NOTE: PURSUANT TO S 25 OF THE MENTAL HEALTH (COMPULSORY ASSESSMENT AND TREATMENT) ACT 1992, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B AND 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE SUPREME COURT OF NEW ZEALAND

SC 16/2015
[2015] NZSC 66

BETWEEN	**B** Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	A J Bailey for Applicant G A Kelly for Respondent
Judgment:	15 May 2015

JUDGMENT OF THE COURT

A An extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found not guilty on the grounds of insanity on five charges: threatening to do grievous bodily harm; unlawful possession of a pistol; unlawful possession of ammunition; unlawful possession of explosives; and possession of an offensive weapon. An order was made under s 24(2)(a) of the Criminal Procedure (Mentally Impaired Persons) Act 2003 that the applicant be

detained as a special patient under the Mental Health (Compulsory Assessment and Treatment) Act 1992.[1]

[2] The applicant appealed to the Court of Appeal against the order making him a special patient. After abandoning a number of the grounds of appeal, he advanced his appeal to the Court of Appeal on the basis that he had not acknowledged guilt on two of the charges that he faced and wanted to defend them.[2] Thus he argued that his counsel in the District Court had not acted in accordance with his instructions when advancing the insanity defence in relation to those charges and that this failure by his trial counsel led to a miscarriage of justice.

[3] The Court of Appeal considered affidavits from both the appellant and his counsel in the District Court, and the counsel was cross-examined in the Court of Appeal. The Court of Appeal found that the evidence before it did not support the ground of appeal and that ground of appeal was dismissed.[3]

[4] The applicant applies for leave to appeal against the Court of Appeal decision. The application is out of time but the respondent does not challenge the grant of an extension of time. We therefore extend time and deal with the application on its merits.

[5] The application for leave to this Court essentially reiterates the ground advanced in the Court of Appeal. The applicant's counsel argues that the applicant's evidence before the Court of Appeal was unchallenged (because he was not cross-examined in the Court of Appeal) and should have been accepted by the Court of Appeal notwithstanding the evidence given by the applicant's counsel that directly contradicted it.

[6] The basis on which the application is advanced in this Court appears to be premised on the Court of Appeal having rejected the applicant's evidence. But, in

---

1 *R v B* DC Nelson CRI-2011-042-2349, 27 April 2012 (Judge Zohrab).

2 The two counts were threatening to do grievous bodily harm and unlawful possession of explosives.

3 *B v R* [2014] NZCA 212 (White, Ronald Young and Simon France JJ) [*B* (CA)]. A second ground of appeal relating to the inclusion of a charge of unlawful possession of an explosive device in the order detaining the applicant as a special patient was allowed.

fact, the Court of Appeal concluded that the evidence given by the applicant did not provide an evidential basis for the ground of appeal.[4] To reiterate, the basis on which the appeal was advanced was that the applicant had instructed his counsel that he wished to defend two of the charges which he faced but not the others. An alternative ground of appeal, advanced on the basis that he had instructed his counsel that he wished to defend all five of the charges was abandoned in the Court of Appeal.

[7] So the question before the Court of Appeal was whether the applicant had instructed his counsel to the effect that he wished to contest two charges only. The applicant's evidence was that he had asked his counsel if it was possible to rely on the insanity defence for some charges but not others, and had been told that he could not do so. He said that he had therefore instructed his counsel to defend all of the charges and elect trial by jury. As the Court of Appeal said, that did not provide an evidential basis for the proposition that he had instructed his lawyer to defend two of the charges only.[5] There was, therefore, no unchallenged evidence that the applicant had instructed his lawyer that he wished to defend two charges and plead the insanity defence on the others, which was the basis on which he advanced his appeal in the Court of Appeal.

[8] We do not consider that a dispute about factual findings made in the Court of Appeal is a proper basis for the grant of leave for a second appeal to this Court. In effect, the applicant seeks to embark on another exercise involving fact finding, which simply duplicates the process undertaken in the Court of Appeal.

[9] The applicant argues that a point of public importance arises, relating to the obligations of counsel concerning instructions on the insanity defence. We do not accept that that is the case: rather the case turns on the specific facts and the resolution of the disputed assertions of the applicant and his counsel as to what instructions were given.

---

4 *B* (CA), above n 3, at [13].
5 At [13].

[10] We do not consider that there is any risk of miscarriage if leave is not granted. Accordingly, we dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent