NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE APPLICANT'S EX-WIFE 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: DISTRICT COURT ORDER [2018] NZDC 22994 PROHIBITING PUBLICATION OF THE APPLICANT'S NAME, THE DATE, PLACE AND LOCATION OF THE EARLIER OFFENDING, AND THE LOCATION OF THE CURRENT OFFENDING REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 74/2020
[2020] NZSC 139

BETWEEN	WM (SC 74/2020) Applicant
AND	THE QUEEN Respondent

Court:	O'Regan, Ellen France and Williams JJ
Counsel:	A N Isac QC and E J Watt for Applicant F R J Sinclair for Respondent
Judgment:	10 December 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] In 2018, the applicant was convicted after a District Court jury trial on seven charges of sexual violation by unlawful sexual connection and one charge of indecent

assault on a boy under 12 (his son, whom we will call "A").[1] The offending occurred between 1996 and 1999, when A was aged between four and seven years and again between 2000 and 2002 when A was aged between seven and ten years. All of the charges were representative.

[2] Some years earlier, the applicant's ex-wife made a complaint to the police alleging that the applicant had regularly raped her in the late 1990s. The applicant pleaded guilty to two representative charges of rape and was sentenced to three years' imprisonment. A was present at the sentencing.

[3] The Crown made a pre-trial application to lead the evidence of the applicant's convictions for raping his wife (the prior convictions evidence) as propensity evidence at the trial relating to the offending against A. The application was unsuccessful. The Crown intended to appeal against that ruling, but before that occurred the defence came to an agreement with the Crown that the prior convictions evidence could be adduced at the trial for offending against A. An agreed statement of facts was provided to the jury under s 9 of the Evidence Act 2006.

[4] The applicant appealed to the Court of Appeal against his convictions for the offending against A, alleging trial counsel error. Affidavits from both the applicant and his trial counsel were before the Court of Appeal. His trial counsel explained that he and the applicant had discussed the matter extensively and had come to the view that it was best to have the prior convictions evidence before the Court. In part this was because the applicant, as a member of the Exclusive Brethren Church, considered that he should be open and transparent. But it was also seen as having some advantages including the following:

(a) A had written loving letters to the applicant while the applicant was in prison, and it was advantageous to adduce these, which required explaining that the applicant had been in prison.

(b) After the applicant was released from prison, A wrote and asked to come and live with him (at this stage A was a drug addict and had fallen

[1] This was a retrial, after a hung jury at the first trial.

in with white supremacists). The applicant refused this on the advice of his probation officer because it might affect his parole status. This was apparently what prompted the complaint from A. The defence wanted to adduce evidence of this as well.

(c) The applicant's ex-wife gave evidence that she had seen sexual activity between the applicant and A in a bedroom. The evidence of the rape conviction provided a basis to say the ex-wife had a motive to fan hatred against the applicant and lie about this.

(d) Explaining why A had a motive to fabricate allegations of the sexual offending against him.

(e) Allowing defence counsel to tell the jury that the evidence was in front of them because the defence had put it there, giving credit to the applicant for honesty.

[5] The Court of Appeal reviewed the evidence of the applicant and his trial counsel about the reasons for allowing the evidence of the prior convictions to be before the jury. The Court found that the applicant had agreed to this strategy after extensive discussion with his counsel.[2]

[6] The Court rejected the argument made on the applicant's behalf that the applicant's trial counsel had been wrong to consider that the trial strategy would not be overwhelmed in effect by the prejudice attaching to the prior convictions. The Court considered that the strategy was logical and understandable in the context of the particular evidence in the present case.[3] It also saw it as important that the trial strategy had been affirmed after the first trial resulted in a hung jury, which allowed the applicant and his counsel to gauge the impact of the evidence on the defence.[4]

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[2] *WM (CA714/2018) v R* [2020] NZCA 338 (Brown, Brewer and Hinton JJ) at [24].
[3] At [27].
[4] At [28].

[7] Ultimately, the Court concluded that the advice given by the applicant's trial counsel was advice available to a competent counsel.[5] It therefore did not consider that this was one of the rare cases identified in *R v Sungsuwan* where the conduct of counsel, although reasonable in the circumstances, could nevertheless be shown to have given rise to an irregularity that resulted in a miscarriage of justice.[6]

[8] The application for leave to appeal to this Court is advanced on the basis that it is a matter of general and public importance to determine whether advice from trial counsel to admit evidence of prior convictions which has previously been excluded can be considered reasonable or advice that a competent counsel might give, and if so, in what circumstances.[7] We do not consider that this is a matter of general or public importance. Rather, it is a matter of assessment, taking into account the particular facts.

[9] The application for leave also refers to a miscarriage of justice having occurred.[8] We are not satisfied that an argument based on an allegation of a miscarriage of justice has sufficient prospects of success to justify a further appeal.

[10] The applicant also advanced as subsidiary arguments two further possible grounds of appeal. The first is the fact that a specific propensity evidence direction was not given. The second is that the direction given by the trial Judge to the jury about the use of the evidence of the prior convictions was given only during the summing up, and not earlier in the trial and was, in any event, inadequate. We do not see either of these grounds of appeal as giving rise to a matter of general or public importance. Nor do we see any concern that either has led to a miscarriage of justice.

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

Solicitors:
Fitzherbert Rowe, Palmerston North for Applicant
Crown Law Office, Wellington for Respondent

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5 At [30].
6 At [32], citing *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [67] per Gault, Keith and Blanchard JJ.
7 Senior Courts Act 2016, s 74(2)(a).
8 Section 74(2)(b).