NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA633/2012
[2016] NZCA 287

	BETWEEN	GRAEME ANDREW JOBLIN Appellant
	AND	THE QUEEN Respondent

Hearing: 23 May 2016

Court: Stevens, Woodhouse and Wylie JJ

Counsel: S G Vidal for Appellant
L Preston for Respondent

Judgment: 27 June 2016 at 10.00 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Stevens J)

Table of Contents

Introduction

[1] Following a trial before Judge Farish and a jury in the Christchurch District Court Mr Joblin was convicted of sexual offending spanning a 30year period against 10 complainants. Each complainant was a teenage boy at the relevant time. The charges included six counts of supplying cannabis, seven counts of doing an indecent act (on a boy under 16), two of inducing a boy under 16 to do an indecent act, one count of sodomy, six counts of sexual violation by unlawful sexual connection, two counts of indecent assault (on a boy between 12 and 16) and two counts of indecent assault. The jury convicted Mr Joblin on all charges except one of the counts of supplying cannabis.[1]

[2] On appeal Mr Joblin asserts a miscarriage of justice has occurred due to his not having received a fair trial. Through his counsel, Ms Vidal, he alleges various breaches of his fair trial rights. Among these Mr Joblin seeks to impugn the conduct of his trial counsel (not Ms Vidal) for:

(a) an alleged lack of preparation for trial;

(b) the failure to call witnesses; and

(c) an alleged failure to prepare written submissions or adequately argue a pre-trial propensity argument and mode of evidence applications.

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[1] Prior to sentencing Judge Farish quashed the verdicts on two of the counts of indecent assault because of an absence of proof as to the date of offending arising from a change of legislation during the period of the charges: *R v Joblin* DC Christchurch CRI-2009-009-18148, 31 August 2012 (Ruling 1).

[3] Mr Joblin filed four affidavits in support of his appeal. In response the Crown filed affidavits from Mr Paul Norcross (who acted for Mr Joblin between March 2009 and September 2011), Mr Colin Eason and Mrs Claire Yardley (who were respectively senior and junior trial counsel), and Mr Barnaby Hawes (one of the prosecution counsel). We also heard oral evidence from Mr Joblin, Mr Eason, Mrs Yardley and Mr Norcross.

Background

Factual context

[4] The sexual offending spanned two periods. The first was from 1978 to 1981 in Wellington when Mr Joblin was a young teacher at a high school in Wainuiomata (the Wellington charges). Both of the complainants for the Wellington charges (PBK and RJ) were pupils of Mr Joblin in their third to fifth form years at school.

[5] The second period was from 2000 to 2008 in Christchurch when Mr Joblin was a busking musician playing in the Cathedral Square (the Christchurch charges). All of the complaints for the Christchurch charges (HO, SA, NR, RD, JR, BW, SR and BD) were youths with troubled backgrounds. Most of them came across Mr Joblin when he was busking. For example, the final and youngest complainant, BD, encountered Mr Joblin in the Square late one night in February 2008 after he had run away from home following an argument with his father.

[6] A detailed summary of the offending is contained in Judge Crosbie's pre-trial ruling.[2] In essence, Mr Joblin's offending followed a similar pattern for both the Wellington and Christchurch charges. He would befriend the complainant and then invite them back to his address. He would then supply the complainants with alcohol and cannabis and the offending was often commenced while complainants were asleep or strongly affected by the alcohol or drugs. The sexual offending involved multiple indecencies performed upon the boys, including sodomy and digital–anal penetration.

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2 *R v Joblin* DC Christchurch CRI-2009-009-18148, 8 August 2011 [Pre-trial ruling].

Representation of Mr Joblin by Mr Norcross

[7] Because it is at the heart of the issues we must consider, we will briefly describe key aspects of the circumstances of the legal representation Mr Joblin had in the lead-up to trial. His first counsel was Mr Norcross, whose instructions were terminated by Mr Joblin on 7 September 2011.

[8] Mr Norcross represented Mr Joblin over a period of around two and a half years. The case was assigned to him after Mr Joblin's second appearance in the District Court on the charge of sexual offending against BD, one of the Christchurch complainants. In his affidavits, Mr Norcross describes the considerable efforts he went to in order to obtain detailed instructions. The following gives a flavour of the difficulties he experienced:

> 16. At times, the appellant was difficult to obtain instructions from, as he was preoccupied by matters extraneous to his response to the allegations against him. These topics included the police attitude against him, complaints about his previous remands in custody, his beliefs of collusion by the complainants against him and alleged inducement by the police.
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> 17. When I would meet with the appellant, either in custody or when he was on bail, I would repeatedly ask him to prepare notes for me of what he could say to assist to defend the charges, and try to keep him on track to discuss the actual allegations. I would tell him that it was important for him to write down for me what he had to say in respect of the charges.
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> 18. I recall at an earlier stage, during 2010 when he was in custody on remand, I would meet the appellant in prison to take his instructions. I would repeatedly ask him to prepare for each session by mak[ing] notes for me. He would usually have with him a bag or bags with papers in them. Although he would refer to these as "my papers" he never provided any material from them to me, or indeed gave me any written instructions, despite my requests to do so.

