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

IN THE SUPREME COURT OF NEW ZEALAND

SC 140/2015
[2016] NZSC 71

BETWEEN	T (SC 140/2015) Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	W C Pyke for Applicant I R Murray for Respondent
Judgment:	20 June 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted after a jury trial of one charge of sexual violation of his grand-niece, A, who was 12 years of age at the time of the offending. He appealed against conviction and sentence to the Court of Appeal. His appeal against conviction was dismissed, but his sentence was reduced from five years and two months' imprisonment to four years and eight months' imprisonment.[1]

[2] The applicant seeks leave to appeal against his conviction on the same points as he advanced unsuccessfully in the Court of Appeal. None of these points involves matters of general or public importance so the application is advanced on the basis

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1 *T(CA117/2015) v R* [2015] NZCA 572 (Randerson, Lang and Clifford JJ) [CA conviction appeal].

that a substantial miscarriage of justice may have occurred or may occur unless leave is granted.[2]

[3] Propensity evidence was given at the trial by a young relative of the applicant, W.[3] She gave evidence that she was raped by the applicant when she was 13 years of age in 2008. The applicant had been discharged under s 347 of the Crimes Act 1961 in respect of W's allegations when the matter came to trial in 2010. This was because of conflicting accounts given by W of the precise nature of the sexual assault on her. W's evidence at the applicant's trial in the present case was that the applicant had penetrated her vagina with his penis. She explained that the differences between her various accounts at the applicant's trial for offending against her and her evidence in the present case was because she had not experienced sex before the 2008 incident and was not confident in describing the anatomical details at the time she gave her evidential video and at the 2010 trial. She was 19 at the time of the trial in the present case, and said she was now more confident in relation to these matters.

[4] The applicant wishes to raise two matters in relation to W's evidence: its admissibility and the fact that the trial Judge in the present case did not give a reliability warning.[4]

[5] In relation to admissibility, the applicant wishes to argue that W's evidence, having been found sufficiently unreliable to justify a s 347 discharge at the 2010 trial, should not have been admitted as propensity evidence.[5] The arguments on admissibility were carefully evaluated by the Court of Appeal both in its pre-trial decision and in the conviction appeal, in which it declined to revisit the pre-trial decision, and we do not consider that there is a risk of a miscarriage if a third airing of these arguments is foreclosed by the refusal of leave on this point.

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2 Supreme Court Act 2003, s 13(2)(b).

3 There was also propensity evidence at the trial of another relative, G. The applicant had been convicted in 1995 of indecently assaulting G, who was aged 15 at the time.

4 Evidence Act 2006, s 122(1).

5 The proposed challenge to the admissibility of W's evidence would be, in effect, a challenge to a pre-trial decision of the Court of Appeal upholding a District Court decision that it was admissible: *T(CA199/2014) v R* [2014] NZCA 364 (Wild, Ronald Young and Cooper JJ).

[6] In relation to reliability, the argument the appellant wishes to make is that the Judge ought to have given a reliability warning and that the failure to do so led to a miscarriage. The Court of Appeal accepted that a warning would have been appropriate but found that, in the context of the trial, the omission to give a warning did not lead to a miscarriage.[6] This was a facts-specific analysis and we see no risk that a miscarriage will occur if leave is not granted on this issue.

[7] The applicant also wishes to raise points relating to two aspects of the closing address of the prosecutor at the trial. The first was a comment about the basis for the applicant's acquittal for the alleged offending against W, which the applicant said was misleading because he was, in fact, discharged under s 347 rather than acquitted by a jury. The second was an observation by the prosecutor about the age of the applicant's partner.[7]

[8] The Court of Appeal considered that these comments by the prosecutor, unfortunate as they were, were unlikely to have assumed great significance in the trial.[8] It noted that it would have been difficult for the Judge to correct the comment about the acquittal on the rape count involving W because the circumstances of the dismissal of the charge were not before the jury. We see no appearance of a miscarriage of justice arising from that assessment.

[9] We dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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6 CA conviction appeal, above n 1, at [29]–[30] and [40]–[41].

7 In *Kohai v R* [2015] NZSC 36, [2015] 1 NZLR 833 at [44] and [50], this Court said a similar statement made by the prosecutor in Mr Kohai's trial should not have been made. That criticism applies equally to the statement made by the prosecutor in the present case.

8 CA conviction appeal, above n 1, at [49].