ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA340/2017
[2017] NZCA 575

BETWEEN	DALE ANTHONY BROOME Appellant
AND	THE QUEEN Respondent

Hearing:	6 September 2017
Court:	Asher, Courtney and Gendall JJ
Counsel:	A G Speed and S T Clark for Appellant J E L Carruthers for Respondent
Judgment:	8 December 2017 at 10 am

JUDGMENT OF THE COURT

A The application for leave to appeal is granted.

B The appeal is dismissed.

C Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] Dale Broome is facing one charge of conspiring with two others, Paul Aononu and Martyn Jackson, to manufacture methamphetamine and one charge of possession of methamphetamine. He has applied for leave to appeal a pre-trial decision by Judge D J Sharp allowing the Crown to adduce evidence of:[1]

(a) Mr Aononu's conviction following a guilty plea for conspiring with Mr Broome and Mr Jackson to manufacture methamphetamine;[2]

(b) Mr Aononu's convictions for conspiracy to supply methamphetamine with persons other than Mr Broome, possession of methamphetamine for supply and possession of precursors, materials and equipment for the manufacture of methamphetamine; and

(c) Mr Broome's own previous conviction for possessing precursors and equipment for the manufacture of methamphetamine in 2004 as propensity evidence.

[2] Leave is granted to bring the appeal.

The Crown case and the defence

[3] The Crown alleges that Mr Aononu and Mr Broome met regularly between June and December 2015. Their meetings were typically preceded by a text from Mr Broome to Mr Aononu suggesting that they "catch up". After the meetings Mr Broome would arrange for the manufacture of methamphetamine and the finished product would be passed on to Mr Aononu who, in turn, passed it on to others to sell.

---

1 *R v Broome* [2017] NZDC 12818.

2 We were advised at the hearing that Mr Jackson has now also pleaded guilty to the charges he faced. Whether the Crown makes a similar application in relation to his convictions will depend on the outcome of the present application.

[4] From September to December 2015 Mr Broome was also in regular contact with Mr Jackson who was then facing charges of manufacturing methamphetamine. Mr Jackson was in desperate need of money. The Crown alleges that Mr Jackson proposed to Mr Broome that he (Mr Broome) come to an arrangement with Mr Aononu under which Mr Jackson would cook a quantity of methamphetamine for Mr Aononu to sell. The Crown alleges that Mr Aononu and Mr Jackson proceeded with that plan and Mr Aononu supplied Mr Jackson with ephedrine for the manufacturing process.

[5] Mr Jackson never actually completed the manufacture, possibly because of a substantial police presence in the area. On 13 December 2015 Mr Aononu visited Mr Broome, apparently to find out when the product would be ready. He was stopped by police as he left Mr Broome's address. He discarded a white container that was later found to contain seven grams of methamphetamine. He also had snap-lock bags on his person. During the subsequent police search of Mr Aononu's sister's address (which the Crown says was being used by Mr Aononu for storage) the police found equipment, materials and precursor substances. These facts form the basis for the conspiracy to manufacture charge.

[6] Shortly afterwards the police searched Mr Broome's address. They found a bag containing 0.1 gram of methamphetamine and two glass pipes. This search forms the basis for the charge of possession of methamphetamine.

[7] Prior to these events the police had installed listening devices at Mr Aononu's address. Some of the intercepted conversations between Mr Aononu and his wife and others about the distribution of methamphetamine included references to Mr Broome, meetings with him and the supply of packages to him. This evidence supports the charge of conspiracy to supply methamphetamine.

[8] Mr Broome maintains that he was not party to any conspiracy and the conversations he had with Mr Aononu and Mr Jackson were not about methamphetamine. He says that Mr Jackson, who was then facing active charges, needed to raise money for legal fees. Mr Broome was helping him by arranging for

Mr Aononu to buy items from Mr Jackson. There was, therefore, an innocent explanation for the texts.

Mr Aononu's conviction for conspiracy

District Court decision

[9] The Crown wished to adduce Mr Aononu's conviction for conspiracy to manufacture and supply methamphetamine to prove that, at the relevant time, there existed such a conspiracy. It acknowledged that adducing the names of Mr Broome and Mr Jackson as persons with whom Mr Aononu pleaded guilty to conspiring would result in unfair prejudice to them and advanced its application on the basis that it would adduce the evidence in the form of a memorandum that would not refer to those names. This would mean that the defendants could still assert at trial that they were not part of the conspiracy that Mr Aononu had admitted.

[10] Mr Speed, who appeared for Mr Broome in the District Court and on appeal, relied on the decisions in *R v Bouavong*[3]and *R v Tanginoa*[4] and *Morton v R*[5] to argue that adducing evidence of Mr Aononu's (and Mr Jackson's) conviction would deprive the remaining Mr Broome of the ability to offer a defence, a right conferred by s 25 of the New Zealand Bill of Rights Act 1990 (Bill of Rights) and result in unfair prejudice that required the evidence to be excluded by s 8 of the Evidence Act 2006.

