NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA278/2021
[2022] NZCA 553

BETWEEN	OWEN WILLIAMS Appellant
AND	THE KING Respondent

Hearing: 1 November 2022

Court: Gilbert, Venning and Mander JJ

Counsel: P K Hamlin for Appellant
E J Hoskin for Respondent

Judgment: 17 November 2022 at 11 am

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Venning J)

[1] Following a jury trial in the District Court at Manukau Owen Williams was found guilty on two representative charges of unlawful sexual connection and one charge of doing an indecent act on a young person. The victim in each case was

the same. Mr Williams was acquitted on a charge of rape. On 23 April 2021 Judge S Moala sentenced Mr Williams to 11 years' imprisonment.[1]

[2] Mr Williams appeals against conviction. He had also filed an appeal against sentence, but Mr Hamlin confirmed that aspect of the appeal was no longer pursued. The sentence imposed was within range for the offending on which Mr Williams was convicted. If the conviction appeal fails the sentence appeal should also be dismissed.

Background

[3] Mr Williams entered a relationship with T, the mother of D (the victim) and M (her sister) in about 2005 when the two girls were about two years' old and six months' old respectively. Mr Williams and T had two further children of their own during the relationship. The family lived in Australia briefly in 2008 before returning to New Zealand where they lived with Mr Williams' parents for a time. They also lived in various rental properties. In September 2011 T left the relationship and moved to Australia. D and M continued to live in New Zealand. They spent some time with their biological father but continued to see Mr Williams, their de facto stepfather. Mr Williams had also begun a relationship with T's cousin.

[4] Between 2011 and 2016 D and M came and went between New Zealand and Australia. From about mid-2016 D and M lived in Australia but returned to New Zealand for a Christmas holiday in December 2016. They stayed in New Zealand until January 2017 before returning to Australia. On their return to Australia D, who was then 13 years old, disclosed to T that Mr Williams had been sexually offending against her for some time. When T spoke to M, she said that he had done the same to her.

[5] D described Mr Williams making her suck his penis when she was aged about seven or eight at his parents' address in New Zealand. She said he would force her head onto his penis. D next said Mr Williams would regularly put his finger or fingers into her vagina, after wetting his fingers and wetting her "down there". She also said

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1 *R v Williams* [2021] NZDC 7666.

Mr Williams touched her vagina over her clothes. Finally, she described an incident where Mr Williams had raped her.

[6] When M was interviewed, she disclosed Mr Williams' abuse of her, which included having to suck his penis. She also said that on one occasion he tried to put his penis inside her bottom after she refused to allow him to put it in her vagina.

[7] When spoken to about the offending Mr Williams denied it. He gave evidence at trial that the allegations were false.

[8] The trial before Judge Moala and a jury was the second trial at which Mr Williams had faced the allegations involving D. At the first trial in early 2019 he had faced seven charges in relation to alleged offending against her. He was acquitted on three of the charges. The jury could not agree on the remaining four charges which were the subject of the retrial. Mr Williams had also faced three charges in relation to the alleged offending against M. He was acquitted on all the charges involving M.

[9] The Crown applied to lead the evidence of M as propensity evidence (the acquittal propensity evidence) at the second trial of the remaining charges against D. Judge Bouchier held that the acquittal propensity evidence was admissible and could be adduced.[2]

[10] This Court granted Mr Williams leave to appeal that decision but dismissed the appeal in a judgment issued on 15 November 2019, with the reasons delivered on 19 December 2019.[3]

Appeal points

[11] Mr Hamlin confirmed Mr Williams' conviction appeal was now limited to the following points:

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2 *R v Williams* [2019] NZDC 20882 (Pre-trial decision).

3 *Williams v R* [2019] NZCA 681. The Supreme Court declined leave to appeal: *Williams v R* [2020] NZSC 5.

