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

NOTE: DISTRICT COURT ORDER IN [2020] NZDC 27025 PROHIBITING PUBLICATION OF THE COMPLAINANTS' NAMES, THE COMPLAINANTS' PARENTS AND ALL ADDRESSES REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA544/2021
[2023] NZCA 593

BETWEEN	HARRY JAMES MITCHELL Appellant
AND	THE KING Respondent

Hearing:	2 November 2023
Court:	French, Thomas and Fitzgerald JJ
Counsel:	B P Kilkelly for Appellant A R McRae for Respondent
Judgment:	24 November 2023 at 11.30 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Thomas J)

[1] Following a Judge-alone trial in the District Court, Mr Mitchell was convicted of 15 charges:[1] five of making an objectionable publication;[2] two of distributing an objectionable publication;[3] two of burglary;[4] five of committing an indecent act on a child under the age of 12 years;[5] and a representative charge of possession of an objectionable publication.[6] Sentencing was transferred to the High Court for consideration of a sentence of preventive detention.[7]

[2] Mr Mitchell was sentenced to a finite sentence of nine years' imprisonment with an order that he serve a minimum period of imprisonment of six years.

[3] Mr Mitchell initially appealed against both conviction and sentence. The appeal against sentence was formally abandoned at the hearing before us.[8]

Grounds of appeal

[4] The grounds of Mr Mitchell's appeal against conviction are:

(a) The decision of the Court was against the weight of the evidence and a miscarriage of justice has occurred.

(b) Evidence extracted from Mr Mitchell's computer was inadmissible because a number of factors made the search warrant invalid.

(c) Trial counsel made a number of errors:

(i) failed to challenge the admissibility of evidence from the computer pre-trial;

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1 *R v Mitchell* [2020] NZDC 27025 [Conviction judgment].
2 Films, Videos and Publications Classification Act 1993, ss 123(1)(a) and 124(2)(a). Maximum penalty, 14 years' imprisonment.
3 Sections 123(1)(d) and 124(2)(a). Maximum penalty 14 years' imprisonment.
4 Crimes Act 1961, s 231(1)(a). Maximum penalty 10 years' imprisonment.
5 Section 132(3). Maximum penalty 10 years' imprisonment.
6 Films, Videos and Publications Classification Act, s 131A. Maximum penalty 10 years' imprisonment or $50,000 fine.
7 *R v Mitchell* [2021] NZHC 2175; and Sentencing Act 2002, s 90.
8 Notwithstanding the abandonment of the sentence appeal, the conviction appeal remains within the jurisdiction of this Court under ss 244, 247(1)(d) and 321 of the Criminal Procedure Act 2011, as the key determinant of the correct first appeal Court is the nature of the proceeding at the time of the decision being appealed: *Tule v R* [2023] NZCA 543 at [9]–[13].

(ii) denied Mr Mitchell the opportunity to call two character witnesses and gave Mr Mitchell no explanation as to why they were not called;

(iii) denied Mr Mitchell the opportunity to engage and call expert IT evidence;

(iv) made little or no challenge to the video and photographic evidence at trial when identification was a central issue; and

(v) there was a general lack of communication between counsel and Mr Mitchell.

[5] Mr Kilkelly, for Mr Mitchell, accepted that the first ground of appeal, that the Judge's decision was against the weight of evidence and a miscarriage of justice had therefore occurred, could not be advanced. That ground was abandoned.

The convictions

[6] Mr Mitchell was convicted of offending against two young boys specifically, as well as numerous other child victims depicted in child sexual exploitation/abuse material located on Mr Mitchell's computer.

[7] The alleged offending against both victims came to light when Mr Mitchell uploaded objectionable videos of himself and the second victim to a forum hosting child sexual abuse material in February 2019. After being alerted by an Australian investigation, New Zealand Police executed a search warrant on Mr Mitchell's address that same month. Mr Mitchell's computer was seized and analysed. In the following paragraphs we set out the basis of the convictions.