[11] The Judge accepted that if the conviction were treated as conclusive proof of the conspiracy under s 49 of the Evidence Act, issues that could otherwise be challenged by the defendants (at that point Mr Jackson had not yet pleaded guilty) might be precluded. He considered, however, that they could still argue that they were not party to the conspiracy admitted by Mr Aononu and therefore there would be no unfair prejudice. He also considered that the problem could be overcome by jury directions. In reaching this view the Judge relied on *R v Taniwha*,[6] which he

---

3 *R v Bouavong* [2012] NZHC 524.
4 *R v Tanginoa* [2012] NZHC 3121.
5 *Morton v R* [2016] NZSC 51, [2017] 1 NZLR 1 at [51].
6 *R v Taniwha* [2012] NZSC 605.

considered had the effect of overruling the High Court decisions in *R v Bouavong* and *R v Tanginoa*:[7]

> [16] *Morton v R* dealt with the effective removal from the jury's consideration of the issue of consent where a defendant faced a charge of sexual violation as a party to other offending. If s 49 were engaged in that situation the defendant could not give evidence of consent on the complainant's behalf. The conclusive nature of s 49 would have prevented the only defence available. The Supreme Court found this an exceptional circumstance given the conflict between s 49 and its effect and s 25 of the NZBORA.
>
> [17] The circumstances here differ greatly. Here, the effect of s 49 is not to remove the defendants' ability to argue that they were uninvolved in the offending alleged. The defence have suggested that the evidence of the fact of a conspiracy coupled with the circumstances and timing of the offending will leave the jury with an escapable conclusion that the defendants would be persons with whom Mr Aononu had conspired. This would seem to be a type of conclusion that the jury could be warned from reaching with an appropriate direction. The defence have already provided an alternative basis for the text communications.
>
> …
>
> [19] It is possible that the presence of conclusive proof of conspiracies to supply methamphetamine and to manufacture methamphetamine may resolve issues that could otherwise be challenged by the defendants but this issue was considered in *R v Taniwha*. …
>
> [20] *R v Bouavong* appears to have been effectively overruled by *R v Taniwha*.
>
> …
>
> [22] If the Crown were not permitted to lead evidence of the convictions of Mr Aononu there could be no legitimate opposition to them leading the underlying evidence against Mr Aononu. The evidence of what was found at his property and possibly evidence of admissions made by him would potentially be admissible. The suggestion of unfair prejudice against other defendants by the admission of the conviction needs to be considered in light of the fact that the physical evidence which lead [sic] to the conviction is available to the Crown and could be led without objection.
>
> [23] I consider the evidence of the convictions of Mr Aononu so amended not to describe the identity of the co-conspirators is admissible. It is not irrelevant to the point where it should be excluded under s 7 of the Evidence Act and it is not unfairly prejudicial to the effect there is a risk that the probative value of the evidence will be outweighed by an unfairly prejudicial effect.

---

7 *R v Broome*, above n 1 (footnotes omitted).

[12] The various criticisms of the Judge's ruling on s 49 can be summarised as a failure to properly assess the effect of the conviction evidence on Mr Broome's fair trial rights. Mr Speed argued that because the evidence would effectively prove an essential element of the Crown case (the conspiracy), allowing it to be adduced would deprive Mr Broome of his right to mount an effective defence. It would therefore result in unfair prejudice and should be excluded by s 8. Mr Speed did not accept that the risk to Mr Broome could be addressed by an order under s 49(2).

Sections 8 and 49 of the Evidence Act

[13] Section 8 of the Evidence Act provides that:

> **8 General exclusion**
>
> (1) In any proceeding, the Judge must exclude evidence if its probative value is outweighed by the risk that the evidence will —
>
> (a) have an unfairly prejudicial effect on the proceeding; or
>
> (b) needlessly prolong the proceeding.
>
> (2) In determining whether the probative value of evidence is outweighed by the risk that the evidence will have an unfairly prejudicial effect on a criminal proceeding, the Judge must take into account the right of the defendant to offer an effective defence.

[14] Section 49 of the Evidence Act provides:

> **49 Conviction as evidence in criminal proceedings**
>
> (1) Evidence of the fact that a person has been convicted of an offence is, if not excluded by any other provision of this Act, admissible in a criminal proceeding and proof that the person has been convicted of that offence is conclusive proof that the person committed the offence.
>
> (2) Despite subsection (1), if the conviction of the person is proved under that subsection, the Judge may, in exceptional circumstances, —
>
> (a) permit a party to the proceeding to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted; and
>
> (b) if satisfied that it is appropriate to do so, direct that the issue whether the person committed the offence be determined without reference to that subsection.

