ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF WITNESS PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011.

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

DISTRICT COURT ORDER [2018] NZDC 22994 PROHIBITING PUBLICATION OF THE APPELLANT'S NAME, THE DATE, PLACE AND LOCATION OF THE EARLIER OFFENDING, AND THE LOCATION OF THE CURRENT OFFENDING REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA714/2018
[2020] NZCA 338

BETWEEN	WM (CA714/2018) Appellant
AND	THE QUEEN Respondent

Hearing:	24 June 2020
Court:	Brown, Brewer and Hinton JJ
Counsel:	A N Isac QC and E J Watt for Appellant F R J Sinclair for Respondent
Judgment:	11 August 2020 at 10.30 am

JUDGMENT OF THE COURT

A The appeal against conviction is dismissed.

B Order prohibiting publication of name, address, occupation or identifying particulars of the identity of the appellant's ex-wife pursuant to s 202 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] In May 2018, a jury found WM guilty on seven charges of sexual violation by unlawful sexual connection and one charge of indecent assault on a boy under 12. The charges were representative and related to historical sexual offending against his son.[1]

[2] WM now appeals his convictions on the basis the jury heard evidence which it should not have heard and that this evidence was used in a way which was prejudicial to WM. He submits that, collectively, these errors led to a miscarriage of justice.

[3] We must allow WM's appeal if we are satisfied that a miscarriage of justice has occurred for any reason.[2] A miscarriage of justice means any error, irregularity or occurrence in or in relation to or affecting WM's trial that has created a real risk that the outcome of the trial was affected; or has resulted in an unfair trial.[3]

Background

[4] The complainant, A, is the appellant's son. He is now aged 27. The Crown's case was that WM offended sexually against A between 1996 and 1999 when A was aged between four and seven years. In 1999, WM and his wife separated. The Crown's case was that further offending occurred between 2000 and 2002 when A resumed contact with WM. A was aged between seven and 10 years during this period.

[5] The seven representative charges of sexual violation by unlawful sexual connection on which WM was convicted applied to offending across both periods. They related to allegations of anal sex and forcing A to perform oral sex. The indecent assault charge related to allegations WM would touch A's penis at the family home.

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1 WM was also convicted of a charge of assault with a weapon, but that conviction is not appealed.
2 Criminal Procedure Act 2011, s 232(2)(c).
3 Section 232(4).

[6] In 2011, WM's wife made a complaint to the police alleging she had been raped by WM regularly during a period of about 11 years. WM pleaded guilty to two representative charges of rape and was sentenced in May 2012 to three years' imprisonment. A was present at the sentencing.

[7] A complained to the police about WM's offending against him in early 2015. WM was charged and first stood trial in December 2017. The jury could not agree on their verdicts and so a retrial was ordered. The second trial took place in the period 30 April 2018 to 14 May 2018.

[8] Prior to the first trial, the Crown applied to lead evidence of WM's convictions for raping his wife as propensity evidence (the prior convictions). Propensity evidence means evidence that tends to show a person's propensity to act in a particular way or to have a particular state of mind.[4] Mr Steedman, who acted for WM in both trials, successfully opposed the application.

[9] Subsequently, Mr Steedman formed the view that admitting the evidence could have tactical advantage for WM's case. WM agreed. WM's defence to A's allegations was that they were false because A wanted revenge for the way his mother was treated, for the way he was treated as a child, and for what was said to amount to a rejection of A by WM in 2015 shortly before A made his complaints to the police. Mr Steedman and WM decided to put the evidence of the prior convictions before the jury as part of this defence. We will consider in detail later the process behind and the reasoning for the making of this decision. At this point we simply note that WM was a member of the Exclusive Brethren Church and this influenced his entire life, including his behaviour as a husband and a father.

[10] At the first trial the evidence of the prior convictions was put before the jury in the form of a written admission of facts in the following terms:

> 1. The Defendant, [WM], was convicted in 2012, in the … District Court, of two representative counts or charges, of sexual violation by rape.

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4 Evidence Act 2006, s 40(1).

2. The charges related to numerous occasions the Defendant raped his then wife, [C], while they were married.

3. He pleaded guilty to these charges, and was sentenced to a term of imprisonment, which he served.

4. The summary of facts which he was sentenced on included the following agreed facts:

    5. The Defendant and the victim [C] were married in 1988. They had four children together; two sons and two daughters. They separated in 1999 soon after the birth of their fourth child (the youngest daughter) and are now divorced.

    6. The victim left the Defendant to move temporarily into a women's refuge when her youngest daughter was around two months old.