Victim one

[8] In 2014, the mother of a six-year-old boy advertised for a boarder to occupy a caravan situated on her property. Mr Mitchell responded and began living in the

caravan, also being permitted access to the house. During this period, he befriended and played with the young boy.

[9] Two convictions for making an objectionable publication relate to videos Mr Mitchell covertly took of the boy while he was taking a bath.

[10] Mr Mitchell made two other videos when he entered the house at night while the family was sleeping. On the first occasion, the video captured Mr Mitchell exposing himself in the doorway of the boy's bedroom and masturbating next to the bed. This video was classified as objectionable. Mr Mitchell was convicted of making an objectionable publication and committing an indecent act on a child under the age of 12. On a second occasion, Mr Mitchell entered the house and positioned himself with his buttocks over the boy's head. This video was not classified as objectionable. In relation to both entries into the house, Mr Mitchell was convicted of two counts of burglary.

[11] On a further occasion, Mr Mitchell laid down next to the sleeping boy and took three photographs of his own body positioned near the boy's head, the nature of which resulted in three convictions for committing an indecent act on a child under the age of 12.

[12] The objectionable publications and images recording indecencies were discovered on Mr Mitchell's computer hard drive following the execution of the search warrant at Mr Mitchell's address. At trial, Mr Mitchell denied any knowledge of the images and videos and claimed they were on a cell phone given to him by the family of the victim.

Victim two

[13] In 2015, Mr Mitchell befriended another family, which included a three-year-old boy, staying at the campsite where he was living.

[14] On a number of occasions, Mr Mitchell played with the boy and his sister in his car. After one of those occasions, the boy made a comment to his mother about

Mr Mitchell's genitalia. After this disclosure, Mr Mitchell was asked to leave the campsite.

[15] In 2019, the boy's mother confirmed to police that a photograph they showed her of a boy wearing a red pyjama top with the words "Fire Department" on it was her son. The boy could be seen wearing the red top in two videos Mr Mitchell made of him while committing indecent acts on him in his car. The videos were classified as objectionable. Mr Mitchell was convicted of one charge of committing an indecent act on a child and two charges of making an objectionable publication.

[16] The search of Mr Mitchell's computer provided evidence that Mr Mitchell was the person who uploaded the videos to a forum used to share child sexual exploitation/abuse images. Mr Mitchell claimed the police planted the images on his computer. Mr Mitchell was convicted on two charges of distributing an objectionable publication.

[17] Mr Mitchell's computer contained five hard drives. One had its contents extracted revealing approximately 40,000 objectionable images, including child sexual exploitation/abuse images. These formed the basis of the conviction on the representative charge of possession of objectionable publications.

[18] At trial, the Crown adduced propensity evidence of Mr Mitchell's 13 previous convictions for committing indecencies against pre-pubescent children and for possessing objectionable publications. The propensity evidence was admitted as evidence that Mr Mitchell has a tendency to offend sexually against children and to possess objectionable images of children being sexually exploited. The propensity evidence was relevant to the identification of the alleged offender.[9]

Challenge to the search warrant

[19] Central to the Crown case was the evidence extracted from Mr Mitchell's computer (the evidence), which was seized by the police from Mr Mitchell's address pursuant to a search warrant. At trial, Ms Basire, Mr Mitchell's trial counsel, sought

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9 Conviction judgment, above n 1, at [13].

a discharge on all charges,[10] on the grounds that the application for the search warrant did not disclose reasonable grounds to suspect the offences specified in the application had been committed and reasonable grounds to believe evidence of those offences would be found in the place or places specified in the application.[11] The trial Judge ruled during the course of the trial that the search warrant was properly issued.[12]