> (3) A party to a criminal proceeding who wishes to offer evidence of the fact that a person has been convicted of an offence must first inform the Judge of the purposes for which the evidence is to be offered.

[15] The purpose of s 49 is to provide a convenient means of proving offences already established to the criminal standard of proof. This prevents the criminal system being "vexed by collateral challenges to concluded determinations of criminal responsibility, with potentially inconsistent outcomes".[8]

[16] The effect of s 49(1) is to make proof of a conviction in subsequent criminal proceedings conclusive evidence that the person convicted committed the offence. But s 49(2) "allows the judge to ease the straitjacket of conclusiveness" in exceptional circumstances by permitting a party to call evidence tending to prove that the person convicted did not commit the offence and, where appropriate, to direct that the issue of whether he or she did commit the offence be determined without reference to s 49(1), ie allowing the conviction to be put in evidence but not on the basis that it is conclusive.[9] Section 49 must, however, be interpreted in light of the fair trial rights recognised in s 25 of the Bill of Rights, particularly the right under s 25(e) to present a defence.[10]

[17] Because s 49(1) applies only to evidence "not excluded by any other provision of this Act" the question of admissibility of conviction evidence has generally been approached on the basis that the gateway provisions of s 7 (relevance) and s 8 (unfair prejudice) precede the application of s 49.[11] The interface between exclusion for unfair prejudice under s 8 and the orders available under s 49(2) to overcome potential prejudice has never been fully explored by this Court. In *Morton v R* William Young and O'Regan JJ commented (obiter), that:[12]

> [9] Section 49(1) applies only "if not excluded by any other provision of this Act". We see this as rendering s 49 subject to more specific provisions of the Act, for instance as to propensity and veracity. *As well, it might also bring*

---

8 *Morton v R*, above n 5, at [91] per Elias CJ.

9 At [93] per Elias CJ.

10 *Morton v R*, above n 5, at [36], [63]–[65] and [67] per William Young and O'Regan JJ, [109], [114] and [117] per Elias CJ and [132] per Glazebrook and Arnold JJ; and *Va'afuti v R* [2017] NZSC 142 at [18].

11 See for example *R v Bouavong*, above n 3, at [60]; *R v Taniwha*, above n 6, at [21]; *R v Tanginoa*, above n 4, at [38]; and *R v Carc* [2014] NZHC 709 at [105].

12 *Morton v R*, above n 5 (footnotes omitted and emphasis added).

> *into play s 8 which deals with the admissibility of evidence which may have an unfairly prejudicial effect on proceedings.* …
>
> …
>
> [14] … s 8 of the Evidence Act is an admissibility provision and therefore does not control the weight (conclusive or otherwise) to be given to evidence once admitted. In this appeal there is no issue as to the admissibility of the convictions. Therefore, the only escape from the s 49(1) prohibition on calling inconsistent evidence is via a finding of exceptional circumstances under s 49(2). *In cases where there is no practical necessity for evidence to be given as to the prior conviction, s 8 might provide a mechanism for exclusion on the basis of the risk that such evidence would have an unfairly prejudicial effect on the proceeding. There is, however, likewise scope for the view that an effect which is mandated by s 49(1) should not be regarded as unfairly prejudicial if the circumstances are not exceptional.* Because it is not relevant to the determination of this appeal, we leave for another day the relationship between ss 8 and 49.

[18] In both *Morton v R* and *Va'afuti v R*, however, the Supreme Court declined to determine the issue because the cases could be decided on the basis of s 49 alone. Likewise, we consider that this is not the right case to determine the question of how ss 8 and 49 relate; as we discuss next, we are satisfied that unfair prejudice will not result from admitting evidence of Mr Aononu's conviction.

Unfair prejudice

[19] We do not accept Mr Speed's argument, relying on *Bouavong* and *Tanginoa*, that evidence that conclusively proves an essential element of the subject offence must be unduly prejudicial and excluded by s 8. This approach cannot stand in light of the decisions in this Court and the Supreme Court on this point.

[20] *Bouavong* proceeded on the agreed basis that the reference in s 49(1) to the evidence of the convictions not otherwise being excluded by the Act required the Court to be satisfied before permitting the convictions to be relied on that the evidence should not be excluded under s 8(1) on the ground that the probative value of the evidence was outweighed by its prejudicial effect.[13] This assessment included consideration of whether the evidence the Crown sought to adduce should be excluded under s 8(2) on the ground that reliance on s 49 would deprive the accused of an effective defence.

---

13 *R v Bouavong*, above n 3, at [60].

