ORDER PROHIBITING PUBLICATION OF THIS JUDGMENT UNTIL 2.00 PM ON 22 OCTOBER 2024.

PUBLICATION OF THE APPLICANT'S PREVIOUS CONVICTIONS PROHIBITED BY S 199A OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/LMS409626.html

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 66/2024
[2024] NZSC 134

BETWEEN	P (SC 66/2024) Applicant
AND	THE KING Respondent

Court:	Ellen France, Kós and Miller JJ
Counsel:	N P Chisnall KC for Applicant B F Fenton for Respondent
Judgment:	8 October 2024
Reissued:	23 October 2024

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B We make an order prohibiting publication of this judgment until 2.00 pm on 22 October 2024.

REASONS

Introduction

[1] After a jury trial in the High Court, the applicant was convicted on five charges of sexual violation by unlawful sexual connection.[1] The charges relate to two complainants, G and H. In support of the charges, the Crown adduced as propensity evidence alleged sexual offending involving a third complainant, K. The applicant appealed unsuccessfully to the Court of Appeal against conviction.[2] He now seeks leave to appeal to this Court against the decision of the Court of Appeal.

Background

[2] The incidents giving rise to the charges relating to G and H took place in 2016 and 2017 (G), and 2017 (H). The Court of Appeal judgment contains a summary of the relevant background to these charges.[3] We need only note, first, that both complainants described offending involving alcohol and drugs following evenings out with the applicant. Second, in terms of context, both complainants were aspiring models, and the applicant was known in the fashion and entertainment industry.

[3] The incident giving rise to the charge relating to K took place in 2011. The alleged offending occurred after, on an evening out with the applicant, K became intoxicated from the consumption of alcohol and drugs. The applicant was convicted of sexual violation by unlawful sexual connection but that conviction was quashed on appeal and a retrial was ordered.[4] The Crown subsequently elected not to call evidence on the retrial ordered by the Court of Appeal. The charge was then dismissed under s 147 of the Criminal Procedure Act 2011,[5] resulting in a deemed acquittal.[6]

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1 He was sentenced to nine years' imprisonment: *R v P* [2022] NZHC 2656 (Edwards J).
2 *[P] v R* [2024] NZCA 248 (Mallon, Churchman and Osborne JJ) [CA judgment].
3 At [6]–[7].
4 *P (CA130/2016) v R* [2016] NZCA 457.
5 On the basis of unchallenged expert evidence relating to the possibility that K's memory was unreliable on issues of consent or reasonable belief in consent, the District Court Judge concluded this possibility could not reasonably be excluded: See CA judgment, above n 2, at [12].
6 Criminal Procedure Act 2011, s 147(6).

[4] K gave evidence at the trial on the charges relating to G and H. The jury at that trial were directed, amongst other matters, that the charge against K had been dismissed on the ground that a properly directed jury could not convict the applicant based upon the evidence then presented. The Judge also explained to the jury what they had to be satisfied about before they could rely on K's evidence in relation to the charges relating to G and H.[7] The applicant accepted in the Court of Appeal that the directions met the requirements in *Mahomed v R* and *Douglas v R*.[8]

The proposed appeal

[5] On appeal the applicant wishes to raise two principal arguments he says are questions of general or public importance.[9] The first is that prior acquittal propensity evidence relating to charges that have resulted in a s 147 discharge is of a different nature to other prior acquittal evidence. Stricter admissibility rules should apply, particularly given the need to avoid double jeopardy and a defendant's right to offer an effective defence. Second, the applicant says that the jury should have been directed that the Crown was required to prove the acquittal propensity allegation relating to K beyond reasonable doubt before the jury could place any reliance on it. The submission is that the approach in *R v Mitchell*, which supports that proposition, should be adopted in New Zealand.[10]

Our assessment

[6] Addressing first the distinction the applicant wishes to advance based on the s 147 discharge, as the respondent submits, in neither *R v Degnan* nor *Fenemor v R* was it suggested that different admissibility rules for different types of acquittal propensity evidence might apply.[11] As the applicant says, neither of those cases dealt with an acquittal resulting from a discharge. However, in *T v R*, this Court dismissed an application for leave to appeal where the applicant challenged the admissibility of propensity evidence in relation to allegations that had resulted in a discharge under

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7 The directions are described more fully in the CA judgment, above n 2, at [28]–[33].
8 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145; and *Douglas v R* [2015] NZCA 542.
9 Senior Courts Act 2016, s 74(2)(a).
10 *R v Mitchell* [2016] UKSC 55, [2017] AC 571.
11 *R v Degnan* [2001] 1 NZLR 280 (CA); and *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298.

s 347 of the Crimes Act 1961, the predecessor to s 147.[12] The Court did not consider any question of general or public importance arose. We see no reason for taking a different view in terms of the application of the leave criteria to this case. As this Court said in *Fenemor v R*, "[t]he necessary assessment will inevitably be very case-specific."[13]

[7] Turning then to the second point, the proposed appeal would reprise the arguments made by the applicant in the Court of Appeal. On the argument based on *Mitchell*, the Court of Appeal explained that Court had been asked to follow *Mitchell* in *Grooby v R*.[14] The Court of Appeal in *Grooby* rejected the submission that the trial Judge had erred in not directing that the propensity evidence had to be proved beyond reasonable doubt. Leave to appeal from that decision was declined by this Court.[15] In declining leave, this Court noted that *R v Mitchell* "was decided in the context of a particular evidential code"[16] and that the law in New Zealand had taken a different path:[17]

> … as illustrated by *R v Holtz*, the general reasoning in the minority judgment in *Mahomed v R* (which was adopted in *Taniwha v R*) and our willingness to allow in evidence relating to an allegation in respect of which the defendant has been previously acquitted, as in *Fenemor v R*.

[8] Further, the Court of Appeal in the present case made the point that in *Fenemor* this Court:[18]

> … confirmed that the admissibility of prior acquittal evidence is no different from other propensity evidence. Consistent with the approach in *Grooby*, in discussing the probative value of acquittal evidence, the Court in *Fenemor* made the point that allegations when viewed in isolation may leave room for doubt but, when viewed as part of a pattern with each drawing support from the others, "can fairly lead to a conclusion of guilt beyond reasonable doubt". The probative value of the acquittal evidence was to be assessed in relation to its support for the allegations at issue, not in relation to its support for the earlier isolated charge on which there was an acquittal.

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12 *T (SC 140/2015) v R* [2016] NZSC 71, [2017] BCL 106.
13 *Fenemor v R*, above n 11, at [12].
14 *Grooby v R* [2018] NZCA 344.
15 *Grooby v R* [2018] NZSC 114.
16 At [3].
17 At [4] (footnotes omitted).
18 CA judgment, above n 2, at [48] (footnotes omitted).

[9] Nothing raised by the applicant calls into question this assessment of the current position. This proposed ground has insufficient prospects of success to warrant a second appeal.

[10] Nor does anything raised by the applicant give rise to the appearance of a miscarriage of justice.[19]

[11] For the avoidance of doubt, as the application for leave to appeal has been dismissed, the relevant suppression orders made in the Courts below in their judgments will lapse.[20]

[12] For present purposes however, the applicant's name will remain anonymous in line with s 199A of the Criminal Procedure Act.

Result

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

[14] We make an order prohibiting publication of this judgment until 2.00 pm on 22 October 2024.

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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19 Senior Courts Act, s 74(2)(b).
20 See CA judgment, above n 2, at [53]–[57].