    7. Sexual intercourse was forced upon the victim on countless occasions [in the period of almost 11 years]. The victim was sexually violated by rape by the Defendant on numerous occasions over the years of their marriage. She cannot recall exact specifics or occasions where these sexual violations took place.

    8. The forced sexual intercourse between the Defendant and the victim increased with frequency soon after the birth of the couple's third child ….

    9. The sexual intercourse abuse that occurred took various forms. This included the Defendant repeatedly elbowing the victim while they lay in bed until sexual intercourse took place, withholding items the victim needed unless sex took place and the Defendant dragging the victim into their marital bedroom and forcing penile penetration upon her.

    10. At times the Defendant would ask the victim to join him in bed. The victim would then ask whether sexual intercourse was his intention and the Defendant would deny it was, yet intercourse would nevertheless occur once they were in their bedroom.

    11. The victim described the Defendant as having chosen to "help himself" with regards to sex as and when his moods dictated.

[11] Before the second trial Mr Steedman and WM agreed to follow the same trial strategy and put the evidence of the prior convictions before the jury in the same way.

[12] WM gave evidence in both trials.

The Appeal

[13] Mr Isac QC for WM submits the evidence of the prior convictions should never have been put before the jury. That was an error by counsel and, in his submission, has resulted in a miscarriage of justice. Further, Mr Isac submits that once admitted the evidence was not adequately regulated by counsel or the trial Judge. Accordingly, the trial Judge should not have allowed the evidence to be admitted. Mr Isac advances two grounds of appeal:

> 2.1 First, the introduction of the marital rape evidence by the appellant, on the advice of counsel, and the uncontrolled use of that evidence by the Crown to support its case, was a trial error that created a real risk of unsafe verdicts.
>
> 2.2 Second, the Trial Judge was wrong to exercise his discretion under s 9 of the Evidence Act 2006 to admit the marital rape evidence despite the consent of the parties. There is no record of the decision or reasons that led the Trial Judge to admit the evidence under s 9.

The first ground of appeal

[14] Mr Isac submits Mr Steedman erred in advising WM to admit the prior convictions evidence because the value to the defence of the evidence was overwhelmed by its unfairly prejudicial effect. The defence could have been run effectively without admitting the evidence.

[15] Mr Isac also points to the use made by the prosecutor of the prior convictions evidence. The submission is that the prosecutor repeatedly invited the jury to use the evidence as supporting guilt on the sexual charges.

[16] WM, in his affidavit of 2 October 2019, sets out his recollection of the advice given by Mr Steedman. He agrees that he discussed the tactic and accepted Mr Steedman's advice.

[17] Mr Steedman, in his affidavit of 18 October 2019, says:

> 11. THE decision to admit evidence of [WM's] prior convictions for marital rape was a decision which I considered to be appropriate in all of the circumstances. I do not consider that this was a mistake. Should a similar situation arise in the future I would want to do exactly the same again.

[18] Mr Steedman deposes that he spent a lot of time with WM discussing his defence. He makes the point that he did not consider the evidence of the prior convictions to be propensity evidence and opposed the Crown's application for that reason. The evidence, when admitted by the defence, did not mean the evidence could be used to show propensity. Mr Steedman deposes:

> 18. SO far as [WM] and I were concerned the issue of the marital rapes filled some of the gaps in the puzzle. [A's] knowledge of the marital rapes went a long way towards providing an explanation for his decision to make a false complaint of a sexual nature against his father. [WM's] position was that [A's] antipathy towards his father had been fanned over the years by his mother, [WM's] former wife. Establishing a contextual background against which [A's] allegations could be measured would be helpful. This would also make it possible for [WM] to give his evidence with complete candour. Having said that, [WM] and I both felt strongly that it would be completely inappropriate for this evidence to be utilised as propensity evidence.

[19] After Judge Lynch excluded the evidence of the prior convictions, Mr Steedman had frequent meetings with WM to finalise trial strategy and to prepare WM to give evidence. Mr Steedman deposes:

> 26. THE more [WM] and I began to prepare for trial the more we realised that my ability to cross-examine [A] effectively would be compromised significantly by the exclusion of all evidence in relation to the marital rapes. We both considered that our ability to present a coherent defence argument would be similarly affected if we were unable to make it clear to the jury why the marriage broke down and why [A] grew to hate his father.
>
> 27. AS our trial preparation continued I formed the view that getting to the truth of the matter so far as [A] was concerned would be a great deal easier if nothing was off limits. [A's] knowledge of the way in which his father had mistreated his mother was something which had plainly had a huge impact on him. [A's] knowledge of the marital rapes provide an explanation for the allegations which he later made against his father. Although [WM] had been an authoritarian father to the younger [A], there appeared to be no other aspect of his treatment of [A] which could logically give rise to false allegations of sexual offending.
>
> 28. BOTH [WM] and I were keenly aware of the risks which were associated with disclosure of the marital rapes. That is why we discussed this issue so frequently.
>
> 29. THERE were other reasons at play as well.
>
> 30. AT all material times [WM] was a member of the Brethren Church. Although on different occasions he had been excluded by the church, his faith remained of critical importance to him and his allegiance to the church remained unswerving. [WM] made it very clear that his faith came first and