[21] Toogood J considered the probative value of the proposed evidence to be marginal, given that the Crown would be calling the same evidence even if the convictions were adduced. He balanced that fact against the effect on the defendant's right to offer an effective defence,[14] particularly the right under s 25(f) of the Bill of Rights to examine prosecution witnesses. In his view offering evidence of previous convictions as the Crown proposed would deprive the defendants of their opportunity to test the evidence offered against them on essential elements of the charges and thereby deprive them of their ability to offer an effective defence of their choosing. That the convictions were the result of guilty pleas accentuated the unfair prejudice because the supposed evidence of guilt would remain untested by any Court.[15] Toogood J concluded that:

> [93] In my view, there could be no doubt that it would be highly prejudicial to the accused in this case to close off aspects of the very live issues for decision by the jury. In the particular circumstances of this case, where the strength of the evidence on those issues had not previously been tested and determined, I did not consider it to be an answer to the prospect of prejudice to the defence to say that defences related to other issues (such as proof of the individual accused's actual involvement, state of knowledge and intent) remained open. To do so would be tantamount to the Crown and the trial judge usurping the right of the accused to decide the nature of the defence case, even if that was no more than simply putting the Crown to proof of all ingredients.

[22] Toogood J considered that, if he was wrong to exclude evidence under s 8(1), exceptional circumstances would have existed under s 49(2) because the case was of a kind where the consequences of applying s 49(1) were not intended by the legislature, ie where an accused's guilty plea was sought to be relied on merely to bolster the Crown's case against a co-accused.[16] He considered, however, that a direction under s 49(2)(a), permitting evidence tending to disprove the conclusiveness of the convictions, would not appropriately put the facts in issue in the absence of defence evidence.

[23] In *R v Tanginoa* Potter J referred to *Bouavong* and took a similar approach, treating the requirements of s 8 as pre-requisites to the admission of convictions for the purposes of s 49:[17]

---

14 Evidence Act 2006, s 8(2).
15 *R v Bouavong*, above n 3, at [75].
16 At [104]–[105].
17 *R v Tanginoa*, above n 4.

> [46] The facility provided by s 49 for the Crown to admit evidence of a conviction as conclusive proof that the person committed the offence cannot be utilised if it will have an unfairly prejudicial effect on the proceeding and, in particular, the right of an accused person to offer an effective defence.
>
> [47] The entry of a guilty plea by an accused is his confession of guilt to the offence charged. In the case of each of Mr Naupoto and Mr Wolfgramm this involves admission that the conspiracy respectively charged existed, and that he was party to it. But the evidence that establishes the essential elements of the charges against them has not been tested at trial and has not been admitted by the three accused. They are entitled to offer an effective defence which challenges both that a conspiracy has been established, and, if so, that the accused in question was a party to it.

[24] The approach taken in these cases is inconsistent with this Court's decisions in *McNaughton v R* (which pre-dated both *Bouavong* and *Tanginoa* but, inexplicably, was not cited in either) and *R v Taniwha* (decided after *Bouavong* and only two days before *Tanginoa* and therefore, understandably, not cited).[18] In *McNaughton* the Court approved the first instance ruling in which MacKenzie J held that:[19]

> The general rule in s 49(1), which contemplates that where the conviction of a person for an offence is relevant to the guilt or innocence at another trial, indicates that the accused at the second trial will not generally have the opportunity to test the aspect of the Crown case which is the subject of that conviction. That is consistent with the view that the ability to advance the defence available to the other party is not a necessary adjunct to the right to a fair trial.

[25] In *R v Taniwha* the Court, citing *McNaughton v R*, confirmed that unfair prejudice will not necessarily result from allowing the conviction of a co-accused to be adduced where the effect is to close off some live issue that might otherwise have been relied on as part of a defence.[20] It is clear, too, from the more recent decisions of the Supreme Court in *Morton v R*[21] and *Va'afuti v R*[22] that one of the effects of s 49, both anticipated and intended, is that a defence that might otherwise have been available may be restricted or even precluded. In *Morton* the Chief Justice referred to the fact that s 49(1) applied to cases where the commission of the offence proved by

---

18 *McNaughton v R* [2011] NZCA 588, approving *R v Cunnard* HC Nelson CRI-2010-442-026, 2 May 2011.

19 *R v Cunnard*, above n 18, at [14].

20 *R v Taniwha*, above n 6, at [42]–[44].

21 *Morton v R*, above n 5, at [64]–[65].

22 *Va'afuti v R*, above n 10, at [19].

the conviction is itself an element to be proved in the case against the defendant.[23] In *Va'afuti* Glazebrook J observed that:[24]

> There is no doubt that s 49 has the purpose and will have the effect in many cases of restricting a defence that might otherwise be available. …
>
> …
>
> Even where evidence does bear directly on the element of the offence, not displacing s 49(1) may accord with the policy behind the section in light of the Bill of Rights. …

[26] It is therefore settled that the fact that the conviction evidence would close off an otherwise live issue that the defendant may have raised will not, of itself, result in unfair prejudice.

