## IN THE SUPREME COURT OF NEW ZEALAND

SC 100/2013 [2013] NZSC 144

BETWEEN DARREN GEORGE HOSKING

Applicant

AND THE QUEEN

Respondent

Court: Elias CJ, Glazebrook and Arnold JJ

Counsel: P J Mooney for Applicant

J E Mildenhall for Respondent

Judgment: 13 December 2013

## JUDGMENT OF THE COURT

## The application for leave to appeal is dismissed.

## **REASONS**

[1] Following a District Court jury trial, the applicant, Mr Hosking, was convicted of seven counts of doing an indecent act in a public place. Six counts involved exposing his genitals to others and one involved masturbating himself. Judge Roberts sentenced him to 15 months' imprisonment on the lead offence (exposure and masturbation in a school yard in the presence of children) and concurrent sentences of eight months' imprisonment on the remaining six counts. Mr Hosking appealed against conviction and sentence. The Court of Appeal quashed two of the convictions, ordering retrials, on the ground that the trial Judge did not give the usual direction that the jury should consider each count separately and the Court could not be satisfied that there was no substantial miscarriage of justice given the evidence in relation to those two counts. The Court upheld the

<sup>&</sup>lt;sup>1</sup> R v Hosking DC New Plymouth CRI-2011-043-1099, 25 July 2012.

<sup>&</sup>lt;sup>2</sup> Hosking v R [2012] NZCA 460. [Hosking (CA)].

remaining convictions, however, but reduced Mr Hosking's sentence to 12 months' imprisonment. The Crown has decided not to proceed with the retrials.

[2] Mr Hosking now seeks leave to appeal, albeit out of time, on the grounds that:

- (a) The evidence of each of the incidents giving rise to the charges should not have been treated as propensity evidence in relation to the other incidents.
- (b) If they were properly treated as propensity evidence, the trial Judge's instructions to the jury were inadequate.
- (c) Having allowed appeals in respect of two of the convictions, the Court of Appeal should have allowed the appeal in respect of the remaining convictions and ordered a new trial on them all.
- [3] We are not satisfied that it is necessary in the interests of justice for this Court to hear and determine an appeal in this case. The Court has previously discussed the principles applicable to propensity evidence, most particularly in *Mahomed v R*.<sup>3</sup> We do not see the present case as raising any matter of general or public importance in that connection. Moreover, we see no risk of a substantial miscarriage of justice. No challenge was made to the joinder of the counts at trial or before the Court of Appeal.<sup>4</sup> The evidence going to the various counts was undoubtedly propensity evidence in relation to the other counts, as the Court of Appeal explained.<sup>5</sup> Finally, the evidence against Mr Hosking on the lead offence was, as the Court of Appeal also said, strong<sup>6</sup> and the Court's analysis of the evidence on the other counts raises no obvious issue. In these circumstances, we are satisfied that leave should not be granted.

Solicitors:

Crown Law Office, Wellington for Respondent

<sup>&</sup>lt;sup>3</sup> *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

<sup>4</sup> Hosking (CA), above n 2, at [2].

<sup>&</sup>lt;sup>5</sup> At [29]–[35].

<sup>&</sup>lt;sup>6</sup> At [21].