[9] Mr Norcross was assiduous in his preparation of Mr Joblin's defence. This included developing a summary of the Crown case on all the charges based on the disclosure files and preparing a chronology (including dates of birth of the complainants) and an outline of the evidence to be given by the witnesses. Mr Norcross also identified potential issues for trial from the disclosure and from the instructions from Mr Joblin. A draft brief of evidence was prepared in case Mr Joblin chose to give evidence at his trial.

[10] Once the draft brief had been prepared, Mr Norcross formed the view Mr Joblin faced "real difficulties" in defending the charges, particularly with respect to the charges involving the complainants PBK and HO. This was because Mr Joblin had admitted multiple sexual acts with each of these boys (as they were at the time), albeit suggesting they were consenting at all times. With HO, Mr Joblin had what he described as a 10 year "genuine relationship" commencing entirely at the instigation of the complainant when HO was 15. On that basis, Mr Norcross advised Mr Joblin that he should consider entering guilty pleas to those charges, and then continue to defend the remaining charges on the basis of complete denial or consent/reasonable belief in consent.

[11] Mr Norcross was counsel when the Crown made a pre-trial application before Judge Crosbie pursuant to s 345D of the Crimes Act 1961 for leave to file an amended indictment to include one count of supplying cannabis to a minor and four counts of doing an indecent act on a boy under the age of 16 years (the joinder application). The complainant in each count was PBK, one of the Wellington complainants. At the same time, the defence made an application for an order under s 340(3) of the Crimes Act that Mr Joblin be tried on counts 1 to 12 (the Wellington charges) separately from the remaining charges in the indictment. Both applications were heard together at the same time as an application by the defence concerning the venue for the trial.[3]

[12] The Crown application for joinder was successful. This rendered the application for severance redundant. The venue application by the defence was rejected.[4] The reason for the Crown seeking joinder was because the prosecution wished to lead all of the sexual allegations and surrounding circumstances as propensity evidence.[5] A preliminary finding that the evidence of each complainant was admissible against the others as propensity evidence was a strong point in favour of joinder. We will return to the approach taken by Mr Norcross to the joinder application when addressing the detail of the complaints made by Mr Joblin.

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3 Pre-trial ruling, above n 2, at [1] and [37].

4 At [40]. Mr Joblin had opposed the trial being transferred to the Timaru District Court. However, as no trials were scheduled to be heard in Christchurch for the remainder of 2011 following the earthquake on 22 February 2011, it was held to be in the interests of justice for the trial to be transferred.

5 At [7].

[13] Mr Norcross also gave Mr Joblin preliminary advice about whether he would give evidence at his trial. Mr Norcross recognised that, as with most serious sexual allegations, there were few witnesses apart from the complainants and Mr Joblin. Mr Norcross appreciated any election to give evidence carried with it significant risks, particularly given Mr Joblin's admissions in his instructions about the complainants PBK and HO. Mr Norcross asserts, and we accept, that no final decision had been made as to whether in fact Mr Joblin would give evidence at his trial. Such a decision would only need to be made at the close of the Crown case.

[14] As events transpired, Mr Joblin terminated Mr Norcross' instructions two weeks before trial. We do not need to examine the circumstances in which that occurred. Such termination was about one month after release of the joinder application ruling. Mr Norcross discussed with Mr Joblin the outcome of the ruling and Mr Joblin accepts that he did not instruct Mr Norcross to file an appeal. However, within a short time of these events Mr Joblin told Mr Norcross that he had "lost faith" in him due to his handling of the "propensity argument" and terminated his instructions.

[15] Thereupon Mr Norcross told Mr Joblin he would make all files (including the disclosure material) available to him. Mr Norcross delivered the files and the disclosure personally to Mr Joblin's house, leaving them on his front doorstep when the door was not answered.

[16] Mr Norcross was cross-examined before us. He was an impressive witness. Where his evidence conflicts with that of Mr Joblin we prefer that of Mr Norcross. The evidence he gave was clear and reliable. He was able to refer to contemporary documentation to demonstrate that he had prepared carefully for trial, despite difficulties in obtaining instructions from Mr Joblin. Had his instructions not been terminated, we consider Mr Norcross was fully ready to represent his client at the trial due to start in September 2011.

Representation of Mr Joblin by Mr Eason

[17] Mr Eason was instructed by the Legal Services Agency (LSA) on 21 December 2011. He made contact with Mr Norcross who confirmed he had

delivered his complete file to Mr Joblin's address and explained he had given Mr Joblin a full set of the disclosure documents at the same time. Mr Eason anticipated that Mr Joblin would provide him with the files he had received from Mr Norcross, as well as the disclosure documents. As this did not occur, Mr Eason was required to obtain a further full set of the disclosure documents from the police.

