ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPELLANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA741/2017
[2018] NZCA 218

BETWEEN	H (CA741/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	22 May 2018
Court:	Williams, Venning and Mander JJ
Counsel:	A G V Rogers, M H McIvor and J Kim for Appellant M H Cooke for Respondent
Judgment:	26 June 2018 at 3.00 pm

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B Order prohibiting publication of name, address, occupation or identifying particulars of appellant pursuant to s 200 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Venning J)

[1] Following a jury trial in the District Court at Hamilton, H was found guilty of a representative charge of doing an indecent act on a child under 12, two charges of sexual violation by unlawful sexual connection and one representative charge of attempted rape. He was found not guilty on two other similar charges. On 24 November 2017 Judge Wilson QC sentenced him to 41 months' imprisonment.[1]

Background offending

[2] The offending occurred over a four-year period between 2010 and 2014 when H was aged between 14 and 18. The complainant was a young female relative. At the time of the offending she was between seven and 11 years old. The defence was a denial that the offending occurred. H was supported in his defence by his father and sister.

[3] In returning the guilty verdicts the jury obviously accepted the evidence of the complainant on those particular charges. There are rational reasons for the not guilty verdicts on the other two counts. In relation to one, the complainant had said there was a cousin or friend with her at the time of the offending but the police could not find the corroborative evidence. The other charge related to offending said to have occurred after both the complainant and H had been riding on a farm bike. The evidence of H's father and sister was that there was a clear rule only one person was permitted on the bike at any time.

The trial

[4] The trial was a relatively short one. It commenced on 2 October 2017. The Judge summed up to the jury on the morning of 4 October 2017. The jury retired to consider their verdicts at 12.02 pm. The jury asked a question at 3.25 pm. After discussion with counsel the Judge answered that query with the following direction:

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1 *R v [H]* [2017] NZDC 26628.

Members of the jury, thank you for your question which reads, "We are struggling with the concept of beyond reasonable doubt in regards to evidence. Does an element of doubt on any aspect mean the charge fails?"

The short and general answer is no, however I have to tell you more about this. The truth beyond reasonable doubt relates to the elements of the offence, so if you go to your charge list or in fact go to the question trail, the question trail sets out what has to be proved beyond reasonable doubt, so the identification of where the charge 1 happened or the circumstances was in connection with collecting firewood. What you have to be satisfied of is that there was a deliberate requirement for the girl to touch the man's penis. That is the essential thing.

Now, what I said to you in summing up was this: Are there any consistencies or inaccuracies on incidental matters? Are they really a reason to discount the evidence on major matters or are they substance to raise a reasonable doubt which will leave you unsure of guilt?

In this case, just taking an example from the case, there has been evidence of a grey laptop and there was a grey laptop, it seems. Matter for you, but you might think there's no dispute about that. What is there is a dispute about is whether there was porn on it or not. Now that in itself would not mean that there would necessarily be a not guilty verdict following from that. That is so long as you are satisfied that the actual elements, the questions that you ask in the question trail, leave you sure on each of those questions.

You can have doubts on incidental matters and still be sure of guilt. For instance, if a witness referred to a red hat and that is obviously not this case, and another witness referred to a blue hat and you were not sure whether it was red or blue but you knew there was a hat, that would not be a reasonable basis for doubt. It is incidental, it is not central to the case and in this case the evidence of whether there was hay bales in the shed when the children were playing hide and seek, is that material, is that a basis, you say, "We find there was no hay bale." Does that mean you discount the whole the complainant's evidence? No, because after all there was an open shed, it was on a particular place on the farm, it had a trailer in it and the children played hide and seek there, so when the witnesses are looking back over years to their childhood, from teenage years, early teenage years, hay bale or no hay bale is not, I suggest to you, a proper basis for reasonable doubt.

So you need to be sure of guilt based on what you define the defendant did and intended and those questions are the ones in the question trail so follow the question trail and that will indicate to you what the central issues are so would you please now retire to consider your verdicts?

[5] The jury then returned with unanimous verdicts at 4.45 pm.

The grounds of appeal

[6] H appeals against conviction. The grounds of appeal are:

(a) counsel error — counsel failed to adduce evidence that, save for one charge of driving with excess blood alcohol, H had no previous convictions;

(b) the Judge failed to direct the jury adequately in relation to the standard of proof; and

(c) the Judge failed to properly answer the question the jury raised about the standard of proof.