> that as a result he needed to be able to put forward a defence which was transparently honest.
>
> 31. IT was always recognised that [WM] would have to give evidence on his own behalf. He considered that he could do this effectively only if he was able to speak with complete candour about the issues which had brought about the breakdown of his marriage and which so badly affected his relationship with [A]. He expressed the view to me that his evidence would be more compelling and more believable if he was free to talk about all of the issues which had impacted on his relationship with [A]. I agreed with him.

[20] Mr Steedman met again with WM on 11 May 2017 and after further lengthy discussion it was agreed that the evidence of the prior convictions should be put before the jury:

> 35. WHILE [WM] says in his Affidavit that he accepted my advice to adduce the evidence, the reality is that this was an issue which we had both agonised over for months. We had talked about it frequently. We had weighed up the advantages and disadvantages of letting the evidence in. [WM] understood the issues involved right from the very beginning. The work which I undertook in trial preparation was far more collaborative than is normally my practice. Even after we made our decision I continued to worry. My assessment was that [WM] was more enthusiastic about the prospect of disclosure being made to the jury than I was.
>
> 36. I am unable to think of a single trial which I have undertaken when my client was more involved in the decision-making process than in [WM's] case. I acknowledge nevertheless that, ultimately, responsibility for any decision such as this always rested with me. That said, I have absolutely no doubt that at the time when this decision was made [WM] was fully aware of the advantages and disadvantages of admitting this evidence and that he and I were in complete agreement that we needed to revisit the pre-trial ruling urgently.

[21] Mr Steedman considered that either WM's son had suffered the sexual abuse he complained of or had some other compelling reason to hate WM which drove him to make false complaints. Mr Steedman deposes that both WM and he thought that the only way to explain this to the jury was by acknowledging the toxic effect which the prior convictions eventually had on the relationship between A and his father. Mr Steedman says further:

> 50. I note that [A] wrote loving letters to his father for several months after [WM] began his sentence of imprisonment for the marital rapes. Both [WM] and I thought that it was important that the jury should have access to those letters. The only way that the letters could be put into their proper context was if the jury became aware that [WM] had been sentenced to a prison term for the rape of [A's] mother.

[22] As to the content of the written admission of facts, Mr Steedman deposes:

> 53. I agreed to the preparation of a Section 9 Notice because information which related to the 2011 prosecution for sexual violation needed to be given to the jury in a controlled and economical manner. The enormous impact which that offending subsequently had on [A's] mother and on [A] himself was highly relevant to the issues which the jury needed to review, but I considered that we needed to minimise the illegitimate prejudice attaching to this evidence by preparing a Section 9 Notice. I acknowledge that the Notice makes for disturbing reading. I considered that its contents were appropriate nevertheless. This was aberrant behaviour which [WM] had freely acknowledged in 2011/2012. Importantly, he had entered guilty pleas. Acknowledging that behaviour again was in keeping with the defence stance that the defendant was consistently honest, regardless of the personal cost. Further, [A] claimed to have witnessed some of what had happened between his parents. Providing the jury with an unvarnished summary of the marital rapes also provided an explanation for [A's] hatred of his father.

[23] Mr Steedman summarises the defence case as follows:

> 54. THE defence case was put forward at both trials on the basis that [WM] was a flawed but honest man who could be expected to own up to his own transgressions. That is why he acknowledged during the course of his evidence that his parenting had often fallen below an acceptable standard (sometimes by a considerable margin) and that his treatment of his children was often cruel.

Discussion

[24] It is quite clear that WM, after extensive discussion with his counsel, agreed to put the prior convictions evidence to the jury in his first trial. He did so as part of an agreed trial strategy which would both enable him to present himself as a flawed but honest man and also provide a stark motive for his son to make false complaints against him.

[25] A defendant has the right to conduct his defence as he wishes. If he is convicted he cannot succeed on appeal by pointing out he accepted his trial counsel's advice and now wishes he had not. It is only if the advice given by counsel was not advice that competent counsel would have given, and the advice led to a miscarriage of justice, that an appeal on this ground will succeed.