[18] Mr Eason had three meetings with Mr Joblin on 5 April 2012, 30 May 2012 and 7 June 2012. A total of 25 file attendances (totalling 97 hours) were undertaken, as well as 17 court appearances occupying 66 hours and numerous telephone attendances.

[19] The meeting on 5 April 2012 occurred once Mr Eason had developed a good understanding of the evidence and how the case was likely to proceed. Mr Eason has deposed, and we accept, that Mr Joblin's focus was not so much on the trial but on the various proceedings which he had filed, particularly an outstanding appeal to the Court of Appeal against the propensity aspect of Judge Crosbie's joinder application decision and a proposed application for a writ of habeas corpus. Mr Eason says Mr Joblin was not prepared to enter into any discussion about the factual allegations and was only willing to deal with the procedural or administrative matters that he had instigated.

[20] Again, the following sets out the difficulties Mr Eason described in obtaining instructions:

> 28. I did have some preliminary comments to make to Mr Joblin about how I saw the case. Mr Joblin told me clearly that none of the allegations ever occurred.
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> 29. Most of the discussion was about the pre-trial matters, and Mr Joblin spent the time talking about the injustices that he had suffered and the need to progress all the pre-trial applications which he had filed. Mr Joblin was not prepared to discuss with me in detail any of the actual evidence which would need to be answered at trial.
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> 30. I am not aware if Mr Joblin had all the disclosure or witness statements that were to be relied on at trial. He did have a number of papers but I could not tell what he did or did not have. He did not request any further disclosure from me. Mr Joblin referred to "his papers" rather than "disclosure" and always appeared to be master of his situation. Mr Joblin had a firm belief that his preparation recorded on his papers would "win the day".

> 31. I told Mr Joblin that if there were witnesses to be called, he needed to make sure I knew who they were as soon as possible. He did not provide me with any witness details in advance of the trial.
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> 32. I always had the impression from Mr Joblin that because of the number of matters that he insisted upon being dealt with before trial, that there was always reason for him to avoid any direct preparation.
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> 33. Most of his instructions to me were specific instructions directed towards his desire to be bailed. His belief was that once bail was granted he would have access to his papers that he had already made notes on, which would assist with his preparation.

[21] On 7 June 2012 Mr Eason met with Mr Joblin to advance the preparation for trial. Mr Eason provided Mr Joblin with a ring binder containing all of the witness statements and asked him to explain exactly what his position was in relation to each complainant and why he thought their evidence was incorrect. It seems Mr Joblin did not do this.

[22] On 11 June 2012 Mr Joblin again asked Mr Eason to advance any outstanding applications, particularly the propensity issue. However Mr Eason had ascertained from this Court that no appeal had been lodged against the decision of Judge Crosbie. Accordingly, he advanced an application to quash the amended indictment and an application for a stay of proceeding. Both were dismissed and the Judge directed that the trial was to commence on 12 June 2012. Later on 11 June Mr Joblin called Mr Eason from the prison to say that he was withdrawing his instructions. In court the following morning the Judge gave Mr Joblin the option of having Mr Eason as his lawyer or he would be appointed as amicus. He chose the former and the trial proceeded on that basis.

[23] In the course of preparing for trial, Mr Joblin did not instruct Mr Eason to call witnesses to counter the Crown evidence against him. Mr Eason received no names from Mr Joblin of people who might be able to refute the evidence against him. It was only towards the last day of the trial Mr Joblin told Mr Eason he wanted two witnesses called in his defence. Both were in the nature of character witnesses. One was a female detective who had been in Christchurch a number of years earlier and Mr Joblin believed that she could provide evidence of his "good reputation". The second was a retired police sergeant, Mr Thompson. Mr Eason and Mrs Yardley followed up on these instructions. The female detective could not be contacted as

she had retired from the police. Mr Thompson was contacted but he said that he would not be able to advance any meaningful evidence in support.

[24] Mr Eason confirmed Mr Joblin's instructions in April 2012 had been that none of the allegations ever occurred. This was consistent with the more detailed instructions given on 7 June 2012. Mr Eason says those instructions did not change and he did not depart from that basis of the defence prior to or during the course of the trial. Accordingly, the trial proceeded on the basis of Mr Eason putting the Crown to proof.

[25] With respect to whether Mr Joblin would give evidence, both Mr Eason and Mrs Yardley gave Mr Joblin advice about whether he should give evidence or not. There is no basis for suggesting the advice given was other than full and accurate. We are satisfied that Mr Joblin's right to give evidence was properly explained to him. He chose not to do so. Mr Joblin signed a written note as follows: "I have been told I am able to give evidence in my trial but I do not wish to do so or call evidence". Mr Eason said that this was consistent with an intention expressed earlier that Mr Joblin would not give evidence at his trial. Mr Eason says, and we accept, that Mr Joblin did not indicate at any stage an intention to give evidence himself.