(a) that the acquittal propensity evidence of M was wrongly held to be admissible at his re-trial;

(b) alternatively, if it was admissible, then the standard of proof for the jury's assessment of M's acquittal propensity evidence ought to have been beyond reasonable doubt; and

(c) evidence given by T about Mr Williams' sexual behaviour towards her amounted to inadmissible propensity evidence which ought not to have been admitted.

[12] Mr Hamlin submitted that the above errors had, individually or cumulatively, resulted in a miscarriage of justice which either created a real risk the outcome of the trial was affected or otherwise resulted in an unfair trial.[4]

The approach to the appeal

[13] In *Haunui v R* the Supreme Court adopted the approach taken by this Court in *Wiley v R* on the issue of whether there was a real risk the outcome of the trial was affected:[5]

> [67] …The question under s 232(4)(a) is "whether the error, irregularity or occurrence in or in relation to or affecting [the] trial has created a real risk the outcome was affected". That question "requires consideration of whether there is a reasonable possibility another verdict would have been reached". If the answer to that question is "no", that is the end of the matter and the appeal will be dismissed. If the answer to that question is "yes", we consider the effect of the Criminal Procedure Act is that the appeal court then asks whether it is sure of guilt. If the answer is "no", the appeal will be allowed. If the answer is "yes", the court determines the error did not in fact create a real risk that the outcome was affected and the appeal will be dismissed. Finally, as we have noted, if the appeal court is satisfied that the jury's verdict was unreasonable (s 232(2)(a)) or that the error has resulted in an unfair trial or a trial that was a nullity (s 232(4)(b)), the appeal will be allowed and the proviso reasoning does not apply.

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4 Criminal Procedure Act 2011, s 232(2)(c).

5 *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 citing *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 (footnotes omitted).

[14] As to the test for an unfair trial, the Supreme Court confirmed in *Condon v R* the right to a fair trial is an absolute right which is affirmed by s 25(a) of the New Zealand Bill of Rights Act 1990. But it also observed that:[6]

> [78] It is important to remember that, as Deane J observes, the assessment of the fairness of a trial is to be made in relation to the trial overall. A verdict will not be set aside merely because there has been irregularity in one, or even more than one, facet of the trial. It is not every departure from good practice which renders a trial unfair, as Lord Bingham made clear in a passage in *Randall*, which was referred to with approval in *Howse*. He said that it is at the point when the departure from good practice is "so gross, or so persistent, or so prejudicial, or so irremediable" that an appellate [c]ourt will have no choice but to condemn a trial as unfair and quash the conviction as unsafe. In *Howse* it was said that this approach is one of general application.

Admissibility of M's acquittal propensity evidence

[15] Despite Mr Hamlin's challenge to the acquittal propensity evidence, the starting point is that such evidence is potentially admissible. In *Fenemor v R* the Supreme Court confirmed that acquittal propensity evidence is admissible.[7] The issue will be whether it satisfies the requirements for admission under s 43, Evidence Act 2006.

[16] Mr Fenemor was a music teacher. Two of his pupils, M and B said that he had touched their genitalia over their clothing. In 1998 Mr Fenemor was charged in relation to B's complaint but not in relation to M. However, M gave propensity evidence at the trial involving B's complaint. Mr Fenemor was acquitted following a judge alone trial. Ten years later, in 2008 Mr Fenemor faced further allegations involving his conduct towards A, another student. At the trial that followed, both M and B were called as propensity witnesses. The Supreme Court rejected the argument for Mr Fenemor that propensity evidence which had been led in a case which resulted in an acquittal should not be admissible. The Supreme Court confirmed that prior acquittal evidence was no different from other propensity evidence. It was admissible provided that it satisfied the requirements of s 43(1) of the Evidence Act 2006.[8]

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6 *Condon v R* [2006] NZSC 62, [2007] 1 NZLR 300 (footnotes omitted).
7 *Fenemor v R* [2011] NZSC 127, [2012] 1 NZLR 298.
8 At [5]. See also: *R v Degnan* [2001] 1 NZLR 280 (CA).