[7] Section 232(2)(c) of the Criminal Procedure Act 2011 applies. The appeal is advanced on the basis a miscarriage of justice has occurred. A miscarriage of justice means any error, irregularity, or occurrence in or in relation to the trial that has created a real risk that the outcome of the trial was affected, or has resulted in an unfair trial.[2]

Counsel error

[8] Trial counsel Mr McIvor accepts that the omission to offer evidence regarding the lack of relevant previous convictions was an oversight on his part.

[9] The Supreme Court has confirmed that evidence of an absence of previous convictions or relevant previous convictions may be admissible as propensity evidence under s 40 of the Evidence Act 2006.[3] The appellant relies on the case of *Shore v R* where this Court observed that if such evidence "had been called it would have improved Ms Shore's chances of a not guilty verdict".[4] The appeal was allowed in that case. H argues that if the evidence of lack of previous relevant convictions had been led it would have made a difference to his case and the trial Judge would have been required to refer to that in his summing-up, so that it would have improved H's chances of not guilty verdicts on all counts.

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2 Criminal Procedure Act 2011, s 232(4)(a) and (b).
3 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [16].
4 *Shore v R* [2017] NZCA 599 at [17].

[10] It is relevant to note that, while the Supreme Court accepted the lack of previous convictions may provide a tendency to show the defendant did not commit the relevant offending it went on to qualify the finding:[5]

> [T]he tendency of the evidence to show this is slight, perhaps very slight, but we do not consider it can properly be said that this kind of evidence has no such tendency whatever.

[11] In *Wi v R*, despite finding that the evidence of lack of previous convictions was wrongly ruled inadmissible, the Supreme Court held that it was not capable of affecting the result. The jury would still have convicted even if informed Mr Wi did not have previous convictions for violence.[6]

[12] The case of *Shore v R*, that the appellant relies on, is quite different to the present case. Ms Shore was a 38-year-old retail assistant convicted of three charges of obtaining by deception. The charges related to the use of two credit cards without the permission of the owners of the credit cards.

[13] The good-character evidence that was available to Ms Shore and which was not called was evidence, not just of a lack of previous relevant convictions, but also evidence from a previous employer at a pharmacy where she had been a long-term employee and had held a position of trust. The employer had relied on her honesty. This Court held that the character evidence, taken as a whole, would have improved Ms Shore's chances of a not guilty verdict.[7]

[14] The significance of the good-character evidence in Ms Shore's case was quite different. It was far more extensive than merely a lack of relevant previous convictions. We are satisfied that the failure to call evidence that H, at his relatively young age, had no previous convictions for sexual offending would not have affected his chance of acquittals on the charges he was found guilty on. It would not have assisted his case in any material way. The members of the jury would expect that a young man like H would not have previous convictions for sexual offending. Next, the suggestion by H's counsel as to the way the Judge would have dealt with such

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5 *Wi v R*, above n 3, at [16].
6 At [47].
7 At [17].

evidence and how he would have summed up to the jury is speculative. The Judge would not have been required to sum up in the particular way that Mr Rogers suggested. A Judge should tailor his or her directions to the circumstances of the particular case.

[15] Mr Rogers also referred the Court to the Full Court decision of the Court of Appeal of England and Wales in *R v Hunter*.[8] There the Court discussed the extent and nature of the good-character direction required in England and Wales. The practice in England and Wales for trial judges to give credibility and propensity directions in relation to good character evidence has developed in a different way to the practice in New Zealand. In *Wi* the Supreme Court discussed the practice in England and Wales for mandatory directions and then stated:[9]

> [40] We are of the view that in principle mandatory directions should be reserved for cases in which they are essential to ensure the defendant has a fair trial. It is generally better to leave the extent and content of directions to the trial judge who has the feel of the case. We recognise it was said in *Falealili* that this approach might tend towards uncertainty and inconsistency. We are not, however, persuaded that this is likely to be a significant problem.