[27] Mr Speed also argued that in cases involving conspiracy adducing evidence of the conviction of an alleged co-conspirator could have the effect of reversing the onus of proof, effectively placing the burden of disproving the offence on the defendant, regardless of any s 49(2) directions. He relied on the following observations by William Young and O'Regan JJ in *Morton* in relation to the differences between admissibility of convictions without a presumptive (ie able to be rebutted) or conclusive effect and those admitted as presumptive or conclusive (which is the effect of s 49(1)):[25]

> [51] Say A and B are charged with conspiring with each other to commit a crime and A pleads guilty. Under a presumptive provision … the admission of the conviction of A would serve to reverse the onus of proof with the result that the jury should convict B unless satisfied of innocence on the balance of probabilities. This was described by Sir John Smith as "a result which was surely never intended and is contrary to all principle". Despite this expression of opinion, English courts have sometimes adopted this approach. …
>
> [52] In a New Zealand case of the kind postulated in [51], s 49 of the Evidence Act, if applied, would result in B having no defence unless the Judge concluded that there were exceptional circumstances warranting orders under s 49(2).

---

23 *Morton v R*, above n 5, at [94].

24 *Va'afuti v R*, above n 10, at [19] and [21] (footnotes omitted), citing *Morton*, above n 5, at [64]–[65] and [94].

25 *Morton v R*, above n 5 (footnotes omitted).

[28] We accept Mr Speed's criticism that the Judge failed to address this aspect of the discussion in *Morton*. We therefore turn to consider specifically the application of s 49 to the charge of conspiracy.

[29] The scenario described in *Morton* of an alleged conspiracy between A and B, with A having pleaded guilty, was drawn from a commentary by Sir John Smith in the Criminal Law Review.[26] That commentary, and the relevant passage in *Morton*, referred to cases in the English jurisdiction relating to s 74 of the Police and Criminal Evidence Act 1984 (UK), which provides that a conviction will be presumptive proof that the person convicted committed the offence. *Morton* cited only part of the commentary, which went on to consider the situation of a three-person conspiracy:[27]

> Presumably a conviction on a plea of guilty can be taken to prove only those facts which are necessarily implicit in it. So where A pleads guilty to a charge of conspiracy with B and C, his conviction is, by the terms of s 74, admissible in evidence upon the trial of B, or C, or both, and establishes that there was a conspiracy to which A and either B, or C, or both, was, or were parties. The onus of proof thus remains with the Crown to prove in the usual way that B, or C, or both was or were party to the conspiracy. The jury might, quite properly, find that it is not proved that either B or C was a party to the conspiracy.

[30] This commentary appeared in relation to the decision in *R v Lunnon* (an alleged four-person conspiracy in which one of the defendants had pleaded guilty) and also referred to *R v O'Connor* (a two-person conspiracy in which one defendant had pleaded guilty) and *R v Robertson* (where the guilty pleas of the co-accused had not been of conspiracy, which was the charge the appellant faced).[28]

[31] In *R v Lunnon*, in which four co-accused were charged with conspiracy to steal and one pleaded guilty before trial, the Court of Appeal of England and Wales held that the evidence of the conviction was admissible as against the others. The appellant contended that to adduce the evidence of the co-conspirator's conviction:[29]

> [E]ffectively undid the ordinary process of trial by which the Crown are required to prove the case against the accused … the onus, instead of being on the Crown, would have rested on the appellant to show on a balance of

---

26 JC Smith "Conspiracy — admissibility of plea of guilty by co-conspirator" [1988] Crim LR 456.
27 At 456.
28 *R v Lunnon* (1989) 88 Cr App R 71 (CA); *R v O'Connor* (1987) 85 Cr App R 298 (CA); and *R v Robertson* [1987] QB 920 (CA).
29 *R v Lunnon*, above n 28, at 74.

> probabilities that [the conspirator who had pleaded guilty] was, in fact, not guilty of the conspiracy to which he had pleaded guilty.

[32] The Court of Appeal distinguished *O'Connor* and *Robertson*:[30]

> In the judgment of this Court the instant case on its facts falls within a spectrum represented at one end by *O'Connor* … a case involving only two conspirators, and at the other end by *Robertson* … where the pleas of guilty being adduced in evidence were not directly upon the count of conspiracy that the accused was facing. Understandably, Mr Spencer urges the similarities with *O'Connor*. *But the crucial distinction between that case and this is that in O'Connor two men were indicted jointly on one account of having conspired together "and with no-one else" ... whereas here there were three co-conspirators still standing trial, albeit one of them the wife of the accused who had pleaded guilty. Thus it was perfectly possible to adduce the evidence of [the co-conspirator's] conviction as being relevant essentially to the first limb of the Crown's case namely, the existence of a conspiracy, rather than to the second limb, that any particular defendant was party to it*.