[26] Mr Isac recognises this. He does not submit that Mr Steedman and WM did not reach agreement on the trial strategy. Mr Isac acknowledges that after the hung jury on the first trial WM and Mr Steedman continued to have confidence in their trial

strategy and exercised it again at the second trial. Mr Isac's point is that Mr Steedman was wrong to consider that the trial strategy would not be overwhelmed in effect by the prejudice attaching to the prior convictions. Mr Isac submits there were other strategies available, not requiring admission of the prior convictions, which could have challenged A's allegations and established motive for a false complaint.

[27] In our view, the trial strategy adopted by WM and Mr Steedman for both trials was logical and understandable in the context of the particular evidence in this case. There was a risk of undue prejudice in admitting the evidence of the prior convictions but it was a risk that was identified, discussed at length, and agreed between Mr Steedman and WM as worth taking.

[28] Importantly, the trial strategy was affirmed after the first trial resulted in a hung jury. In the first trial, Mr Steedman and WM were able to gauge the impact of the evidence on WM's defence, particularly in the way it exposed WM to cross-examination and in the way it enabled Mr Steedman to cross-examine A.

[29] We do not accept Mr Isac's submission that the evidence of the prior convictions was overwhelmingly prejudicial. The first jury was hung. The second jury acquitted WM on two specific charges of sexual offending.

[30] Further, as we have said, the context of the overall evidence in the trial is important. That evidence showed WM to be a violent, controlling and at times brutal husband and father. He was emotionally distant from A. The evidence of the prior convictions, in this context, would not have come as much of a shock to the jury. The difficult task for WM and Mr Steedman was to put a reasonable doubt in the minds of the jury about A's credibility and about WM's ex-wife's credibility (because her evidence included an allegation that on one occasion she saw WM in sexual contact with A). We cannot say that Mr Steedman, a very experienced counsel, was wrong to advance the trial strategy he carefully agreed with WM. It was advice available to competent counsel.

[31] The Supreme Court, in *R v Sungsuwan*, said this:[5]

> [66] There will be cases in which particular acts or omissions of counsel may in retrospect be seen to have possibly affected the outcome but they were deliberately judged at the time to be in the interests of the accused. In some cases the accused will have agreed or acquiesced – only to complain after conviction. Where the conduct was reasonable in the circumstances the client will not generally succeed in asserting miscarriage of justice so as to gain the chance of defending on a different basis on a new trial. Normally an appeal would not be allowed simply because of a judgment made by trial counsel which could well be made by another competent counsel in the course of a new trial.
>
> [67] But there will be cases, rare cases, as was recognised in *Pointon,* where the conduct of counsel, although reasonable in the circumstances in which it occurred, nevertheless can be shown to have given rise to an irregularity in the trial that prejudiced the accused's chance of acquittal (or conviction of a lesser offence) such that the appeal court is satisfied there was a miscarriage of justice. The court will always reserve the flexibility to identify and intervene to prevent a miscarriage of justice however caused.

[32] For the reasons given, we do not accept Mr Isac's submission that this is one of the rare cases where advice, although reasonable in the circumstances, nevertheless resulted in a miscarriage of justice.

Was the evidence of the prior convictions misused?

[33] Mr Isac's submission is that despite the evidence of the prior convictions not being admitted as propensity evidence it was effectively used as such. We do not accept this submission.

[34] In opening to the jury the prosecutor first mentioned the prior convictions as part of the narrative of the family's history. Later, he elaborated:

> Now I need to talk about the sexual violence within the family. During the time period the Crown says the defendant was abusing [A], you're going to hear about how he was sexually violent towards [C], his wife, as I mentioned earlier. You'll hear that he would repeatedly and violently rape her and that this occurred over the course of their 11 year relationship. He was charged with that offending in 2012, he admitted it, he pleaded guilty to it. He was sent to prison as a result. That is a period of time, once the defendant is in prison, it will become important in this trial and that you will hear some evidence about.

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5 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730, citing *R v Pointon* [1985] 1 NZLR 109 (CA).