[20] Following the closure of the Crown case, Ms Basire mounted a further challenge to the search warrant, objecting to the admissibility of the evidence on the grounds that the search warrant authorised the seizure of Mr Mitchell's computer but not the subsequent examination of its content. The Judge considered the Crown's argument that the search warrant permitted examination of the content without further authority, whether under the warrant itself or pursuant to s 110(h) of the Search and Surveillance Act 2012.[13] Ultimately, following a decision of this Court in *Tupoumalohi v R*,[14] the Judge decided that a second search warrant was required because the search warrant permitted police to enter, search for and seize the items listed but did not specifically authorise a search or examination of their contents.[15] The Judge therefore held that the evidence had been improperly obtained. In conducting the required balancing exercise,[16] she considered the right to be free from unreasonable search and seizure to be significant and any intrusion upon it serious, but concluded that the impropriety amounted to a simple error which could easily have been addressed.[17] She decided that exclusion of the evidence would be wholly disproportionate to the level of impropriety and the evidence was admissible.[18]

[21] Mr Mitchell claims that a number of factors made the search warrant invalid and that trial counsel erred in failing to challenge the admissibility of the evidence pre-trial. Mr Kilkelly described that as the nub of the appeal. He explained that Mr Mitchell considers he was denied the right to a fair trial and a miscarriage of justice had accordingly occurred.

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10 Criminal Procedure Act 2011, s 147.
11 Search and Surveillance Act 2012, s 6(1)(a) and (b).
12 *R v Mitchell* [2020] NZDC 26268 [Section 147 ruling].
13 *R v Mitchell* [2020] NZDC 26071 [Admissibility judgment] at [8]–[9].
14 *Tupoumalohi v R* [2020] NZCA 117.
15 Admissibility judgment, above n 13, at [10]–[14].
16 Evidence Act 2006, s 30(2)(b).
17 Admissibility judgment, above n 13, at [15], [17] and [19].
18 At [20].

[22] In her evidence before us, Ms Basire accepted that Mr Mitchell had instructed her pre-trial to consider a challenge to the search warrant. She did so and advised him that, in her opinion, there were no grounds to challenge it. She explained that, during the course of the trial, as evidence emerged, she considered there were grounds to challenge the issue of the search warrant and did so. During the course of her research, she uncovered the case of *Tupoumalohi* which suggested to her there were grounds to object to the admissibility of the evidence on the basis a separate warrant to search the computer was required. She accepted that these issues perhaps should have been advanced pre-trial.

[23] There is nothing in this point. Both the validity of the search warrant and the issue of whether a second warrant should have been obtained were addressed during the trial. Mr Mitchell cannot be said to have suffered any disadvantage from the fact the challenges were made during the trial and not pre-trial.

[24] Both rulings can be revisited by this Court. However, Mr Kilkelly accepted that the Judge's rulings were correct and his written submissions suggesting a contrary view could be put to one side.

[25] We therefore dismiss this ground of appeal.

Trial counsel error

Failure to call character evidence

[26] In his affidavit in support of the appeal, Mr Mitchell claimed he was not given the opportunity to call two character witnesses on his behalf and was given no explanation as to why they were not called. Mr Mitchell did not name those two witnesses.

[27] Ms Basire had considered two potential witnesses, a Mr Davies and Mr Mitchell's brother.

[28] In evidence before us, Mr Mitchell acknowledged that Ms Basire had engaged the services of a private investigator. Ms Basire obtained a statement from Mr Davies

but he had no memory that would assist Mr Mitchell's defence. The private investigator told her he considered Mr Davies far too ill to give evidence. Mr Mitchell accepted that he knew this.

[29] Ms Basire also obtained a statement from Mr Mitchell's brother. She said that he gave her a photograph showing a caravan and a blue station wagon. The file properties showed the photograph was taken in November 2015.