[17] Mr Hamlin sought to distinguish the present case from *Fenemor*. He suggested that, unlike *Fenemor*, in the present case Mr Williams had faced charges involving the acquittal propensity evidence of M, and the jury had not accepted the incidents she described as proved beyond reasonable doubt. He argued that effectively, the Crown was allowed to run its case again, but facing a lesser standard of proof. It became a case of two against one when he was only facing charges involving one of them. Further, the acquittal propensity evidence was lengthy. D's evidence could have been led without reference to M's evidence. Next, the jury may have been tempted to want to remedy a perceived failure of the criminal justice system in relation to M. Mr Hamlin submitted that the admission of the acquittal propensity evidence offended the principle of double jeopardy under s 26(2), New Zealand Bill of Rights Act 1990. Finally, although he was not trial counsel, Mr Hamlin suggested that allocation of resources for trial preparation would have been skewed towards responding to the propensity evidence which added to the unfairness.

[18] The principle, confirmed by the Supreme Court in *Fenemor*, that prior acquittal evidence is admissible is not displaced in this case by the factual differences (such as they are) between that case and the present. Importantly, in both cases the prior acquittal evidence included evidence which the Crown had relied on to support charges in the first trial. Relevantly, in both cases, it was offered for a different purpose to that which it was led in the first trial. In *Fenemor* the prior acquittal evidence of B was led to support the Crown case in relation to A's allegations. In the present case M's evidence was led to support the Crown case that Mr Williams had offended against D in the way she had said. As this Court said in the pre-trial decision on this point:[9]

> [27] … crucially, the evidence is not being offered on the basis that it will prove the allegations (for which he was previously acquitted) beyond reasonable doubt. It is being offered on a different basis, as circumstantial evidence to support [D]'s account. The fact of the acquittal, as we have previously discussed, does not necessarily determine the credibility or the reliability of the witness in that different context.

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9 *Williams v R*, above n 3, at [27] (footnote omitted).

[19] In *Halalupe v R* this Court explained that a prior verdict of acquittal is not a declaration of the defendant's innocence.[10] It is the juries' evaluation of the prosecution rather than of the character of the defendant.

[20] Mr Hamlin's submission that the principle of double jeopardy was infringed was also considered and rejected by the Supreme Court in *Fenemor*. The Supreme Court cited with approval the earlier decision of a Full Court of this Court in *R v Degnan*, which confirmed that a defendant (in this case Mr Williams) can never be tried again for the offences on which he was acquitted (in this case the charges involving M) so there is no double jeopardy.[11]

[21] Nor do we accept that there is any force in Mr Hamlin's suggestion the trial was unfair as it became a two against one scenario. That will often be the practical situation in the case of propensity evidence. It is for that reason that there are constraints on its admissibility. The probative value of the evidence must outweigh any unduly prejudicial effect, as it did in this case. M's evidence was properly admissible as propensity evidence. It was highly probative as it was evidence of the same type of behaviour, committed in similar circumstances against a pre-pubescent girl, M, who, like D, was under Mr Williams' care. We agree with the reasoning of this Court on the pre-trial decision that M's previous acquittal evidence was properly admissible as propensity evidence.

[22] Next, the argument that the jury may have acted to remedy a perceived failing in the criminal justice system by convicting D in response to the acquittal on the charges facing M was recently considered and rejected by the Supreme Court in *R v K*. As the Supreme Court said:[12]

> [49] In effect, this observation reflects a rejection of the law as stated in the Court of Appeal's decision in *Degnan* and this Court's decision in *Fenemor*. If the risk arises in the present case, it would also arise in every case in which it is proposed that acquittal evidence would be led as propensity evidence and, if this risk were truly considered a realistic risk, it is hard to see how acquittal evidence would ever be permitted to be led as propensity evidence.

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10 *Halalupe v R* [2019] NZCA 240 at [16].

11 *Fenemor v R,* above n 7, at [23]. See also *R v Carroll v R* [2002] HCA 55, (2002) 213 CLR 635194 ALR 1; and *R v Z (Prior Acquittal)* [2000] 2 AC 483 (HL).