> Now, the evidence about this is agreed. You are going to hear an agreed summary of the facts of the offending read to you. It includes that the victim, [C], was sexually violated by rape by the defendant on numerous occasions over the years of their marriage. She described the defendant as having chosen to, "Help himself with regards to sex as and when his moods dictated." Now it is agreed, members of the jury, because there is no dispute about it. There can't be; the defendant has pleaded guilty to it. But I need to confront that evidence straight away, members of the jury, because like the allegations here, they will have an emotional impact on you as people, the same as before you have to acknowledge that capacity for prejudice and sympathy so that you can park it and put it to one side, members of the jury.
>
> As His Honour has already told you, you must remember and apply the presumption of innocence. The defendant has pleaded not guilty to these charges so he has that presumption of innocence in relation to them. The offending that he has pleaded guilty to against his wife and you are going to hear about, that cannot and must not prejudice you against him. You are hearing about it, members of the jury, because it is a crucial part of what's going on in [A's] life at the time the Crown says he was being offended against.
>
> You can't understand what [A] says happened to him and why [A] has dealt with it the way he did without understanding what was going on, what has gone on, within his family. You can't understand what was going on within that family without understanding the relationship as it was between his parents. It would be wholly artificial, members of the jury, for his allegations, his evidence to be heard in a vacuum, to deny you the full picture. Because the Crown says that knowing and seeing how his father behaved towards his mother is critical, for instance, in understanding why [A] did not disclose the offending, why he made only a partial disclosure in 2005 and why he wasn't able to stop it at the time. It's also relevant to why [C], his mother, wasn't able to stop and intervene.
>
> Equally, members of the jury, the defence are going to say that what happened to [C] is part of the context in which these allegations have emerged, which of course are going to be said, I expect, to be false. So they're highly relevant to your assessment of the case and they're a crucial factor, like the Brethren Church, that's a contextual factor that cannot be gotten away from. But they cannot, as I said, be determinative. You cannot and must not think that just because the defendant offended against his wife, he probably offended against the son. As soon as you do that, members of the jury, the presumption of innocence which the defendant is entitled to, which we are all entitled to, is gone.

[35] There can be no criticism of those remarks. This was the purpose for which the defence wanted the evidence admitted. The prosecutor points to the Crown's perspective of how the evidence can be used, but disavows propensity reasoning and urges the jury to put aside prejudice.

[36] Mr Steedman, in his opening statement to the jury, emphasised the motives for WM's ex-wife to hate WM (including because of the prior convictions). The ex-wife

was an important witness not only for her description of family life but because of her allegation that on one occasion she saw an act of sexual offending by WM against A.

[37] Mr Steedman went on to submit:

> Now I'm going to do my very best to run the defence case in such a way that you have all of the information that you need and that's my wish and those are also my instructions from [WM] and he and I are going to make things harder for ourselves in a way than perhaps they need to be because of this, although my learned friend has told you about the marital rapes he did so only because we allowed him to. [WM] has elected to tell you about his 2012 convictions for rape. That was his decision and his decision alone. Had he not given me those instructions that we are to ensure that you have all of the information that you need you would never have known of his earlier offending against [C] and if ever you did find out it would be after the trial because our criminal justice system provides significant safeguards for people in the defendant's position and sometimes evidence is excluded because of the enormous prejudice which attaches to it and I have to acknowledge that this time last year I thought that that was what we would have to do, that we would have to exclude the evidence but [WM] has decided you need to know of those earlier convictions. You need to know of the prison term that he served, of the awful way that his offending against his wife … has reverberated down through the years. Having said that it has been agreed between counsel that we are not going to dwell over and over and over again on the details of that offending, the fact that he victimised his wife is what you need to know and that's acknowledged. Please do not lose sight of the fact that it is his decision that all cards are on the table.
>
> That brings me to the final issue which is prejudice. These are the issues that we have to contend with. This is a man who says, "I raped my wife, I know that, I pleaded guilty the first chance I got. I went to prison. I'm a rapist." And he also says, "As a father I fell short of the mark and I acknowledge that." And he also says, "I've been a member of the Brethren Church all of my life," a church that some people loathe but his perspective is that it's the church that's still even now means everything to him. So how is all of that going to impact on you? Well, please try to be true to your oaths. This trial is important not just because of its impact on the lives of the people involved but because trials of this sort, the really hard ones tell us whether or not our criminal justice system actually works.

[38] We conclude that having heard the prosecutor's opening address and Mr Steedman's opening statement, the jury knew there would be evidence of WM raping his wife and how the Crown and the defence thought them relevant to A's allegations. The jury had also received ample and proper advice to put the evidence into proper context and avoid unfair prejudice.

[39] A gave evidence of the family's way of life including the abuse he suffered at the hands of his father. In cross-examination Mr Steedman touched only lightly on

the prior convictions. Towards the beginning and towards the end of the cross-examination Mr Steedman referred to A's presence at WM's sentencing on the prior convictions and put to A that the knowledge this gave him would have intensified his hatred of his father. Mr Steedman focused at much greater length on the letters, on their face affectionate, written to WM by A while WM was serving his sentence for the prior convictions. The prior convictions became a part of the narrative Mr Steedman was constructing to inject doubt into the jury's collective mind as to A's credibility.