[33] The present case concerns an alleged three-person conspiracy. If the facts were that Mr Aononu alone had pleaded guilty to the conspiracy to which the Crown alleges Mr Broome was party, adducing evidence of the conviction to prove the fact of the conspiracy would not preclude Mr Broome from asserting that he was not party to that conspiracy. The fact that he could not put the existence of the conspiracy in issue would be well within the accepted effect of s 49. We do not see that the position would be any different if Mr Jackson's conviction were also put in evidence. In either case, it would be open to Mr Broome to assert that he was not party to the proven conspiracy. We are therefore satisfied that the evidence is admissible under s 49(1), though an issue does arise as to whether exceptional circumstances exist for the purposes of s 49(2).

Exceptional circumstances under s 49(2)

[34] Judge D J Sharp did not consider it necessary to discuss s 49(2) but it was raised before us by Mr Carruthers, for the Crown. He acknowledged that the dates and lack of any other named co-conspirators would likely lead an attentive jury to conclude that Mr Broome must have been the person with whom Mr Aononu

---

30 At 77 (emphasis added).

conspired and submitted that an order under s 49(2)(a) would therefore be appropriate.[31]

[35] The "exceptional circumstances" test under s 49(2) is a high one, justified by the policy considerations underpinning s 49(1), namely:[32]

(a) the saving of time and expense in re-litigating matters already determined;

(b) the availability of relevant evidence that is highly probative;

(c) the fact that it would be inconsistent with the policy of the criminal law if such evidence were to be excluded given that convictions are a sufficient basis to impose grave penalties; and

(d) the need to avoid having the question of a person's guilt or innocence subject to potentially conflicting decisions by different juries.

[36] In *Morton* the Supreme Court discussed, at some length, the circumstances that might amount to exceptional circumstances for the purposes of s 49(2). William Young and O'Regan JJ acknowledged that even if a case, viewed solely in terms of s 49 and its underlying policies, might suggest that exceptional circumstances do not exist, that is not conclusive without also considering ss 25 and 5 of the Bill of Rights.[33] Nevertheless, s 25 was not seen as "automatically trumping admissibility rules merely because they may operate otherwise than in the best interests of a defendant" and that when read with s 5, led to "some flexibility to the fair trial standards which it stipulates".[34] They concluded that:

> [65] Against this background we consider that in many circumstances — indeed probably in most circumstances — s 49(1) will not operate in a way that is inconsistent with ss 25 and 5 of the New Zealand Bill of Rights Act. In particular:

---

31 This acknowledgement marked a departure from the position the Crown took in the District Court, where it maintained that the evidence could be safely adduced in a form that simply omitted any reference to Mr Broome.

32 *Morton v R*, above n 5, at [125] per Glazebrook and Arnold JJ.

33 At [63].

34 At [64].

(a) We do not accept that the exceptional circumstances test is necessarily satisfied whenever the prior conviction bears on the conduct of the defendant in connection with the offence. …

(b) Nor is it critical that the person previously convicted was not the defendant. The legislative history to s 49 shows that it was always envisaged that in cases involving receiving or of being an accessory, proof of a prior conviction of a third party (for instance for theft in the case of receiving) may be used to prove the commission of that offence.

[37] Elias CJ summarised the position in this way:[35]

> The fact that the commission of the offence of rape is an element of the offence with which the appellant is charged as a party does not give rise to exceptional circumstances in itself. The commission of the offence has been established by jury verdict. No basis for doubting the convictions has been put forward … Permitting reconsideration of the commission of the offences of rape by the principals is contrary to the policy of s 49(1) in the absence of circumstances raising any doubt as to the correctness of the verdicts or questions of trial fairness.

[38] In the present case there has not, of course, been a prior jury trial. Nevertheless, the status of a conviction entered following a guilty plea ought not be regarded as being of lesser probative value than one following trial. Nor is there any suggestion the safety of the conviction should be in doubt.

[39] We nevertheless recognise that unfairness could result from the effect of s 49(1) in this case because of the limited scope of the evidence against all three men. The Crown asserts that Mr Broome was the connection between Mr Aononu and Mr Jackson. Its case rests mainly on the same text and surveillance evidence that also formed the basis for Mr Aononu's (and Mr Jackson's) conviction. Whilst Mr Broome's claim that he was not party to the conspiracy is not formally inconsistent with Mr Aononu's conviction, his assertion that these communications had an innocent purpose will have the effect of tending to disprove the existence of the conspiracy, an outcome that is precluded unless there are exceptional circumstances for the purposes of s 49(2).

[40] For this reason, we accept that exceptional circumstances will likely be made out for the purposes of s 49(2)(a), though we do not consider it appropriate to make a

---

[35] At [107].

direction; that will be a matter for the trial judge. At this point we do not see any justification for a direction under s 49(2)(b) but that, too, will be a matter for the trial judge.

