NOTE: PUBLICATION OF NAME(S) OR IDENTIFYING PARTICULARS OF COMPLAINANT(S) PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: DISTRICT COURT ORDER SUPPRESSING THE NAME OF THE APPELLANT CONTINUES IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

SC 28/2014
[2015] NZSC 53

BETWEEN	L (SC 28/2014) Appellant
AND	THE QUEEN Respondent

Hearing:	19 February 2015
Court:	Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ
Counsel:	A N Isac and J L W Wass for the Appellant B J Horsley and Y M Moinfar for the Respondent
Judgment: Re-issue date:	21 April 2015 7 May 2015

JUDGMENT OF THE COURT

A The appeal is allowed and the conviction is quashed.

B There is to be no retrial.

REASONS
(Given by Glazebrook J)

Background

[1] Mr L was convicted, after a jury trial in the District Court at Palmerston North before Judge Morris, of one representative charge of indecent assault against a

boy aged between 12 and 16 years.[1] He was acquitted on two further charges. Mr L's case in relation to each count was that the alleged acts had not occurred and that the complainant was either lying or unreliable in his account. All of the charges arose out of conduct that was alleged to have taken place almost 20 years ago.

[2] Mr L's appeal against conviction was dismissed by the Court of Appeal on 30 May 2013.[2]

[3] On 8 August 2014, this Court granted Mr L leave to appeal on the following questions:[3]

(a) whether the trial Judge should have given the jury a warning, under s 122(1) of the Evidence Act 2006, concerning the complainant's evidence; and

(b) whether the Court of Appeal was wrong to conclude that no miscarriage of justice arose from the Judge's ruling as to the manner in which Mr L could give evidence of a payment he had made to the complainant.

Background

[4] The events giving rise to the charges were alleged to have started when the complainant was 13 years old. Mr L had been engaged to assist with a drama production at the complainant's school (we will call this "*Production A*"). The complainant was involved in the lighting for that production. He alleged that, when he and Mr L were together in a 'genie' (a crate at the top of a lighting ladder) during rehearsals, Mr L would press his erect penis into the complainant's lower back. This was the basis for the first count.

[5] The defence called evidence that a genie was not used during *Production A*. When this proposed evidence was put to the complainant, he accepted that it could

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1 Contrary to s 140A(1)(a) of the Crimes Act 1961 (now repealed). He was sentenced to five months' home detention, 200 hours of community work and ordered to pay reparation.

2 *L (CA707/2012) v R* [2013] NZCA 191 (O'Regan P, Goddard and Lang JJ) [*L v R* (CA)].

3 *L (SC 28/2014) v R* [2014] NZSC 107 [*L v R* (SC leave)].

be "a pretty fundamental problem" with his allegations and that "if there's no genie ladder in the school hall in 1991 then … [he] can't have been sexually abused in it". The Crown conceded in its closing address that a genie was not used in *Production A* as the school did not possess one at the time and that therefore the offending in relation to count one could not have occurred during that production.[4] Mr L was acquitted on count one.

[6] As to the second (representative count) the Crown case was that the alleged offending on a genie occurred on a number of other occasions during other local theatre company productions between 1 January 1991 and 23 December 1992.[5] This count was amended during the trial to extend the end date of the alleged offending from 23 December 1992 to 4 April 1993[6] to cover a local theatre company production (we will call this "*Production B*"), which took place in March and April 1993 when the complainant was 15.

[7] The alleged offending on a genie during *Production B* had not been mentioned by the complainant in his police interview and evidence in relation to that production came up for the first time in court.[7] Mr L was acquitted by majority on this count.

[8] The third count (and the one on which Mr L was convicted) was a representative charge arising from the complainant's allegations that Mr L frequently drove him home from rehearsals and productions. This count originally covered the same time period as the second count and was also amended during the trial to extend the time period so that this count also covered the period 1 January 1991[8] and 4 April 1993.

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4 We do not know why, in light of this concession, count one was not withdrawn from the jury.

5 There may have been issues with this being couched as a representative count given the different productions involved and the possibility of different defences. The same comment applies to count three. See *Ahsin v R* [2014] NZSC 153 at [181] and [182] per McGrath, Glazebrook and Tipping JJ and *KAW v R* [2012] NZCA 520 at [46]–[53].

