NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985

IN THE SUPREME COURT OF NEW ZEALAND

SC 113/2013
[2014] NZSC 10

BETWEEN	K Applicant
AND	THE QUEEN Respondent

Court:	McGrath, William Young and Arnold JJ
Counsel:	D P H Jones QC for Applicant M D Downs and M L Wong for Respondent
Judgment:	20 February 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted on 15 counts of sex offending against his daughter between 1998 and 2004. At the time she was aged between 12 and 16 years.

[2] Following an evidential video interview of the complainant, the taking of a statement from her mother and the receipt (pursuant to a search warrant) of text messages between the complainant and the applicant, the complainant, at the suggestion of the Police, made a telephone call to the applicant which was recorded. In the course of the call, the applicant made admissions implicating him in the offending with which he was later charged. The recording of the call was admitted

as evidence at the applicant's trial. The explanation he gave in evidence for his apparent admissions was not believed by the jury. His appeal to the Court of Appeal was dismissed,[1] and he seeks leave to appeal to this Court.

[3] The applicant argues that the recording of the call was improperly obtained and should have been excluded at trial under s 30(5) of the Evidence Act 2006. The applicant's main submission is that the Police already had sufficient evidence to charge the applicant when the recorded telephone conversation took place. He says that they had used the complainant to obtain admissions from him to avoid their obligation to caution the applicant before interviewing and arresting him. This is said to be in breach of clause 2 of the Chief Justice's Practice Note on Police Questioning.[2] The Court of Appeal rejected the submission that the Police already had sufficient information to charge the applicant. The Court held that in all the circumstances there was no breach of the Practice Note's requirements.[3]

[4] The applicant also seeks leave to appeal on the ground that the Court of Appeal applied the wrong legal test when deciding that the recording was not unfairly obtained on the basis that the complainant was not acting as an agent of the state when she made the phone call and that the admissions had not been elicited in a manner that was unfair.[4] The Court of Appeal's judgment was based on principles determined in *R v Barlow*,[5] a case which involved recording of conversations with persons after they had been arrested by the Police. The present case concerns a recorded conversation that took place prior to the participant's arrest. The situation was accordingly of a different kind to that in *Barlow* but the differences are not, in our view, such as to involve an extension of its principles.

[5] In the end, this is a case which involved the application of established law to a different factual situation. The application for leave to appeal does not raise a legal question of general or public importance. Nor do we see any basis for argument that a substantial miscarriage of justice may have occurred.

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1 *K (CA106/2013) v R* [2013] NZCA 430.
2 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.
3 *K (CA106/2013) v R*, above n 1, at [31].
4 See at [21] and [27]–[30].
5 *R v Barlow* (1995) 14 CRNZ 9.

[6] The application for leave to appeal is accordingly dismissed.

Solicitors:
Cook Morris Quinn, Auckland for Applicant
Crown Law Office, Wellington for Respondent