[26] Mr Eason also confirmed that due to the difficulties he had had obtaining instructions from Mr Joblin prior to trial that he was either offered, or sought from the trial Judge, the opportunity at the conclusion of the evidence of each complainant to have time with Mr Joblin to discuss the evidence and confirm any further specific instructions. The record of the trial confirms, with respect to some of the witnesses, that this opportunity was provided. We accept Mr Eason's evidence that special arrangements were made with the Judge to assist him in any way he considered necessary to obtain proper instructions during the trial from Mr Joblin.

[27] Mr Eason was cross-examined before us. He too was a credible and reliable witness. Aspects of what he said were confirmed by the handwritten notes of instructions he took from Mr Joblin. Other aspects of his evidence were supported by the record of events at trial. Mr Eason described similar difficulties in obtaining instructions as had Mr Norcross. This suggests a clear pattern of behaviour by

Mr Joblin on this issue. Where Mr Joblin's evidence conflicted with that of Mr Eason, we prefer Mr Eason's evidence.

Mrs Yardley's evidence

[28] As already noted, Mrs Yardley was instructed as junior counsel for the trial. She outlined in her affidavit the tasks she undertook. These included cross-examining one of the complainants, NR, because Mr Eason was unable to do so. She also made arrangements late in the trial to find one of the two persons Mr Joblin wished to call to give character evidence. She spoke to Mr Thompson and ascertained he could not give any specific evidence helpful to Mr Joblin's defence.

[29] Mrs Yardley was cross-examined. We also consider her to be a credible and reliable witness. She was able to confirm much of what Mr Eason said about the trial process and the steps counsel took to ensure the Crown case was properly tested and a fair trial was achieved for Mr Joblin.

Evidence of Mr Joblin

[30] Mr Joblin's affidavit evidence dealt with four main topics: his imprisonment prior to trial (the bail issue); the opportunity he had to prepare for trial; the manner in which he was represented by counsel both at his trial and in pre-trial matters; and the procedure followed at trial. Approximately half of his first affidavit is taken up with the bail issue and with the topic of disclosure material. He says he asked Mr Eason to uplift his disclosure material from Mr McNab, a friend who had been assisting Mr Joblin. Mr Eason accepts he was asked to do so. However when he made such enquiries Mr McNab convinced him that he did not know of or have any such material. We accept that this was the case. In any event, Mr Joblin had already been supplied by Mr Norcross with two sets of the disclosure material.

[31] Both Mr Joblin's lengthy first and second affidavits list a catalogue of complaints against both Mr Norcross and particularly Mr Eason. There is elaboration of his instructions to Mr Norcross concerning his defence, including a set of annexures which relate to the development of very detailed instructions obtained by Mr Norcross. Much of Mr Joblin's affidavits deal with his instructions to

Mr Eason, with complaints about trial preparation, the issue of giving evidence in his own defence and other matters including witnesses he claims to have identified. Mr Joblin also filed a fourth affidavit in which he responds to affidavits by Mr Norcross and Mr Easton.

[32] Mr Joblin was cross-examined. Suffice it to say that we found him a most unsatisfactory witness. For reasons which we will discuss later in this judgment, we are satisfied that Mr Joblin's version of events in relation to both his dealings with Mr Norcross and Mr Eason does not accord with the reality. In many respects what Mr Joblin said is controverted by contemporary records and documents created by Mr Norcross and Mr Eason. As such, we consider Mr Joblin's evidence to lack both credibility and reliability. We will refer to other aspects of the claims and complaints made by Mr Joblin when we address the specific grounds of his appeal below.

[33] Before doing so, we refer briefly to claims made by Mr Joblin about inappropriate actions by the police. One such claim was that the police uplifted a number of his personal papers when conducting a search warrant at his home. As Mr Hawes' affidavit confirms, this issue was investigated by the prosecutor and the issue explored in the course of trial. None of the police officers involved in the execution of the warrant recalled seeing any notes of that type and there is no record of them being seized in the paperwork pertaining to the search warrant. The search warrant itself would not have authorised the seizure of such material.

Three preliminary points on appeal

[34] The primary submission made by Ms Vidal on appeal is that Mr Joblin did not receive a fair trial.[6] To this broad proposition there were a number of strands. These included a claim the trial should, because of its complexity and the seriousness of the charges, have proceeded in the High Court. At the hearing Ms Vidal confirmed this ground would not be pursued. That was a proper decision by counsel; the ground has no merit.

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[6] As affirmed by ss 24 and 25(a) of the New Zealand Bill of Rights Act 1990. See also *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300.

[35] The second strand was described as "bail and detention issues". Although the ground was not withdrawn, it was only faintly pressed by Ms Vidal. Again she was right to do so. From the extensive material provided by Mr Joblin, it is plain the main problem with bail was of his own making: he could not provide a suitable and safe bail address. Mr Joblin pressed all counsel acting for him to advance various applications. They did so as best they could largely without success. Bail and detention issues were diligently advanced and properly managed by both Mr Norcross and Mr Eason. They cannot now be blamed for the lack of success on this issue.