6 The complainant moved to another town in April 1993.

7 In his police interview, the complainant had mentioned Mr L "smacking [him] on the backside" during that production but that allegation, given it appears not to have occurred while in the genie or the car, was not the subject of charges.

8 In his police interview, however, the complainant said that he did not think he was driven home from the school production, *Production A*, by Mr L. Instead, in his police interview he said that the incidents in the car occurred between the local theatre where *Production B* was held and home and "another theatre with [another production] and home".

[9] As to the details of the alleged offending while being driven home, the complainant alleged that Mr L would place his hand on his thigh progressing to his groin area, then touch the waistband of his trousers with his fingertips. This was accompanied by sexualised language. There were some inconsistencies in the complainant's police interview as to whether Mr L actually touched his genital area. For example, in his police interview he said that Mr L "tried" to make contact with his genitals and that "if I had pubic hair then his thumb would have been in contact with it". When asked directly by the police interview whether Mr L had touched his genitals through clothing the complainant said "Well that's, yeah well, yes and no".[9]

[10] The complainant also offered conflicting evidence as to where he was living during *Production B*. His evidence in chief was that he was living at one address but he accepted in cross-examination that in October 1992 he had moved to another address. In her evidence in chief, the mother of the complainant indicated that she was "99% positive" that Mr L only dropped the complainant off to the first address and that to her knowledge Mr L did not drop off the complainant to the second address.

[11] In early 1993 the complainant moved to another town. He and Mr L did not meet again until the complainant was 19 or 20. In his police interview, the complainant said that he had telephoned Mr L to ask why Mr L had done those things to him and "fucked my life". They then met and Mr L gave him $500 and a letter that was "along the lines of an apology", which the complainant destroyed almost immediately[10] as he "carried a lot of shame" and "it was very private". The complainant's evidence in court was largely consistent on this point.

[12] Mr L's evidence was that he had seen the complainant again at a petrol station and that, shortly after that, the complainant had telephoned asking for money. He

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9 This inconsistency was pointed out by Judge Lynch in a pre-trial ruling: see *R v [L]* DC Palmerston North CRI-2010-054-2333, 26 July 2011.

10 While in his police interview the complainant said that he destroyed the letter almost "instantly", in his examination in chief, when asked what he had done with the letter, he said "I think I held onto it for a while". This contradiction was put to the complainant in cross-examination.

denied that the letter was a letter of apology.[11] Instead, Mr L said in his evidence that the conversation and letter contained three things: that Mr L did not admit any wrong doing; that Mr L was helping the complainant out on a one-off basis because the complainant was under financial and emotional stress; and if he did return for more money, then Mr L would go to the police. In his evidence, Mr L said that he had kept a copy of the letter and that he filed it with his financial records for his business, but it was destroyed after seven years.

Procedural history

[13] The complainant did not make a complaint to the police until 2008, following an altercation with his employer during which he linked his behaviour at work to his alleged abuse. The complainant explained in his police interview that he had "reached breaking point". Charges were not laid by the police until 22 June 2010.

[14] In 2011 there was an application to admit propensity evidence in Mr L's trial from another alleged victim (CB)[12] of Mr L. This had been dismissed by Judge Lynch on 26 July 2011.[13] An appeal to the Court of Appeal against that ruling was dismissed.[14] In that judgment the Court of Appeal expressed concern about delay, suggesting that the Executive Judge in Palmerston North take all possible steps to allocate a priority fixture for the trial to be heard in 2011.[15] As a result, a trial date was allocated in January 2012.

[15] In November 2011, the Crown applied to adjourn the trial in order to enable an application for joinder following a further complaint made by another alleged victim (DI) in October 2011. Despite Mr L's objection, the January 2012 fixture was vacated to permit a hearing on the Crown's joinder application and a fresh trial date was set for August 2012.

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11 In his police interview, when it was put to Mr L that the complainant said that he was given a letter of apology, Mr L said "Did I, maybe that's what he asked for, I don't know. I honestly can't recall" and that he did not "believe so."

12 The Court of Appeal used difference reference tags for the witnesses (X,Y, Z).

13 *R v [L]*, above n 9.

14 *R v BB (CA482/2011)* [2011] NZCA 509.