[40] Mr Isac criticises the way the prosecution used the evidence of the prior convictions in its examination-in-chief of the ex-wife and in cross-examination of WM.

[41] The fact that an admission of facts had been signed and put before the Court did not prevent either party from elaborating on the subject matter of the admissions. So far as the ex-wife's evidence is concerned, it was largely narrative and in the context of what it meant to have grown up in an Exclusive Brethren family and then be a young wife in an Exclusive Brethren family. For example, she told the prosecutor she did not know there was such a thing as raping a wife, "If he demanded it, you had to let them".

[42] Overall, the ex-wife's evidence about the prior convictions fitted within the narrative which the defence intended the jury to learn about because it gave A and the ex-wife a strong motive to give false evidence against WM.

[43] We do not accept Mr Isac's submission that in cross-examination of WM:

> The prosecutor also used the marital rape evidence to attempt to portray the appellant as a violent, controlling man who could not control his sexual urges, despite his religious beliefs …

[44] The prosecutor certainly explored the effect on WM of his membership of the Exclusive Brethren church and how that affected life in his home. He was entitled to do that. It was important context. The prosecutor also cross-examined WM to show that the teachings of the church did not prevent WM from offending against his ex-wife

and his children. The prosecutor was entitled to do that. Mr Isac highlights the following passage as the prosecutor linking the prior convictions with A's allegations:

> Q. You had a period where you tried to reconcile with [C]?
> A. Yeah, yes.
> Q. And then after you'd done a bit of time outside the church you were allowed back in?
> A. Yeah but I had to prove myself that I was different.
> Q. Well how did you do that because [C] says when you had contact with her and the family you weren't any different, you hadn't changed?
> A. That's her, that's her, what's the word, that's her interpretation of it.
> Q. Oh well so I'm asking you how did you prove that you'd changed?
> A. I had a couple of elders from the church who would talk to me on a regular basis.
> Q. So it was their view that you'd changed, it was what was important for you coming back in?
> A. I think so, yeah.
> Q. So they would've let you back in when they were satisfied you had sufficiently repented for what you'd done?
> A. You can normally see in someone's face if they're trying to hide something, it's pretty obvious.
> Q. They would've talked to you about how you'd taken being the head of the household too far, you'd gone too far with [C]?
> A. Yeah.
> Q. The church doesn't approve of homosexuality though does it?
> A. Definitely not.
> Q. I think you told us last time it's clearly against the truth of the scripture.
> A. Yeah.
> Q. So there's no homosexual Brethren I take it?

[45] We accept that the reference to homosexuality was unfortunate. It was, we think, meant to refute any assertion that WM would not offend against A because to do so would be against the teachings of his church. We do not think the exchange has any significance in the overall context of the trial.

[46] In closing, the prosecutor first discussed each of the charges and A's evidence underpinning them. He discussed the evidence of the psychologist called by the Crown and then came to the evidence of the prior convictions:

> I also need to talk to you about the evidence you've heard via the section 9 agreements and the various questioning about what the defendant did to [C]. It's there because it's relevant, members of the jury. It's there because you can't tell the story of this family without knowing that, without knowing what happened inside their house. We've both, my learned friend and I've both addressed you on it. The Crown says that's hugely important to the time it has taken for [A] to disclose this offending, why he didn't disclose it at the time, why he began to think it was normal, for instance, but you mustn't lead to conclusions about the evidence of the defendant raping his wife. You can't and mustn't think that, "Well because he did that to [C] he must have done this to [A]." His Honour will talk to you about it but you've got to be careful (inaudible 10:38:36) acknowledge the prejudice but it's a hugely important (inaudible 10:38:42), members of the jury. And it's the same in a way the evidence of violence in the household. It's relevant, it's context why not disclose, why couldn't he disclose, why did this carry on, why did this happen so much, why was there a partial disclosure then a full disclosure later. But the evidence of violence also reflects some real markers though, so it's really important conclusions. The defendant losing control, acting impulsively, inflicting hurt, inflicting pain and inflicting pain and carrying on are the significant conclusions, the Crown say.

[47] The prosecutor cannot be criticised for those remarks. As with his opening, he puts the evidence as part of the narrative, gives the Crown's perspective as to inferences it might support, and makes it explicit that it was not propensity evidence.