Mr Aononu's other convictions

[41] The Crown also seeks to adduce evidence of Mr Aononu's convictions for conspiring with people other than Mr Broome to supply methamphetamine, possessing methamphetamine for supply and possession of precursors, materials and equipment with the intention that they be used in the manufacture of methamphetamine.

[42] The Crown proposes to use this evidence as circumstantial evidence; the fact that Mr Aononu was dealing in methamphetamine at the same time as he was having conversations and exchanging text messages with Mr Broome is one piece of evidence that points towards those communications being about methamphetamine rather than having an innocent purpose as the defence asserts.

[43] The position is very similar to that considered by this Court in *R v Taniwha*, in which the Crown sought to adduce at the respondent's trial convictions of a co-defendant for methamphetamine dealing over the same period as the respondent's alleged offending on grounds that the convictions pointed towards texts between the two relating to methamphetamine.[36] The Court held this was not unfairly prejudicial; it was for the jury to decide whether there was any connection between the co-defendant's convictions and the communications between the two.[37] Mr Speed acknowledged that *Taniwha* did pose a difficulty for him. Nevertheless, he argued that undue prejudice would result from admitting the evidence because it would make it unfairly difficult for Mr Broome to advance the argument that the communications were not about methamphetamine.

[44] We do not accept this argument. Undoubtedly, the evidence that a man convicted of dealing in methamphetamine during the very period that Mr Broome claims to be having innocent communications with him carries a degree of prejudice.

---

36 *R v Taniwha*, above n 6.
37 At [36].

But we do not see it as unfair prejudice. It remains open to Mr Broome to assert, in cross-examination and in submission to the jury, that the communications were not about methamphetamine. This part of the appeal fails.

Propensity evidence

[45] In 2004 Mr Broome was convicted on one charge of possessing precursors and equipment. The Crown wishes to adduce the evidence to show that the communications between Mr Aononu and Mr Broome were likely to be about methamphetamine rather than another, innocent, topic.

The District Court decision

[46] The Judge identified the relevant issue at trial as being the defence contention that the communications between Mr Jackson and Mr Broome related to legitimate attempts to sell property rather than methamphetamine. He considered that the issue should be determined:[38]

> [W]ith reference to both Mr Broome and Mr Jackson being known as persons who possessed the knowledge and skills which could have been applied in furtherance of an alleged criminal conspiracy.

[47] Acknowledging the fact that, for Mr Broome, the propensity evidence was limited to only one conviction from 2004 for possession of equipment and precursors, the Judge nevertheless considered that the linkage between possession of equipment and precursors and the current allegations of conspiracy to manufacture and possession of methamphetamine was inherently unusual and the knowledge associated with the use of such items is a particular state of mind and unusual type of knowledge.[39] He concluded that the evidence had significance and a real probative basis and (implicitly) was not unfairly prejudicial though he recognised a need for directions as to the appropriate uses of the evidence by the jury.

---

38 *R v Broome*, above n 1, at [78].

39 At [79] citing *R v Atkinson* [2016] NZHC 3171; leave to appeal declined in *Vijn v R* [2017] NZCA 4.

Appeal

[48] The admissibility of evidence as propensity evidence is controlled by ss 40–43 of the Evidence Act. For evidence to be admitted as propensity evidence it must satisfy the definition of "propensity evidence",[40] have probative value "in relation to an issue in dispute",[41] and its probative value must outweigh the risk that the evidence may have an unfairly prejudicial effect on the defendant.[42]

[49] Mr Speed's first argument was that Mr Broome's 2004 conviction was not propensity evidence. Propensity evidence is defined as evidence that tends to show a propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events or circumstances with which a person is alleged to have been involved.[43] This definition requires a propensity with a degree of specificity linked in some way to the conduct or mental state said to constitute the offence.[44] A single incident may constitute propensity evidence.[45]

[50] Mr Speed argued that, having identified the nature of the propensity evidence as showing knowledge, the Judge wrongly treated it as satisfying the definition of propensity evidence. He relied on this Court's observations in *Rei v R* that knowledge in itself was not evidence of propensity:[46]

> [34] At the outset we note that the tendency of the evidence to prove the appellant's knowledge of methamphetamine manufacture is not of itself "a propensity". The definition of propensity in the *Shorter Oxford Dictionary*, which was adopted by this Court in *R v Tainui*, is an "inclination, tendency, bent, disposition". Knowledge of something does not fall within that definition. While it makes sense to talk of someone having a propensity to become angry or to be sexually attracted to children, it does not make sense to say someone has a propensity to know something; a person either knows something or does not.

