the evidence that needed to be addressed.

[8] The Crown opposes the application. It submits the evidence was admissible under s 43 of the Evidence Act and no point of general or public importance is raised by the application of settled legal principles to the particular facts of this case. The Crown also submits a more specific relationship evidence direction is not required where the propensity evidence in issue does not rely on coincidence reasoning and that a general prejudice and sympathy direction is otherwise sufficient. It also submits a specific direction could have actually prejudiced the applicant by underlining the relevance of the relationship evidence more than necessary. It submits no miscarriage of justice occurred.

Our assessment

[9] The points Mr K seeks to raise have already been examined by the Court of Appeal. Nothing raised by Mr K suggests that the Court of Appeal’s analysis might have been in error. It is not therefore in the interests of justice to grant Mr K’s application for leave to appeal.

Result

[10] An extension of time for leave to appeal is granted.

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

Solicitors:
Crown Law Office, Wellington for Respondent

¹¹ Contrary to the Court of Appeal’s finding: CA judgment, above n 1, at [31].