[36] Ms Vidal also submits the failure to obtain bail was relevant to difficulties Mr Joblin had in presenting his defence. This point is most relevant to the circumstances confronting Mr Eason when he was endeavouring to obtain detailed instructions from Mr Joblin on 5 April, 30 May and 7 June 2012. We are satisfied that the fact that Mr Joblin was in custody at those times was not the real problem: it was Mr Joblin himself. When Mr Eason sought specific instructions, Mr Joblin allowed himself to be fixated by procedural matters. He seemed unwilling or unable to engage with matters of substance. Despite this, Mr Eason pressed on with his preparation. We are satisfied he did all he could to prepare both himself and Mr Joblin for the trial, notwithstanding that Mr Joblin remained in custody.

[37] The third strand concerns the right to counsel. Ms Vidal argued in her written submissions that, at the time Mr Joblin was seeking to appeal the joinder application ruling, the Ministry of Justice wrongly withdrew the right to counsel thereby removing his access to legal assistance.[7] Without the assistance of counsel the appeal was lodged initially in the incorrect court and then, once filed in the correct court, it was in the incorrect format and so rejected. Mr Joblin believes the appeal was re-filed with the assistance of Mr McNab in the correct court, but the Registry has stated that it did not receive that appeal. Ms Vidal also submitted after the expiry of the period for appealing the pre-trial ruling and following Mr Joblin's remand in

[7] By letter dated 21 September 2011. This was because Mr Joblin dismissed Mr Norcross two weeks before trial and had requested in writing that the LSA not assign another lawyer to his case indefinitely.

custody, Mr Eason was assigned. Mr Joblin had not elected Mr Eason as counsel and had not been advised of his right to elect counsel of choice.

[38] Again this submission was not pressed in oral argument. It has no merit. The LSA assigned Mr Eason to act for Mr Joblin.[8] He did so in the manner described above at [17] to [27]. At the start of the trial on 12 June 2012 the Judge gave Mr Joblin the choice to have Mr Eason act as his counsel or as amicus. Mr Eason was available to act for him and Mr Joblin accepted he should do so. There was no deprivation of Mr Joblin's right to counsel.

Trial counsel conduct

[39] The fourth strand and main challenge on appeal concerns complaints about the conduct of counsel, Messrs Norcross and Eason. We begin by referring briefly to the applicable principles.

[40] Such principles are established by the Supreme Court in *R v Sungsuwan*: the "ultimate issue" on appeal is where trial counsel conduct is in issue is whether justice has miscarried.[9] Delivering the majority judgment Gault J stated:[10]

> [C]onsideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

[41] As discussed by this Court in *R v Scurrah*:[11]

> [17] The approach appears to be, then, to ask first whether there was an error on the part of counsel and, if so, whether there is a real risk that it affected the outcome by rendering the verdict unsafe. If the answer to both

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8 Although the LSA operated a "preferred lawyer policy" in assigning counsel to legal aid clients, there is nothing in the Legal Services Act 2011 or the New Zealand Bill of Rights Act that implies a right for legal aid clients to choose their counsel: *Clark v Registrar of the Manukau District Court* [2012] NZCA 193, (2012) 9 HRNZ 498 at [87]–[89].

9 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730.

10 At [70] per Gault, Keith and Blanchard JJ.

11 *R v Scurrah* CA159/06, 12 September 2006.

> questions is "yes", this will generally be sufficient to establish a miscarriage of justice, so that an appeal will be allowed.
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> [18] On the other hand, where counsel has made a tactical or other decision which was reasonable in the context of the trial, an appeal will not ordinarily be allowed even though there is a possibility that the decision affected the outcome of the trial. This reflects the reality that trial counsel must make decisions before and during trial, exercising their best judgment in the circumstances as they exist at the time. Simply because, with hindsight, such a decision is seen to have reduced the chance of the accused achieving a favourable outcome does not mean that there has been a miscarriage of justice. Nor will there have been a miscarriage of justice simply because some other decision is thought, with hindsight, to have offered a better prospect of an outcome favourable to the accused than the decision made.
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> [19] This analysis will be sufficient to deal with most cases.
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> [20] But there will be rare cases where, although there was no error on the part of counsel (in the sense that what counsel did, or did not do, was objectively reasonable at the time), an appeal will be allowed because there is a real risk that there has been a miscarriage of justice.

[42] This Court in *Hall v R* discussed the obligations on trial counsel regarding the obtaining and following of instructions in respect of fundamental trial decisions.[12] There is no need for further elaboration here as most of the issues concerning trial counsel conduct in this case can be resolved on the facts.