[48] Mr Isac criticises the prosecutor's later submissions to the jury on the topic of "establishing a general pattern of behaviour involving both physical and sexual violence". The first passage Mr Isac refers to is:

> And there's a third way that the incidents that he acknowledges and the violence that he inflicted affects things because, as the defendant acknowledged, [A] would've been very frightened of how he was behaving towards him and [A] says he was afraid. He acknowledges that his family was scared of him, that he controlled them. His attitude towards his wife which … he could do whatever he wanted. So, really, he has to accept that [A] would've grown up scared of him, afraid of him, scared of what he could do to him. That's relevant of course, members of the jury, because that's a pathway [A] says it was so hard for him to disclose the offending. And, most importantly, why [A] says he couldn't tell the full story when he was 12, he was too scared, too scared of his father. He sees him in church. Remember also when my learned friend was challenging him about sexual abuse happening in the bathroom and then going to the dinner table and what he said to my learned friend then, "He was sitting right there at the dinner table, do you think I could just admit it, I would've got a hiding." It's pretty much what

> he said, members of the jury. That's the impact of the violence and the dominating and the controlling way of the defendant's behaviour towards his family.

[49] We do not accept Mr Isac's characterisation of this submission. All the prosecutor was suggesting to the jury was that WM's behaviour towards A and his family explains why A found it so hard to make his complaint.

[50] The second passage Mr Isac refers to is:

> I want to talk briefly about the evidence of the defendant's behaviour in the house that really shows us the extent of his power and dominance over the family, if I put it that way, members of the jury, because the Crown says that's what the defendant had over his family during this terrible reign. The rape of [C]; that reflects his power over her. [A] knew she was being hurt and when I asked him about how he felt when he could hear his mum screaming, he said, "Helpless, because I couldn't stop it." So [A] knew his father's power, if I put it that way. [A] knew he was hurting, the defendant was hurting him, or the physical acts alone, which the defendant admits to, [A] knew he was hurting the other children, the physical abuse of them, hitting them, kicking [L] for instance, so it's very clear in [A's] mind that the defendant had all the power in the family. And when the defendant would hurt [A] sexually, as the Crown says, when he threatened to hurt [A] if he told anyone, he's got power over [A] as well. The way the defendant acted with him at [A's] house gives him the power to keep this offending secret, if I put it that way, members of the jury.

[51] Again, we do not accept Mr Isac's characterisation of this part of the prosecutor's address. The prosecutor is again submitting to the jury that the home environment explains why A did not make earlier disclosure. The prosecutor is not inviting the jury to use propensity reasoning. The portions of the prosecutor's address following the passage cited by Mr Isac make that clear:

> And then there's the point, well, [A] had his interview in 2005, so the next challenge along the line, should have told it all then. Well, [A] says he was still too scared. He wasn't also free of the church and free of his father. He was still seeing him all the time at church and he said he was still scared of him. And [A], when I asked him this in his evidence-in-chief, said he hadn't unlocked his vault and he wasn't ready to let it go at that point, and we know from [the psychologist's] evidence that a partial disclosure process, a fragmented disclosure process, isn't uncommon for children who have been sexually abused.
>
> You've also got to think about the impact of what happened to [C]; what we know about what [A] knew at the time. He's still got those memories of being scared when he'd hear the defendant hurting his mother. And also remember that in 2005, when [A] gives his interview though, [C] hasn't gone to the police yet. All he knows is that she's left, so he hadn't seen, at that point, the

> full, it's quite clear that [A] didn't see the full extent of the abuse but he was aware that his father was hurting his mother. It wasn't suggested to him, for instance, that he knew what was and wasn't in his mum's affidavit, for instance. It's his perspective as a child about how he experienced things that's important. So, knowing how his father treated his mother, that's relevant to why he didn't disclose everything in 2005. And when you combine that with the fact he's still seeing him at church, the Crown says the fear was still operative, if I put it that way.

[52] Mr Steedman, in his closing address, again touched lightly on the topic of the prior convictions. In his affidavit Mr Steedman explains:

> 55. BOTH [WM] and I hoped that the subtext throughout the entire trial might be that he was an honest man who had always admitted in a completely appropriate way the things which he had done, namely the marital rapes and the physically abusive behaviour towards [A]. We hoped that as a result the jury would give him the benefit of the doubt when he argued that he had never abused [A] sexually.
>
> 56. I did not think then, and I do not think now, that I needed to labour this point in my closing address to the jury. There were two reasons for this. Firstly, I made my closing address on a Friday afternoon at the end of the second week of what had been a gruelling trial. The jury appeared to be tired. Secondly, I didn't want the jury to think that I was patronising them. [WM's] prompt guilty pleas to the marital rapes were a critical and significant plank of his defence. In my view this was something which was obvious throughout the trial.