15 At [15].

[16] In July 2012, the application for joinder was heard. This of necessity involved considerations relating to propensity evidence. On 27 July 2012, the Court provided the result of the hearing to counsel (with reasons to follow). The s 347 application with regard to the first two charges in relation to DI was granted and the remainder of the charges (apart from one) were stayed.[16] The Judge indicated that, but for the stay, she would have accepted the Crown's propensity and joinder arguments.[17]

[17] Some confusion appears to have arisen as to whether this meant that the evidence of DI could, despite the stay, be called as propensity evidence in Mr L's trial.[18] In the course of a telephone conference, the Judge indicated that "the same difficulties the accused would have in defending the matter, that related to the stay, would exist just the same in relation to the defence's [Mr L's] ability to defend it as propensity and I had assumed that one would go with the other".[19] She offered to set this out in an addendum to her reasons. She pointed out that the stay application had not, however, been argued on the basis that the evidence could be admissible even if a stay had been granted.[20]

[18] On 17 August 2012, the Judge released her reasons for judgment on the stay.[21] The Judge came to the view, with regard to two of the charges relating to DI, that no reasonable jury could find a lack of consent and no reasonable belief in consent.[22] As to the remaining charges, DI's allegations had been investigated by the police some 22 years before but the original file had been lost. A computer note said that "the offence was 'cleared' on the grounds it was consensual and DI was over 16 years at the time". The Judge considered that Mr L could not have a fair trial on

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16 *R v [L]* DC Palmerston North CRI-2011-054-3524, CRI-2010-054-2333, 17 August 2012 (Reasons for stay of execution) (Judge Morris) [*R v [L]* (Reasons for Stay)]. The Judge highlighted that the stay did not encompass a perverting the course of justice charge in relation to DI: see *R v [L]* DC Palmerston North CRI-2010-054-2333, 23 August 2012 (Pre-trial Ruling 1) (Judge Morris) [*R v [L]* (Pre-trial Ruling1)] at [43]. According to the appellant, this charge was abandoned by the Crown in early 2014 and he was discharged.

17 *R v [L]* (Pre-trial Ruling1), above n 16, at [11].

18 See [14]–[16].

19 At [18].

20 At [17].

21 *R v [L]* (Reasons for Stay), above n 16.

22 At [20].

the issue of DI's age, particularly after such a lengthy period, without access to the police file. A stay of the remaining charges (apart from one) was granted.

[19] On the issue of propensity, the Judge concluded that the case of DI and the current complainant were not similar to any significant extent, apart from the offer to exchange money for silence, which had been made in both cases.[23] In the Judge's view, the probative value of that evidence would have outweighed its prejudicial effect, had a stay not been granted.[24] The Judge, in an addendum to the judgment repeated her earlier indication that stay and propensity should stand or fall together.

[20] On 22 August 2012, the Crown filed a propensity application for the trial (due to commence on 27 August). The Crown sought to admit the evidence of DI, as well as that of CB and another witness[25] as propensity evidence. It was the prosecutor's view that the new complaints from DI were sufficient reason to apply again for admission of CB's[26] evidence.

[21] It was common ground that, if the application to adduce propensity evidence had been heard, then the trial would have had to have been adjourned again. Mr L opposed the late Crown application for an adjournment and the Judge decided that the trial should go ahead.[27]

Section 122 warning

Background

[22] After the jury had retired, on 31 August 2012, the Judge recorded in a minute that she had considered whether she should give a direction under s 122 of the Evidence Act. She recorded that she had decided that a direction was not required to ensure fairness but would reconsider that position if either counsel considered this to be wrong. In the Judge's view, the allegations were relatively self-contained and not

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23 At [40].
24 At [48] and [49].
25 This female, called Z by the Court of Appeal, was planning to adduce evidence of Mr L's tendency to pinch boys' bottoms and evidence that he touched her inappropriately. This witness did not make a police complaint.
26 CB was discussed at [14].
27 *R v [L]* (Pre-trial Ruling 1), above n 16.

complicated, there was no need for "fine assessments as to age and time" and no issues as to alibi. Therefore she said that "the heightened risk re reliability that occurs as a result of the passage of time, is not so acute".[28]

[23] Defence counsel then made a formal request under s 122(3) that a direction be given, which the Judge declined.[29] The Judge said that she considered there to be good reason not to comply with the request. The Judge stated that a s 122 warning was not required as the central issue before the jury was "whether this complainant is honest".[30] The Judge also considered that the type of acts alleged were of such a confined nature that she did not believe the reliability of the complainant's evidence would be diminished by the passage of time.[31] Further, in the context of this case she considered that it was also relevant that the jury had retired and that there had been no request prior to that.[32]

[24] For completeness, we note that there was a jury question on 3 September 2012 (after the weekend) asking to be reminded of "the meaning and relevance of truthfulness, credibility, reliability and accuracy". The Judge in answer to that question explained the difference between reliability and credibility by reference to an example not related to the case.