Conduct of Mr Norcross

[43] Ms Vidal alleges Mr Norcross failed to oppose the aspect of the pre-trial joinder application dealing with the admissibility of propensity evidence and this has given rise to a miscarriage of justice. Ms Vidal submits this amounts to trial counsel error in that it:

(a) involved failure to follow Mr Joblin's instructions;

(b) prevented Mr Joblin from being able to present his defence — Mr Joblin was not present at the pre-trial hearing and so he was absolutely dependent on counsel to ensure that the minimum standards of criminal procedure were adhered to; and

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12 *Hall v R* [2015] NZCA 403 at [61]–[77].

(c) resulted in an unfair trial, due to the admissibility of "untrue and unreliable statements" of the complainants that the jury was able to rely upon in determining his guilt.

[44] For these claims Ms Vidal relies on Mr Joblin's assertions in his fourth affidavit that the propensity witnesses were all liars and cheats (as evidenced by the extensive conviction histories of a number of the witnesses). Mr Joblin further claimed the police officer(s) who provided those statements to the Court had an agenda against him, they did not act impartially or professionally, they proactively sought out complainants and tailored statements to create a situation of similar allegations, angling at an application for the admission of propensity evidence. Thus Ms Vidal submits Mr Norcross as his counsel was bound to oppose the admissibility of the propensity evidence.

[45] Ms Vidal submits this would have required the cross-examination of the propensity witnesses before a proper determination could be made by the Court pursuant to s 43 of the Evidence Act 2006. Without such cross-examination the issues affecting the probative value of the evidence could not be properly assessed. This was crucial to the balancing test that the Court must undertake when determining whether or not to allow the prosecution to offer propensity evidence.[13] There was a risk that too much weight could be given to the probative value of the evidence and without an appreciation of the unfairly prejudicial effects of it.

[46] For the Crown Ms Preston submits such claims of trial counsel error by Mr Norcross are misplaced for several reasons:

(a) Mr Joblin's post-conviction appeal rights are extant. However, no ground is advanced on appeal alleging an error of law in the admission of the propensity evidence.

(b) Mr Norcross is recorded by Judge Crosbie as having accepted that he "could not realistically oppose the Crown's argument in relation to

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[13] That being whether the probative value outweighs the risk that the evidence may have an unfairly prejudicial effect of the defendant: Evidence Act 2006, s 43(1).

propensity evidence … as relevant".[14] Mr Norcross confirmed he was given a proper hearing by the District Court Judge on the propensity issues and the grounds for the severance application that he brought on behalf of Ms Joblin.

(c) The submission of counsel error confuses the admissibility of the evidence per se and its cross-admissibility as propensity evidence in support of the other complainants' evidence.

(d) No evidence was provided by Mr Joblin to support his beliefs that the complainants were lying about the central allegations, or that the police had induced false complaints.

(e) Judge Crosbie considered the arguments made on behalf of Mr Joblin by his counsel in support of the severance application. These were directed at the prejudicial effect of the propensity evidence.

[47] We agree with Ms Preston that this ground of challenge cannot be sustained. Judge Crosbie was dealing with a Crown joinder application and a defence severance application. In that context, the cross-admissibility of the evidence given by the complainants (as propensity evidence) was a central issue to be determined on a pre-trial basis. We consider Mr Norcross took an appropriate course of challenging the admissibility of the evidence on the basis of its overall prejudicial effect.[15] To have challenged (at the pre-trial stage) the probative value of evidence of the nature to be given by the complainants would have been futile. We are satisfied Mr Norcross properly advanced all available arguments in the context of the joinder and severance applications. The fact that the application for severance failed cannot be laid at the feet of Mr Norcross.

[48] We agree with Ms Preston that the credibility of the evidence of each complainant was the central issue for trial before the jury. At the pre-trial stage the propensity analysis was to be considered with reference to the factors in s 43(3) of

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14 Pre-trial ruling, above n 2, at [9]–[10].
15 At [10].

the Evidence Act and the decisions of this Court.[16] To the extent that Mr Norcross had endeavoured to challenge the evidence based on possible defences at trial, he would have risked a finding that this factor supported the admission of the evidence.[17]

[49] The complaint that Mr Norcross failed to challenge the credibility of the complainants, who were "all liars and cheats", and should have cross-examined the complainants on the propensity application is misconceived. Absent any evidence to suggest the complainants were lying in their accounts, counsel was not in a position to challenge their evidence except by calling Mr Joblin at the pre-trial hearing. Mr Norcross confirmed there was never any intention to do so. We would add that Mr Joblin, neither now or then, has provided any basis for alleging collusion involving the complainants.

[50] Finally, it is relevant that there was in fact no appeal filed against Judge Crosbie's ruling. That was not the fault of Mr Norcross as he was not instructed to file an appeal. Mr Joblin chose to attempt to do that himself. He failed in that endeavour. When Mr Eason was instructed he ascertained that no appeal had been filed by Mr Joblin. Had Mr Joblin wished to advance a ground of appeal before us alleging an error of law on the basis of the improper admission of the propensity evidence, this Court would have considered the matter.[18] No such ground was advanced and Ms Vidal expressly chose to rely solely on the allegation of counsel error by Mr Norcross.