12 *R v K* [2019] NZSC 46 at [49], [2019] 1 NZLR 561.

[23] Finally, we cannot accept the submission that the previous acquittal evidence would have unduly impacted trial preparation. Mr Hamlin was not trial counsel. There is nothing before us to suggest that trial counsel considered that to be an issue. Further the principal issue in the trial was always whether the Crown could prove beyond reasonable doubt that the offending had occurred. The issues between the first and second trial, in so far as they related to D, remained the same.

The standard of proof for acquittal propensity evidence

[24] In the alternative, but related point, Mr Hamlin submitted that, if the prior acquittal evidence was to be led then it should have been subject to a direction that the jury had to be satisfied it was credible and reliable beyond reasonable doubt before they could use it when determining the remaining charges against Mr Williams. He emphasised that at the first trial the jury had clearly not been satisfied beyond reasonable doubt as they had acquitted Mr Williams on all the charges involving M.

[25] Again, this submission is answered by settled authority. The standard of proof for admissibility of propensity evidence is on the balance of probabilities. In *T(CA117/2015) v R*, this Court confirmed that standard applied to acquittal propensity evidence:[13]

> [25] It is also necessary to bear in mind that the standard of proof for propensity evidence is not the same as that required for an essential element of the charge. In a case involving alleged sexual offending, propensity evidence is a form of circumstantial evidence that the jury may take into account when considering whether to accept the central allegations made by the complainant. W's account of what had happened to her did not need to be proved beyond reasonable doubt. The jury had only to be satisfied that her account was correct as a matter of fact. That could be proved to a lower standard than beyond reasonable doubt.
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> [26] Furthermore, a decision as to the admissibility of propensity evidence determines only whether the evidence in question may be placed before the jury. If the evidence reaches that threshold, it is ultimately for the jury to determine whether it is credible and reliable and whether it assists them to decide whether to accept the complainant's version of events.

[26] In *T(CA/117/2015)* the Judge at the first trial had dismissed the charge based on the proposed prior acquittal evidence because she did not consider it sufficiently

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13 *T(CA117/2015) v R* [2015] NZCA 572 (footnote omitted).

reliable to support the charge. Despite that, this Court confirmed its admissibility and the standard of proof to be applied to such evidence as above.

[27] In her summing up on the use of M's evidence Judge Moala directed the jury:

> [45] You have heard evidence from [M] that she was abused by Mr Williams and even though he was found not guilty the law says that you are entitled to hear that evidence. There are two reasons for that. [T]he first is to provide you with the full picture, the full narrative of the offending without artificially cutting out what happened to [M]. The second reason is that it demonstrates a propensity by Mr Williams to sexually offend against young girls who are in his care and that's the Crown's case.
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> [46] You can only use this evidence from [M] if you are satisfied it is true. Importantly it is not the same high standard as being sure. You simply need to be satisfied that it is true. In other words make up your mind about [M]'s evidence. If you are satisfied that the evidence is true you cannot jump to the conclusion that the defendant has done it to [M] and therefore he must have done it to [D]. If you are satisfied that allegations in relation to [M] are true, it becomes part of the evidence that you need to consider in relation to the charges for [D]. The Crown highlights that in relation to the allegations by [M] and the current allegations Mr Williams was a stepfather to both of the girls. He was much older than both of the girls. Both girls were young children and vulnerable given their age and their living situation. The offending occurred at around the same time. The acts occurred frequently in relation to both girls. The offending was similar. Some of the offending was similar, in particular the oral sex. The places it occurred were similar, in the bedroom and in the garage. The Crown says that although they are sisters they did not collude. It was not put to them that they had put their heads together and come up with these false allegations. The Crown says to you these similarities make it more likely that the defendant has committed all of the offences. They show he has a tendency to act in that way and that his behaviour follows a pattern.
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> [47] That is a legitimate argument only if you accept the similarities or patterns actually exist. Mr Williams denies sexually assaulting [M]. He says that he never touched her. He stood trial for that alleged offending and he was found not guilty. He points to the differences. He says that the only sexual act that was similar was the oral sex. The sexual intercourse only happened to [D]. The attempt to have anal intercourse only happened to [M] and the touching on the vagina only happened to [D]. The offending against [M] occurred in the bedroom where others were present but asleep whereas the offending in relation to [D] largely happened when they were alone.
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> [48] Defence says that the incident that [D] describes where [M] was abused did not happen because in their submission [M] does not remember it. [T]herefore, the defence says to you there are no similarities and there is no pattern. I remind you that the defendant does not bear a burden to prove anything in this trial. So what you need to do with that evidence is to ask yourself a simple question. Are we satisfied that these incidents disclose a pattern of behaviour? If the answer to that question is yes and you accept the idea that the incidents disclose a pattern of behaviour then you can give it such weight that you consider appropriate in relation to all of the charges.

