NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 68/2015
[2015] NZSC 161

BETWEEN	MICHAEL SHANE HENRY LIHOU Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	A N Isac for Applicant J E L Carruthers for Respondent
Judgment:	30 October 2015

JUDGMENT OF THE COURT

A The application for leave to appeal against the Court of Appeal pre-trial decision ([2013] NZCA 195) is dismissed.

B The application for leave to appeal against the Court of Appeal conviction decision ([2015] NZCA 227) is also dismissed.

REASONS

[1] The applicant was convicted after a jury trial in the High Court of abduction for the purpose of sexual connection, assault, rape and sexual violation of a 17 year old female complainant. He seeks leave to appeal against a decision of the Court of Appeal dismissing his appeal against conviction.[1]

[1] *Lihou v R* [2015] NZCA 227 (French, Simon France and Clifford JJ).

[2] The focus of the proposed appeal is on the propensity evidence which was led at the trial and the directions given by the Judge in relation to that evidence. The admission of the propensity evidence was not challenged in the applicant's conviction appeal to the Court of Appeal, but was the subject of an earlier Court of Appeal decision dealing with the applicant's application for leave to appeal to that Court against a pre-trial ruling in the High Court that the propensity evidence was admissible at the trial.[2]

[3] In his submissions in support of the application for leave to appeal, the applicant also applies for leave to appeal against the Court of Appeal pre-trial decision. However, the Court of Appeal pre-trial decision was a decision to decline leave to appeal and was therefore not amenable to appeal to this Court.[3] That application is therefore dismissed for want of jurisdiction. However, we do not see that as preventing the applicant from challenging in this Court the admission of the propensity evidence at his trial if leave to appeal against the conviction appeal is granted even though there was no post-conviction challenge to the admission of the evidence in the Court of Appeal.

[4] The charges on which the applicant was convicted resulted from an incident in 2012. The Crown case was that the applicant invited the complainant to his home, then forcibly prevented her from leaving, physically assaulted her, sexually violated her and raped her. In the early hours of the following morning he frog-marched her eight kilometres across the countryside before setting up camp. A farmer saw a campfire that they made and the police were contacted, following which the complaint was made and the applicant was arrested.

[5] The propensity evidence related to two earlier incidents in respect of which the applicant was convicted and imprisoned. The first of these occurred in 1988. An agreed statement of facts relating to this incident was admitted at his trial for the present offending. It recorded that the 1988 complainant was 16 years old. The applicant attacked her and her associates with a knife in her mother's home. He then dragged the complainant to her mother's car and drove it out into the country and

---

2 *R v Lihou* [2013] NZCA 195 (Wild, Chisholm and Keane JJ), on appeal from *R v Lihou* [2013] NZHC 262 (Williams J).

3 Criminal Procedure Act 2011, s 213(3).

then forced the complainant to accompany him across country for several days. He raped her in the car and during the trek across country.

[6] The second incident occurred in 1996. The agreed statement of facts also dealt with this incident. It recorded that the complainant had been a tutor in the prison in which the applicant had been an inmate and he had boarded with her after his release. After a violent incident he was asked to leave. A month or so later he and an associate detained the complainant in her own car, and while the applicant held the complainant at knifepoint the associate drove the car from Auckland to Taumarunui. During this journey the applicant kissed and fondled the breasts of the complainant, though he was not convicted of sexual assault in relation to those incidents. The incident came to an end when the police stopped the car. As the applicant tried to make his escape he ran away from the car dragging the complainant with him until he was eventually forced to let her go.

[7] Counsel for the applicant, Mr Isac, raised in his submissions a point which had not been considered in either of the Court of Appeal decisions or in the original High Court decision admitting the propensity evidence. The essence of this argument is that the complainant in the 2012 incident knew of both of the earlier incidents because she had been assisting the applicant in preparing his autobiography. In cross-examination at the trial she accepted that she had seen papers relating to both of the earlier offending episodes and knew that the applicant had been convicted of kidnapping and raping a young woman in relation to the 1988 incident. However, she said that she had not been aware that, during that incident, the applicant and the 1988 complainant had gone out into the countryside.

[8] The key point that counsel for the applicant wishes to raise on appeal is that the complainant's knowledge of the earlier incident undermined the basis on which the propensity evidence was admitted, because, he said, evidence was admitted on the basis of the implausibility of the complainant ascribing by mere coincidence conduct to the applicant which he was known to engage in. In essence his argument was that the complainant could have fabricated a story resembling the previous offending, and that this undermined the basis on which the propensity evidence was admitted.

[9] That submission assumes that the only basis for admission of the propensity evidence was coincidence reasoning. But that is not the case. The propensity evidence showed that the applicant had a propensity to act in a manner that was consistent with the behaviour that the complainant attributed to him, which increased the probability of her evidence being true. In addition, it is significant that the striking, unusual feature of both the 1988 offending and the 2012 offending was that the applicant forced the complainants to walk considerable distances across country. The complainant in the present case said she did not know that that was a feature of the 1988 offending. Thus, coincidence reasoning was legitimate in respect of that distinctive aspect of the propensity evidence. We do not see any point of public importance arising and we also see no risk of a miscarriage if leave is declined on this point.

[10] Another point raised by counsel for the applicant is the fact that the evidence of the 1988 and 1996 incidents as set out in the agreed statement of facts went beyond what was relevant to the issues. Mr Isac said that meant a number of aspects of the earlier offending which did not have similarity to the present incident so were not of probative value but which were prejudicial to the applicant's case were before the jury in the present case. We accept that some details could possibly have been excluded, but we do not see any risk of a miscarriage from the failure to do this. We have no information as to why the agreed statement of facts contained these details but it may have been to demonstrate differences between the 1988 and 1996 incidents and the 2012 incident. Whether that is the case or not, we do not see any risk of a miscarriage arising from the admission of this additional material. Given the nature of the information legitimately included in the agreed statement of facts, it is unlikely that the extra details would have added any significant additional prejudicial effect to the evidence of the earlier incidents.

[11] The applicant also wishes to raise on appeal a point relating to the trial Judge's directions to the jury in relation to propensity evidence.[4] A key aspect of the criticism of the Judge is that he did not explain to the jury the significance of the complainant's knowledge of the propensity incidents. For the reasons we have

---

[4] *R v Lihou* HC Wellington CRI-2012-035-797, 21 June 2013 (summing up notes) (Gendall J) at [38]–[42].

already given, we do not see that as having the significance attributed to it by the applicant. Indeed, we consider that the direction given by the Judge properly reflected the basis for the admission of the propensity evidence as establishing an identifying characteristic of the applicant, rather than as the basis for coincidence reasoning. The Judge could perhaps have been clearer about this, but if he had we consider that the direction would have been more unfavourable from the applicant's point of view than it actually was. Again, we see no point of public importance nor do we see any risk of a miscarriage of justice if leave is not given.

[12] We are satisfied that no grounds for the granting of leave to appeal are made out. We therefore dismiss the application for leave to appeal against the Court of Appeal decision dismissing the applicant's appeal against conviction.

Solicitors:
Crown Law Office, Wellington for Respondent