[51] Mr Speed did not, however, quote the further observations that the Court made immediately afterwards:

---

40 Evidence Act, s 40(1)(a).
41 Sections 7 and 43(1).
42 Section 43(1).
43 Section 40(1).
44 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [3].
45 *Latifi v R* [2014] NZCA 11; and *Patten v R* [2014] NZCA 486.
46 *Rei v R* [2012] NZCA 398, (2012) 25 CRNZ 790 (footnotes omitted), citing *R v Tainui* [2008] NZCA 119 at [53].

> [35] This does not mean, however, that the evidence of the appellant's previous convictions is not propensity evidence. The evidence still tends to show that the appellant has a propensity to be involved in the manufacture of methamphetamine. The tendency of the evidence to show that propensity is sufficient, on the plain words of s 40(1), to make the evidence propensity evidence. There is nothing in the Evidence Act to suggest that because the evidence may also be probative in a way that does not depend on propensity reasoning, that it should not be treated as propensity evidence. The upshot is that in assessing the probative value of the evidence the Court must assess, in light of the issues to be determined at trial, both its tendency to prove the appellant's propensity to be involved in methamphetamine manufacturing and its tendency to prove the appellant's knowledge of the materials and processes necessary for methamphetamine manufacture.
>
> (Footnotes omitted.)

[52] Likewise, in this case, whilst we agree that the Judge wrongly proceeded on the basis that knowledge could constitute propensity evidence, the evidence may nevertheless have been capable of showing propensity of the kind required by s 40.

[53] In the District Court the Crown characterised the evidence of previous convictions as showing a tendency to be involved with the manufacture of methamphetamine because Mr Broome knew about the equipment and precursor materials required to manufacture methamphetamine and had a tendency to be in possession of equipment and precursor materials used in the manufacture of methamphetamine.[47]

[54] On appeal Mr Carruthers maintained that position, arguing that the previous conviction disclosed a state of mind, namely an interest in methamphetamine, and a tendency to engage in the manufacturing process albeit at a distance from the actual act of manufacturing.

[55] The possession of precursors and equipment for the purpose of manufacturing methamphetamine is relatively unusual. In our view, a previous instance of such behaviour does show a tendency towards a particular state of mind, namely an interest or preparedness to be involved in the manufacture of methamphetamine. We therefore accept that Mr Broome's previous conviction of such an act could constitute propensity evidence.

---

47 *R v Broome*, above n 1, at [45]–[46].

[56] This brings us to the probative value of this conviction. Mr Speed argued that the probative value of the evidence was so low that it did not outweigh the risk of unfair prejudice at trial. When assessing the probative value of propensity evidence the nature of the issue in dispute must be taken into account.[48] In addition, other specified matters may be taken into account, including the frequency of the acts constituting the propensity evidence, the connection in time between those acts and the subject matter of the current allegations, the extent of similarity and the extent to which the acts are unusual.[49]

[57] It is common ground that the issue in this case is whether the communications between Mr Broome and Mr Jackson, which Mr Broome claims were innocent dealings relating to the sale of items belonging to Mr Jackson, were in fact coded messages relating to methamphetamine. Mr Carruthers argued that the interest that Mr Broome has previously shown in the manufacture of methamphetamine (evidenced by his previous conviction) is highly probative given the current allegation against him that he was conspiring to manufacture methamphetamine. Mr Carruthers acknowledges that the previous offending and the current allegations are not closely related in time but points to the similarities between them, namely that in both cases Mr Broome was involved in a plan to manufacture methamphetamine but took a role removed from the actual manufacture, demonstrating an interest in manufacturing and a willingness to play a part in bringing it about.

[58] Mr Speed argued that the previous offending was both unremarkable and significantly different in character from the current allegations and so had a very low probative value in relation to the issues in the case. He relied on the observation in *Freeman v R* that:[50]

> [P]ropensity evidence which reveals no more than a propensity to commit offences of the kind alleged, despite having some probative value, will often be inadmissible given the inevitable associated prejudice. This is particularly so when the characteristics of the offending in question are unremarkable.

---

48 Evidence Act, s 43(2).
49 Section 43(3).
50 *Freeman v R* [2010] NZCA 230 at [21].

[59] However, given we have already concluded that possession of precursors and equipment for the manufacture of methamphetamine is in itself relatively unusual, we do not consider that the probative value of the propensity evidence here is outweighed by its associated prejudice. There is a high degree of coincidence in Mr Broome being accused in both 2004 and 2015 of acting in such a way as to facilitate others to manufacture methamphetamine. The evidence has probative value in relation to the current charge that outweighs its prejudicial effect.

[60] We also concur with the Judge that an appropriate jury direction will be able to meet any risk of unfair prejudice.

Result

[61] The application for leave to appeal is granted.

[62] The appeal is dismissed.

[63] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest permitted.

Solicitors:
Crown Law Office, Wellington for Respondent