[30] Offending against the second victim occurred in February and March 2015, when Mr Mitchell was living at a motor camp. An issue at trial was whether Mr Mitchell possessed a blue station wagon. In his affidavit for the appeal, Mr Mitchell said that he has never owned or had access to a station wagon. In evidence before us, Mr Mitchell accepted that he may have had a station wagon registered in his name but that Mr Davies drove it and he did not have access to it. When asked about the photograph provided by his brother, Mr Mitchell maintained that the photograph was taken after his "business deals" with the motor park had finished.

[31] That the file properties showed the photograph of a caravan and blue station wagon were taken in November 2015 would have been substantially against Mr Mitchell's interests as it would have established his ownership, or at least his opportunity to use, a vehicle consistent with that used in the offending against the victim in the same year the offending took place. This was a matter that had apparently been overlooked by the Crown.

[32] Mr Mitchell does not claim he instructed Ms Basire to call either witness. In any event, he must establish the decision not to call the witnesses "was not one a competent lawyer would have made" and that what occurred "may have affected the outcome".[19]

[33] It was well open to Ms Basire to conclude that there was little to be gained by calling Mr Davies or Mr Mitchell's brother, as their evidence would be of limited, if

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[19] *McKay v R* [2019] NZCA 393 at [28], citing *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [77].

any, probative value and, in the case of Mr Mitchell's brother, could have further undermined the defence case.

Failure to engage and call expert IT evidence

[34] Mr Mitchell maintained he was denied the opportunity to retain and call evidence from an IT expert, saying he wanted to use the services of a Christchurch electronics firm to review the findings of the Crown witness as to various aspects of the evidence but "[t]hat request was turned down by my lawyer without explanation."

[35] Mr Mitchell's claim is somewhat misleading. Ms Basire had engaged a digital forensic expert, Brent Whale, to review the Crown evidence. Mr Mitchell was sent a copy of Mr Whale's report. Mr Whale had uncovered digital forensic detail inconsistent with Mr Mitchell's defence, which was to the effect that the material on his computer had been planted on it by others or was on the device prior to Mr Mitchell's having possession of it. To call Mr Whale would have been counter to Mr Mitchell's interests.

[36] In evidence, Ms Basire disputed that Mr Mitchell instructed her to engage another expert and observed that, in any event, the electronics firm to which Mr Mitchell referred would not qualify as forensic experts for the purpose of giving evidence at trial.

Lack of challenge to video and photographic evidence

[37] Mr Mitchell provided little detail of this complaint.

[38] We note that Ms Basire successfully challenged the classification of some of the publications, and challenged, pre-trial, admissibility and propensity issues. The admissibility challenge resulted in the Crown's withdrawing photographic evidence of Mr Mitchell's hands.

[39] From our review, we consider Ms Basire did a thorough job in the face of a compelling Crown case.

General lack of communication

[40] Mr Mitchell complained that there was a general lack of communication from Ms Basire and he was "too often left without explanations as to the conduct of [his] trial."

[41] In her affidavit, Ms Basire deposed that, between the time Mr Mitchell was charged in February 2019 and the conclusion of the Judge-alone trial in December 2020, she was in regular communication with him, including visiting him at the prison several times, obtaining permission to take her laptop to the prison to show him the objectionable publications, having multiple AVL meetings and having multiple (often weekly) phone calls with him. She said she took detailed instructions from him and that at every step Mr Mitchell was informed, including being advised as to the strength of the Crown case and his options, including seeking a sentence indication.

[42] Exhibited to Ms Basire's affidavit were numerous file notes in support of that evidence.

[43] When asked whether, in light of Ms Basire's affidavit, he accepted there had been a good level of communication from her, Mr Mitchell conceded that "may be correct".

Conclusion on counsel error

[44] None of the complaints raised, either separately or taken together, identify any counsel error or irregularity and there is no real risk any issues raised affected the outcome in a way detrimental to Mr Mitchell.[20] There has been no miscarriage of justice. We therefore dismiss this ground of appeal.

Result

[45] The appeal against conviction is dismissed.

Solicitors:
Crown Solicitor, Timaru for Respondent

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[20] *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [70].