> If the answer to the question is no and you reject the idea that these incidents disclose a pattern of behaviour you should look at the evidence of [D] separately from [M]'s evidence.
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> [49] Remember in the end, you must look at each charge separately. Do not reason that just because the defendant may have been involved in another instance of sexual misconduct, in particular, in relation to [M], that does not mean that he is automatically guilty of offending in relation to [D].

[28] The Judge's directions were orthodox and consistent with this Court's rulings as to how such evidence is to be used by the jury.

The mother's evidence

[29] During the course of her testimony, T gave the following evidence:

> Q. What about the touching or the licking of his fingers or the other things you have told us about, did she indicate where that had happened?
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> A. At his parents' house.
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> Q. You have told us that she said Owen made her suck his penis.
>
> A. Yes.
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> Q. Did she describe to you how Owen did that or what Owen did?
>
> A. No.
>
> Q. What she did describe to you as to wetting his fingers before touching her vagina, did that sound familiar to you?
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> A. Yes.
>
> Q. And why was that?
>
> A. 'Cos those are the things he used to do when we used to have sex.

And then later:

> Q. [T], you've already told us about Owen wetting his fingers and putting them down there or something that he did with you and that's something [D] described to you, okay?
>
> A. Yeah.
>
> Q. And just before morning tea, we were talking about certainly engaged in oral sex?
>
> A. Yeah.

Q. You know what that means, and that's something that [D] has said that had happened between her and Owen, and I asked you when you did that with Owen yourself engaged in oral sex, whether he did anything to you and that's where we go to, all right?

A. Yeah.

Q. So let me ask that question again now. When you and Owen engaged in oral sex, when you sucked his penis, did he do anything physically to you whilst that was going on?

A. He used to like grab my head and try and push and push it down there and stuff.

[30] No application was made for the admission of that aspect of T's evidence as propensity evidence.

[31] Mr Hamlin submitted that T's evidence tended to show Mr Williams' propensity to act in a particular way while engaging in oral and digital sex acts. It was effectively propensity evidence but was admitted without the District Court ruling it as admissible under s 43 of the Evidence Act 2006. Mr Hamlin submitted that, if assessed under the propensity rules the probative value of the evidence was very low. The acts in question were generic sexual acts and there was no question as to whether the acts with T were not consensual. He submitted the risk of prejudice to Mr Williams was high.

[32] Ms Hosking conceded that the relevance of T's evidence was as propensity evidence. But she submitted it was probative and not unduly prejudicial and that if an application had been made to admit it, it would have been admitted.

[33] In closing the Crown dealt with the matter briefly:

> It is a remarkable coincidence you might think that the acts described by the girls of wetting his fingers before putting them down below, forcing her head onto his penis and his desire to engage in oral sex were all features of the sex life between the defendant and [T], and of course the same features of the sexual abuse of the two girls.

[34] Defence counsel said:

> [D] and [T] have both spoken up, Mr Williams spitting on his finger and then touching their private parts and the Crown suggests this is very distinctive.