Discussion

[25] This Court, in *CT v R*, noted that the Court of Appeal had generally discouraged the giving of s 122 warnings.[33] This Court did not consider that to be the correct approach. It said that the "whole premise of the section is that it is not always appropriate to leave it to counsel to point out the risks associated with particular types of evidence". It followed that a "general view that such warnings are generally unnecessary or inappropriate is thus inconsistent with the premise of the section".[34] It was also emphasised that the judge should take personal responsibility for pointing out the risk of prejudice arising in cases of long delayed

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28 *R v [L]* DC Palmerston North CRI-2010-054-2333, 31 August 2012 (Minute 6) (Judge Morris).
29 *R v [L]* DC Palmerston North CRI-2010-054-2333, 31 August 2012 (Minute 7) (Judge Morris).
30 At [3].
31 At [4].
32 At [6].
33 *CT (SC 88/2013) v R* [2014] NZSC 155 at [46].
34 At [50].

prosecution and add "the imprimatur of the bench to the need for caution".[35] Otherwise "the jury will be left with competing contentions from counsel without any real assistance in addressing them".[36]

[26] This Court also held that the term unreliability is not a narrow or technical term and that a restrictive approach to directions under s 122 is not warranted.[37] The Court also held that s 122 is not merely concerned with the effect of time (and intervening events) on memory. It was held, by majority, that s 122 covers the effect of delay on the ability or otherwise of a defendant to check and challenge the evidence of a complainant.[38]

[27] In this case, one of the main submissions for the defence was that the complainant's evidence was not credible because it was unreliable. We accept Mr Isac's submission that cross-examination had demonstrated that the complainant's evidence was unreliable in a major respect (the offending could not have occurred in a genie at the school production of *Production A*). There had also been other inconsistencies, including as to what had allegedly occurred in the car when being driven home. Further, the end date of the offending in counts two and three had to be extended during the trial in recognition of evidence that had arisen for the first time at trial with regard to *Production B*.

[28] In addition, as Mr Isac points out, the complainant himself on a number of occasions in his evidence blamed the lapse of time between the alleged acts and the trial for his inability to recall events accurately (in particular in response to suggestions that he had fabricated his evidence). This was a case where the complainant's own evidence was that his memory had been adversely affected by the passage of time.

[29] In light of these factors, the Judge's first two reasons (that the trial only concerned the complainant's honesty and that the confined nature of the

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35 At [51].
36 At [51].
37 At [45].
38 At [48]–[49]. This was the only point on which the minority dissented; the minority agreed that directions should be given about the prejudicial effects of delay on the ability of the defendant to defend the allegations. However, the minority held that the need to give these directions for this reason arises from the need for a fair trial, rather than s 122: see [60]–[72] and [75].

complainant's allegations meant they were not of a nature to be affected by the lapse of time) cannot stand. While we accept the allegation of what had allegedly occurred in the various productions in the genie were relatively constant (unlike the allegations relating to the alleged offending in the car), there was the major issue relating to the lack of a genie in *Production A* and also the fact that the evidence as to the alleged offending on the genie during *Production B* arose for the first time during the trial.

[30] The lapse of time also made it more difficult for Mr L to defend the charges and this also meant a s 122 warning should have been given. There were issues as to the role of both Mr L and the complainant in the various productions, made more difficult again by the fact that the alleged offending during *Production B* was only raised at trial. There were issues as to where the complainant was living at the time of that production. Another example concerns the letter which Mr L wrote to the complainant in 1998: the complainant alleged that it was a letter of apology (and thus an admission), but destroyed it soon after. Mr L's case was that the letter had denied any wrongdoing. His copy of this letter had, however, been destroyed after seven years and so his ability to mount an effective defence on this crucial issue was prejudiced.