[16] The case of *Hunter* referred to by Mr Rogers is a further development of the English and Welsh practice but the New Zealand practice is mandated by the Supreme Court decision in *Wi.*

The Judge's direction on the burden of proof and standard of proof

[17] Mr Rogers next submitted that the Judge failed to direct the jury that, in relation to the standard of proof, more than proof on the balance of probabilities was required. Mr Rogers referred to [48] of *R v Wanhalla* where William Young P said:[10]

> (b) Jurors should be told that more than proof on the balance of probabilities is required.

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8 *R v Hunter* [2015] EWCA Crim 631, [2015] 1 WLR 5367.
9 *Wi v R*, above n 3, citing *R v Falealili* [1996] 3 NZLR 664 (CA).
10 *R v Wanhalla* [2007] 2 NZLR 573 (CA).

[18] Mr Rogers also referred to the comment in *R v Dookheea* by the High Court of Australia that:[11]

> Consequently, as the authority of this Court stands, it is generally speaking undesirable for a trial judge to contrast reasonable doubt with any doubt. But, for the reasons already given, in point of principle it is not wrong to notice the distinction; and, therefore, as a matter of authority, it is not necessarily determinative of an appeal against conviction that a trial judge may for one reason or another happen to do so.

[19] H's argument is that the trial Judge erred by failing to expressly direct the jury that more than the civil standard of proof on the balance of probabilities was required. The submission misinterprets the relevant passages of the Court's decision in *Wanhalla.* At [48] of that decision William Young P was drawing together the concepts involved in an appropriate direction on the standard of proof taken from Canadian authorities. He then went on to set out a proposed appropriate direction in the next paragraph.

[20] As Mr Rogers acknowledged, the trial Judge's directions in the summing up, in combination with his further directions in answer to the jury's question, complied with the requirements of the *Wanhalla* formula as contained in [49] of this Court's judgment in that case. The Judge's direction on the standard of proof was orthodox and in accordance with the standard direction.

[21] Further, in any event, the Judge used the standard direction in summing up:

> [18] The Crown must prove that the defendant is guilty beyond reasonable doubt. It is a very high standard of proof which will only be met if at the end of the case you are sure that [H] is guilty. It is not enough if the Crown makes you believe that the defendant is probably guilty or even very likely guilty. But you cannot prove anything to a mathematical certainty and the Crown does not have to do that in relation to past events. A reasonable doubt is an honest and reasonable uncertainty left in your minds about the guilt of the defendant after careful and impartial consideration of the evidence.

[22] This direction incorporates the requirement for proof of more than on the balance of probabilities by the direction that it is not enough to find the defendant probably guilty or even very likely guilty.

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[11] *R v Dookheea* [2017] HCA 36, 347 ALR 529 at [37].

The Judge's response to the jury's question

[23] Mr Rogers next submitted that the Judge erred in the answer he provided to the jury question. He submitted the Judge should have directed the jury they must entertain a reasonable doubt where any inference consistent with innocence was reasonably open on the evidence. Again, Mr Rogers relied on the observations of this Court in *Wanhalla* concerning the reasonable possibility direction.[12]

[24] The answer Mr Rogers proposed the Judge should have provided the jury was not an answer to the question the jury had asked.

[25] The Judge's direction answered the point which the jury had raised in their question. His direction was correct. While the Judge's response may have covered issues that were unnecessary, such as the red hat, blue hat discussion, he did refer to instances specific to the particular case. Importantly the Judge drew the jury's focus back to the question trails which correctly set out the elements of the offending the jury had to be satisfied of beyond reasonable doubt in order to convict. We are satisfied the jury must have understood the onus and standard of proof. It must be assumed they applied it on the two charges they found H not guilty on.

[26] In any event, the Judge did deal with the reasonable possibility direction in the brief tripartite direction he gave the jury regarding the defence evidence. When discussing the evidence given by H the Judge said "if you are unsure whether you believe him then that will still leave you with a reasonable doubt".[13]

Result

[27] None of the grounds of appeal succeed.

[28] The appeal against conviction is dismissed.

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12 *R v Wanhalla*, above n 10, at [51].
13 At [23].

[29] In order to protect the identity of the complainant, we make an order prohibiting publication of the name, address, occupation or identifying particulars of the appellant pursuant to s 200 Criminal Procedure Act 2011.

Solicitors:
McLeod & Associates, Auckland for Appellant
Crown Law Office, Wellington for Respondent