Conduct of Mr Eason

[51] The second complaint is directed at the conduct of Mr Eason as trial counsel. Ms Vidal submits that Mr Eason was inadequately prepared for trial and failed to seek or follow Mr Joblin's instructions, only seeking instructions as the trial progressed. It is submitted that this impacted on Mr Joblin's ability to advance his defence and led to a miscarriage of justice.

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16 At [20]–[29].
17 At [18]–[19].
18 Ms Vidal also made no challenge on appeal to any aspect of the directions of Judge Farish in her summing-up dealing with the propensity evidence.

[52] We have already referred when considering Mr Eason's evidence to his ability and preparedness to present Mr Joblin's defence at the trial on 12 June 2012.[19] We are satisfied that many of Mr Joblin's difficulties were of his own making.

[53] When Mr Norcross' instructions were suddenly terminated, he made arrangements to get the whole of his file plus the disclosure materials to Mr Joblin. What Mr Joblin did with these documents is unclear, although he claims that the disclosure materials ended up with Mr McNab. As we have seen, Mr Eason made inquiries to obtain the disclosure material from Mr McNab (along with any other documents he held) but was unsuccessful. Any failure to obtain documents from Mr McNab is not the fault of Mr Eason.

[54] So far as concerns Mr Eason's attempt to obtain instructions, there is no doubt that Mr Eason sought instructions and that Mr Joblin had ample opportunities, albeit while in custody, to convey proper instructions to Mr Eason. Finally, when Mr Joblin did give instructions, the partial denial he had given to Mr Norcross had changed to a full denial. In the handwritten instructions Mr Eason took from Mr Joblin, the evidence of all the complainants was variously described as "never happened", "fantasy", "totally made up" and so on. This was consistent with Mr Eason's overall instructions that the offending did not occur. Mr Eason accordingly opened the case for Mr Joblin at trial with a statement that "the offending with which [Mr Joblin] is charged did not happen". From the moment Mr Joblin so instructed Mr Eason, the die was cast. Mr Joblin clearly knew what he was doing and chose to run his defence in this way.

[55] This created a fundamental difficulty for Mr Joblin at trial. His options were to go into the witness box himself or to put the Crown to proof. The former would have carried considerable trial risk and was one Mr Joblin elected, after receiving advice, not to pursue. There is no challenge to the legal advice given to Mr Joblin on the decision not to give evidence. This was a decision made by Mr Joblin himself and he gave signed written instructions to his counsel confirming this was his election.

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[19] At [21]–[27] of this judgment.

[56] During the trial the Judge made considerable efforts to facilitate the conduct of the defence of Mr Joblin. Unusually the Judge allowed a break after virtually every witness to enable Mr Eason and Mrs Yardley to take further instructions. The fact that instructions were taken in this manner does not support a contention that Mr Joblin could not advance a defence; rather it indicates that every measure was taken to ensure that he could exercise this right.

[57] With respect to the complainant witnesses, there was no evidence provided, now or at trial, that there was collusion between the complainants. Additionally, any tentative or vague suggestion that the police gave inducements to the complainants to give evidence has not been substantiated on appeal. Moreover Mr Joblin has provided no detail of other witnesses who might have been called to give evidence in his defence except the two police officers referred to by Mrs Yardley. She found one of the witnesses but he was unable and unwilling to give evidence at trial. There is no merit to any of Mr Joblin's complaints about the manner in which Mr Eason challenges the Crown witnesses or failed to call witnesses for the defence.

[58] With reference to the case presented by Mr Eason at trial, Ms Vidal accepts that Mr Joblin did not tell Mr Eason that there was a brief of evidence already prepared by Mr Norcross. Accordingly the failure of Mr Eason to prepare a brief of evidence does not amount to trial counsel error. As Mr Easton confirmed, given the denials by Mr Joblin, it was most unlikely Mr Joblin would give evidence himself. We are satisfied that Mr Eason adequately presented the defence at trial that Mr Joblin deliberately equipped him with.[20] We conclude that Mr Joblin has not made out the ground of inability to present a defence or the challenge that Mr Eason did not properly prepare for trial.

[59] This ground of appeal alleging trial counsel error therefore fails.

Application of s 122 of the Evidence Act

[60] The final ground concerns the adequacy of the Judge's directions in compliance with s 122(2) of the Evidence Act. Mr Joblin's trial took place before

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[20] *Hall v R*, above n 12, at [94].

the decision of the Supreme Court in *CT (SC 88/2013) v R*.[21] Ms Vidal submits Judge Farish's directions regarding delay did not meet the standard now required by that judgment.