[31] The third reason given after the application was made by defence counsel (that no request had been made before the jury began their deliberations) does not justify not acceding to the request. It is the judge's responsibility to give a s 122 warning and that arises whether or not there is a request for such a warning.[39] In any event the jury's question showing they were having some difficulty with the concepts of reliability and credibility would have been a good opportunity to give the warning.

[32] This was a clear case where a reliability warning should have been given. The issues of reliability were not merely related to peripheral matters but went to the heart of the charges. The fact that a warning was not given meant that the trial miscarried. This means that the appeal must be allowed.

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[39] The wording of s 122(1) does not make a request a precondition to such a warning.

Restrictions on giving evidence

Background

[33] Mr L's second ground of appeal is that the Judge had erred in restricting the manner in which he was able to refer to the illness of his child, which was relevant to his explanation as to why he had made the $500 payment to the complainant.

[34] Mr L's first son had been diagnosed at a young age with a rare cancer which had resulted in a series of surgeries stretching over a year. At the time of the complainant's request for money, his second son had just been diagnosed with the same condition, which had been very stressful for his wife and himself. Mr L was intending to give evidence that his difficult family circumstances at the time had a significant part to play in his decision to make the payment and not report the matter to the police.

[35] When the evidence as to the nature of the boys' illness was first raised by Mr L in his evidence, the Judge stopped the questioning as she was concerned that the evidence was being led to engender sympathy for the accused. However, once the reason for the evidence was explained, she accepted that the evidence was relevant but ruled that it should be led "with the least call to sympathy."[40]

[36] The prosecutor, Mr Vanderkolk, then raised the issue as to how the evidence was going to be given and whether it would allow the Crown to ask questions about the relationship with DI and the payment made to him. The Judge held that if the extent of the evidence was that, the illness of the child created stress at home "it would not cross the line of propensity evidence being given by the defence that would enable under s 41 for the Crown to call other propensity evidence to rebut it".[41] The Judge said, however, that if Mr L gave evidence of being a "generally good family man who is upstanding and sees to do the right thing by all including his

[40] *R v [L]* DC Palmerston North CRI-2010-054-2333, 30 August 2012 (Ruling 4) (Judge Morris) at [5].

[41] *R v [L]* DC Palmerston North CRI-2010-054-2333, 30 August 2012 (Minute 4) (Judge Morris) at [7].

family then he is walking in dangerous territory”.[42] In the end, it was agreed that the evidence would be led and this is what occurred.

[37] Apart from another vague reference that the complainant was affected by other “things” in the complainant’s life, the following extract from the examination in chief was the only reference to the illness:

> Q And it’s the case isn’t it that in [1998] your second son was diagnosed with the same serious health condition as your first child, is that correct?
>
> A That is correct.
>
> Q And that came as a real shock to you and the family?
>
> A Yes it did.
>
> Q And it was a difficult time within the household, is that correct
>
> A Very difficult, yes.

[38] The Court of Appeal accepted Mr L’s submission that the trial Judge “seemed to have an unusually sensitive approach to the possibility of rebuttal evidence”.[43] The Court commented that this in part seemed to result from an undue preoccupation of the prosecutor with the possibility that Mr L’s evidence would be propensity evidence.[44]

[39] The prosecutor had taken the position that any attempt to raise evidence that might be seen as “good character” evidence would allow DI’s evidence as rebuttal evidence. For example he had submitted during an in-chambers discussion before the Judge, that Mr L ought not to be permitted to lead evidence of any position of trust in terms of administration or trusteeship of money. If he did, then it was submitted that this “will trigger evidence in relation to buying silence”.[45] The

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42 At [8].

43 *L v R* (CA), above n 2, at [53].

44 At [53]. The Court of Appeal did hold that the portion of his evidence that was lead was relatively small, and his reasons for making the payment were in any event more focused on his sympathy for the complainant’s destitute state rather than on his own family matters: see at [54]. Mr L submits that the reason why he focused on the destitute state rather than his family matters was because his lawyer was restricted in the evidence he could lead.

