NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS, OF COMPLAINANT UNDER THE AGE OF 18 YEARS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011

IN THE SUPREME COURT OF NEW ZEALAND

SC 9/2015
[2015] NZSC 43

BETWEEN	REBEL WAITOHI Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, Arnold and O'Regan JJ
Counsel:	N P Chisnall for Applicant M G Wilkinson for Respondent
Judgment:	22 April 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against a decision of the Court of Appeal dismissing his appeal against sentence.[1]

[2] He had been sentenced by Lang J in the High Court to a term of imprisonment of six years and six months.[2]

[3] The appellant had been found guilty at trial of two counts involving the causing of injury to his infant daughter. The first count was a count under s 188(2)

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1 *Waitohi v R* [2014] NZCA 614 (French, Asher and Clifford JJ) (Court of Appeal judgment).
2 *R v Waitohi* [2014] NZHC 1018.

of the Crimes Act 1961 of wounding with reckless disregard for the safety of another. This involved causing a life-threatening vertical tear to the back of the baby's throat by ramming his finger or some other object into the baby's throat. The injury was a serious one that had lasting effects (requiring the baby to feed through a tube) but from which the baby has now recovered. Lang J imposed a sentence of five years imprisonment on this count (uplifted from four years and six months because of the appellant's previous convictions for violent offences).[3] The second count was a count under s 189(2) of the Crimes Act of injuring with reckless disregard for the safety of another. This involved causing fractures to two of the baby's ribs. Lang J imposed a cumulative sentence of 18 months imprisonment for this count (reduced from two years and six months to take into account the totality principle).[4]

[4] The point of principle that the applicant wishes to pursue if leave is granted relates to s 9A of the Sentencing Act 2002. That section requires a sentencing Judge to take into account a number of specified aggravating factors where the offence involves violence against, or neglect of, a child under 14 years of age. In its decision, the Court of Appeal observed that its earlier decision in *R v Brown*,[5] which was decided before s 9A came into force, will require reconsideration in light of s 9A.[6] However, it did not undertake that reconsideration. This appeared to be because the Court found that the present offending was more serious than the offending in *R v Brown*, justifying the higher starting point in the present case than that adopted in *R v Brown*.[7]

[5] The applicant says the aggravating factors in s 9A were addressed in *R v Brown* and an earlier decision on sentencing for the infliction of violence with reckless disregard, *R v Wilson*.[8] So the applicant wishes to argue that s 9A does not signal the need for "tougher sentences" than those imposed prior to its enactment.

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3 At [15] and [19].
4 At [15].
5 *R v Brown* [2009] NZCA 288.
6 Court of Appeal judgment, above n 1, at [25].
7 At [26].
8 *R v Wilson* [2004] 3 NZLR 606 (CA).

[6] Counsel for the applicant, Mr Chisnall, accepts that it would be only where an important question of principle arises or where there is plainly an appearance of a substantial miscarriage of justice that this Court would grant leave on a sentencing matter. He submits that this case is such a case because the Court of Appeal concluded that s 9A "in and of itself, signals a need for tougher sentences", a proposition that he says requires scrutiny in this Court.

[7] The Court of Appeal's statement in the present case about s 9A was that the sentencing range in *R v Brown* "will require reconsideration".[9] As mentioned earlier, it did not undertake that reconsideration. It has not determined how s 9A affects its earlier decisions and has not concluded that more severe sentences are required or, if they are, how much more severe such sentences should be. If we gave leave, therefore, we would be required to consider those issues without the benefit of the considered views of the Court of Appeal, a consideration that counts against leave being granted. The impact of s 9A was not directly in issue in the present case because, as noted earlier, the Court of Appeal treated the offending as more serious than the offending in *R v Brown*, justifying the higher starting point in the present case than that adopted in *R v Brown*.

[8] Mr Chisnall also submits that a miscarriage of justice has occurred because the Court of Appeal did not explain why a markedly higher starting point (four years and six months) was upheld in the present case than that adopted in *R v Brown* (three years and six months). That submission seeks a revisiting of the factual assessments made by the Court of Appeal. We do not see the Court of Appeal's assessment as plainly giving rise to a substantial miscarriage of justice. In effect the applicant is seeking a second hearing of his appeal on the facts, something that is not a proper basis for an appeal to this Court.

[9] The application for leave to appeal is dismissed.

Solicitors:
Public Defence Service, Wellington for Applicant
Crown Law Office, Wellington for Respondent

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[9] Court of Appeal judgment, above n 1, at [25].