> Now [M] also talks about spitting on his finger. She does this … but then she spits –sorry, he spits on his finger and then he rubs it around the hole on the top of his penis and then makes [M] suck his penis. Now this doesn't match. This is actually not an insignificant difference. This is a very unusual difference between the accounts. At – spit on your – the fingers rub the vagina, lubricating it, doesn't make sense if he's doing it to the tip of his penis and then getting her to suck his penis. It doesn't make sense, it doesn't match. It sounds much more like a story that's changed during the telling.

And later:

> Now [T] talked about similarities between what she says the girls described to her and what Ms Williams did to her. Of course, most of those similarities were not particularly unusual and we don't know where the girls got it from. This is another point that the Crown have emphasised quite a bit. Where would they have this information from? How could they possibly come up with this sort of information if it wasn't true? Now the answer to that from the defence perspective is we simply don't know where they got it from, nor could we be expected to know, nor … do we need to know, nor do you need to know. At the time of the interview, [D] was 13 and a half. There are plenty of places that she could've got the information from. We simply don't know.

[35] The defence actually used T's evidence and suggested it helped Mr Williams:

> … [T's] evidence helps Mr Williams and this is because she doesn't describe [strange] things that [D] said happened. Similarities are only relevant or only really relevant when they're unusual. If [T] spoke about Mr Williams doing the unusual things that [D] said happened to her, that would be very (inaudible …). Now the similarities that the Crown have pointed to he wanted oral sex. I'm afraid that's not unusual. He wanted anal sex again. These are not particularly strange things and there's no suggestion that with [D], he even tried to have anal sex. The only reference to anal sex relates to [M], not [D]. So that's not particularly unusual. She did talk about him pushing her head down during oral sex but then under cross-examination she conceded that he only ever had his hand on her head lightly. So again, it's not an unusual aspect that during oral sex, he puts his hand lightly on her head. If [T] had said that Mr Williams particularly enjoyed it when she sat on a chair with her pants down and he took his pants off and sat on top of her, if that was what Mr Williams liked to do in the bedroom with [T], that would be unusual and that would match what [D] says but that's not what [T] said. If she said that Mr Williams had always masturbate prior to oral sex, that would match what [D] said but that's not what she said.

[36] In her summing up the Judge dealt with T's evidence on these issues very briefly. Her only reference was to the defence closing:

> [64] He also said to you that while the Crown has relied on the similarities between what was done to [T] in the course of Mr Williams' sexual relationship with her and what was done with the girls he submitted to you

> that those acts of oral sex and even anal sex are not unusual and that you should not read too much into it.

[37] As Ms Hoskin conceded, T's evidence about Mr Williams' sexual activity with her was only relevant and admissible as propensity evidence. We have some reservations as to whether the evidence would have been properly admissible as propensity evidence. As defence counsel submitted, the actions T described were very general and could not be said to be uncommon during sexual activity. Against that, we accept D and M described similar acts and any sexual activity with pre-pubescent girls is unusual. But the point is that if T's evidence was to be admissible as propensity evidence, the Judge should have given a direction as to how the evidence was to be used. That did not happen. To that extent there was an error.

[38] In this case however, we are satisfied the error in the admission of the evidence without a propensity direction has not led to an unfair trial. The evidence had been led at the first trial without comment. No point was raised during the interlocutory stages in preparation for the second trial. It was limited in scope and did not assume any significance at Mr Williams' second trial. A propensity direction as to how it could have been used would simply have drawn more attention to it. Unlike most propensity evidence, there was nothing inherently prejudicial about T's description of sexual activity between consenting adults. Neither counsel nor the Judge placed any emphasis on the evidence. The Crown's reference to it in closing was very limited. As noted, defence counsel used it to make a submission that it actually helped Mr Williams by contrasting it with the circumstances of the offending alleged by M and D.

[39] Overall, we are satisfied that the admission of T's evidence without a propensity direction could not have led to an unfair trial or the risk of a miscarriage.

Result

[40] The appeals against conviction and sentence are dismissed.

Solicitors:
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