45 *R v [L]* DC Palmerston North CRI-2010-054-2333, 29 August 2012 (in-chambers discussion) at 2.

prosecutor submitted that "fundamentally the position is that [Mr L] can have no good character in this trial".[46]

[40] As to the evidence as to the illness of Mr L's sons, in an in-chambers discussion, the submission was made by the prosecutor that Mr L "because of the benefits that he's gained to this point from the criminal justice process[47] has to be colourless, characterless and affectionless, in this trial".[48] We understand that the comment (and others of a similar nature) were made in the presence of Mr L.

Submissions

[41] Mr Isac, counsel for Mr L, submits that the Judge wrongly restricted Mr L's ability to give evidence on his sons' illness as a reason for making the payment to the complainant because of her mistaken attitude to the risk that it might constitute positive propensity evidence. The result was that Mr L was deprived of the ability to properly put his defence to the jury. Importantly, as a result of the prosecutor's objections and the Judge's sensitivity to the issue, the jury's attention was not drawn to the connection between the sons' illness and Mr L's decision to pay money to the complainant, which was critical to the defence case. Mr L should have been permitted to give his evidence without restriction, and in his own words.

[42] In addition, it is submitted that the impact on fair trial rights was exacerbated by the repeated objections of the prosecutor and his applications to call propensity evidence during Mr L's evidence in chief. Quite apart from any impression these interjections may have had on the jury, it is submitted that they had a real effect on the ability of Mr L to give a coherent and convincing account in his own defence.

[43] In Mr L's submission, the approach adopted by the prosecutor and the Judge was wrong:

(a) first, the evidence which Mr L wished to give was not propensity evidence. It was simply evidence that explained why he would have

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46 At 3.

47 This appears to be a reference to the fact that the trial had not been adjourned to allow the propensity argument to be determined.

48 *R v [L]*, above n 45, at 13.

been prepared to pay money to the complainant even though he denied any wrong-doing. Any question of sympathy or prejudice could have been dealt with by a direction, and it was; and

(b) secondly, even had the evidence gone to the appellant's character, it was not relevant propensity evidence. The prosecutor's premise that any evidence of good character would have opened the door to the admission of all of the Crown's propensity evidence was wrong. There must be some link between the evidence that has been given and the proposed rebuttal evidence. Here there was none.

[44] The Crown submits that the Judge's ruling did not prevent Mr L's explanation for making the payment from being made. In fact, the Crown submits that he was able to detail his motivations in his evidence. The pressures on his family were highlighted twice during the defence counsel's closing address and were referred to by the Judge in her summing up. As a result, there was no miscarriage of justice.

Discussion

[45] We accept Mr L's submission that the evidence Mr L wished to give was not evidence showing his "propensity to act in a particular way or to have a particular state of mind".[49] It was merely evidence seeking to explain why he had paid the complainant. He should have been able to give that evidence in his own words.

[46] We also accept the submission that, even were this not the case, there has to be some link between any propensity evidence given by a defendant and any proposed propensity evidence offered by the prosecution under s 41(2).[50] We do not comment on the extent or nature of any link but it is certainly not the case that Mr L had to be "colourless, characterless and affectionless" in his evidence or risk the

49 Section 40(1)(a) of the Evidence Act 2006.

50 The need for a link was highlighted by the Law Commission in the commentary to the Evidence Act. The Law Commission stated that "if a defendant offers evidence about his or her regular attendance at cricket matches to show that he or she was there on a particular occasion and therefore could not have been at the crime scene, the judge is unlikely to allow the prosecution to retaliate by offering totally unrelated propensity evidence consisting of the defendant's previous convictions": Law Commission *Evidence: Code and Commentary* (NZLC R55 vol 2, 1999) at [C197]. See also Mathew Downs (ed) *Cross on Evidence* (looseleaf ed, Lexis Nexis) at [EVA41.2] and *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [43].

calling of DI’s evidence. As well as being wrong in that submission, it was not appropriate for the prosecutor to express himself in that language.

[47] As we have already held that the trial miscarried, it is not necessary for us to express a view on whether this ground, if it had stood alone, would have led to the appeal being allowed.

Result

[48] The appeal is allowed and the conviction quashed.

[49] In light of the fact that Mr L has completed his sentence and that the offending upon which he was ultimately convicted was relatively minor, the Crown does not seek a retrial and none is ordered.

Solicitors:
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Crown Law Office, Wellington for Respondent