[61] Section 122(2)(e) of the Evidence Act requires a trial Judge to consider giving a reliability warning when evidence is given about conduct of an accused person if that conduct is alleged to have occurred more than 10 years prior to the trial. In *CT (SC 88/2013) v R* the Supreme Court pointed out that "in cases of long-delayed prosecution there will almost always be a risk of prejudice".[22] In such circumstances the Supreme Court said:

> [51] … [u]nless the Judge takes personal responsibility for pointing out that risk and adds the imprimatur of the bench to the need for caution, the jury will be left with competing contentions from counsel and without any real assistance in addressing them.

No particular form of words is required.[23]

[62] In terms of the facts the offending in respect of the Wellington charges occurred between 1978 and 1981. Plainly this timing engaged the provisions of s 122(2)(e). For the Christchurch charges some of the offending against three of the complainants, HO, SA and NR, also engaged these provisions.

[63] When summing up to the jury on this issue the Judge said:

> [32] Now I just want to pause there and it's important and it's a matter that was raised by Mr Eason, it's a matter I need to raise with you. In relation to both [PBK] and [RJ], there is a significant delay before their matters corning to the attention of anyone. For [RJ] he didn't go to the police until 2009 and [PBK] wasn't approached and didn't tell what he can recall of what happened until 2010 when he was approached by Detective Holmes.
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> [33] Where there has been substantial delay in bringing charges to trial, the accused may face difficulty in conducting his defence. Now this can arise in two ways. One is that the case will turn on the oral evidence of the complainant and his memory, as indeed in relation to [RJ] and in [PBK] may have faded or been unconsciously altered over the time, such that he, depending on [PBK] or [RJ], may not be a reliable witness. Another is that the passage of time may mean that the accused has lost the opportunity to call witnesses who may have been able to rebut what the complainant has said or says or to locate any other evidence that may have been useful to

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21 *CT (SC 88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465.

22 At [51].

23 Evidence Act, s 122(4). See also *CT (SC 88/2013) v R*, above n 21, at [57].

> him. That works both ways though because the Crown are also, to a certain extent, compromised because for the same reasons, the forensic evidence that you might expect to be able to retrieve if an allegation is made very quickly you might be able to locate but as time passes and the opportunity to retrieve such material also disappears. So that is something you need bear in mind in relation to the [PBK] and the [RJ] complaint.

[64] Here the Judge did refer to the "substantial delay in bringing the charges to trial". She had, in the previous paragraph, referred to the matter as being "important" and one that she "need[s] to raise with you". The Judge then referred to the fact that an accused person "may face difficulty in conducting his defence" because of the delay. The Judge described the ways in which such difficulty may arise, referring to faded memory on the part of the complainants impacting on reliability and the loss of the opportunity to call witnesses or locate other useful evidence. The Judge also noted the fact that this worked both ways, because the Crown also loses the potential to retrieve any forensic evidence. Finally the Judge said that this was "something you need to bear in mind in relation to two of the complainants".

[65] In the case of the Wellington complainants the direction was tailored to the circumstances of the case. Although the direction did not refer to any of the Christchurch complainants, we consider that the direction was adequate. The Judge noted the prejudice that might arise for Mr Joblin in presenting his defence, which, for all charges, was fabrication on the basis that the offending did not occur.

[66] Further, we are satisfied that, if a stronger warning was called for by the approach in *CT (SC 88/2013) v R*, no miscarriage of justice arises from the failure to give it.[24] Our reasons are as follows. First, Mr Joblin has not pointed to anything in this case from which delay is said to have caused a miscarriage. Certainly there was nothing at the trial to suggest any prejudice or disadvantage to Mr Joblin from the loss of background details about the events concerned. Ms Vidal pointed to nothing in particular said to have given rise to prejudice or the need for a stronger warning. Defence counsel at trial referred in his closing address to the "significant delay" involved in some of the charges. Therefore the jury was required to assess the calibre of a person telling the story "from some distance in the past". Specifically

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[24] *CT (SC 88/2013) v R*, above n 21.

Mr Eason put the defence in relation to one of the Wellington complainants, PBK, as follows: "Well the point about all of this is that if this relationship had elements that were wrong and that were not appropriate and which [PBK] clearly did not want to have any part of it, is it possible that someone would continue on in that situation."

[67] In relation to the complainant RD, Mr Eason also referred to the delay in bringing the charges. Mr Eason suggested that the "passage of time [meant] there is very little landscape left". In other words, the delay supported the defence that the allegations did not occur, or at least raised a reasonable doubt that they did. There is no suggestion that at trial Mr Eason sought from the Judge a stronger direction under s 122 or a general reliability direction.[25]

[68] The final aspect is that the Judge referred to the defence challenge as relating not only to credibility and honesty but also as to accuracy and reliability. The Judge emphasised the defence case relevant to the jury's assessment of the evidence particularly in terms of the challenges to the complainants' evidence based on reliability, truthfulness and honesty.

[69] Accordingly we conclude this ground of appeal cannot be made out. The directions of the Judge in respect of the issue of delay did not occasion a miscarriage of justice.

Result

[70] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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[25] Compare *Tranter v R* [2014] NZCA 602 at [16]–[21].