[53] We do not accept Mr Isac's criticism that having admitted the evidence of the prior convictions Mr Steedman made little of it. From Mr Steedman's point of view, the evidence served its purpose. It became part of the subtext for the defence that A, and the ex-wife, had a hatred of WM such that they would accuse him falsely of sexually abusing A. We understand why Mr Steedman did not want to make the prior convictions evidence the focus of his closing address when it fitted into an overall narrative going to the defence case.

[54] Mr Isac criticises the Judge's summing-up on a number of grounds. Essentially, Mr Isac submits the Judge did not adequately instruct the jury on how to use the evidence of the prior convictions, and in particular did not instruct the jury not to associate the evidence with the evidence of physical violence in the family to create a narrative supportive of A's allegations.

[55] We do not accept Mr Isac's criticism. First, given the way the evidence was led and on which it was cross-examined, and the way both counsel addressed it, there could only be a risk of miscarriage of justice if the Judge misdirected the jury on use of the prior convictions evidence. The Judge did not misdirect the jury.

[56] First, the Judge gave standard directions on sympathy and prejudice without reference to particular evidence. Later, the Judge directed specifically:

> [138] I need to say at the outset that the evidence of the marital rape, s 9 agreement, is not evidence to support the proposition that the defendant is guilty of these charges.
>
> [139] That evidence is another component in another area. Because he pleaded guilty to those two charges does not mean he is guilty of these charges. That is really important for you to lock on early on and remember throughout.
>
> [140] He pleaded guilty to those charges and you will have the s 9 agreement about that with the detail that was read to you. You will have the fact of the conviction and the fact he went to jail. All of those components came out in the evidence at various stages, but please do not jump to the conclusion that he is guilty of these charges because he was convicted of those charges. They are separate.
>
> [141] They are a component, as I have said, but they do not indicate guilt. Please do not come to that conclusion.
>
> [142] The Crown says that evidence is relevant because it is background to the way the defendant behaved in the house.
>
> [143] The defence say it is a relevant factor because it is part of the reason in the matrix why [A] made up the allegations.
>
> [144] So it is certainly an important component of the trial, but as I have said, this will be the third time, it is not an important component of guilt or innocence of the charges.
>
> [145] I am pretty much sure you have got that distinction by the way you are nodding towards me. I think it only fair to the Crown and to the defence to put it like that because that is the way they presented their cases.

[57] The direction tells the jury it cannot use the evidence as propensity evidence for A's allegations. It clearly and succinctly puts the basis for its purpose, from each party's point of view.

[58] We accept the Judge could have given specific directions when the written admissions were given to the jury. We accept also he might preferably have gone on to direct that the evidence should not be joined to the evidence of physical violence

when considering whether WM offended against A sexually. However, given the way the case had been run for both parties the Judge said enough. And, having noted jurors nodding in apparent understanding of the simple point he was making, the Judge was satisfied he had communicated the point.

Decision

[59] The first ground of appeal does not succeed. We do not find a miscarriage of justice has occurred through the admission of the prior convictions evidence.

The second ground of appeal

Did the trial Judge wrongly admit the written admissions of prior convictions?

[60] Section 9 of the Evidence Act 2006 gives a Judge a discretion, so long as all parties agree, to admit evidence that is not otherwise admissible. In this case Judge Lynch, before the first trial, had ruled the prior convictions evidence inadmissible as propensity evidence because its prejudicial value outweighed its probative effect. Mr Isac argues that Judge Large, the Judge in the second trial, did not have the discretion under s 9 to admit the evidence, even though all parties agreed, because it went against WM's fair trial rights.

[61] We have already found that the admission of the prior convictions evidence did not cause a miscarriage of justice. It follows that this second ground of appeal cannot succeed. That is because the ground presupposes that admitting the evidence was unfair to WM.

[62] We accept that a Judge is not bound to admit evidence under s 9 just because the parties to a trial agree that it should be admitted. The Judge has a discretion and an overall responsibility to exercise it to ensure there is a fair trial. But it would be rare for a Judge to refuse to permit the defence to put otherwise inadmissible evidence before a jury, with the consent of the Crown, when the defence has decided that this would assist the defence. In a startling situation a Judge would want to be satisfied that the decision was made after due deliberation. But, the law is that a defendant is entitled to run their defence as they choose, even if their choice seems unwise.

Decision

[63] The second ground of appeal does not succeed.

Result

[64] The appeal against conviction is dismissed.

[65] To protect the identity of A, we make an order suppressing the identity of WM's ex-wife under s 202(2)(d) of the Criminal Procedure Act 2011.

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