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

NOTE: THE HIGH COURT ORDER PROHIBITING PUBLICATION OF THE NAME OR IDENTIFYING PARTICULARS OF THE APPLICANT REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

SC 31/2016
[2016] NZSC 72

BETWEEN	M (SC 31/2016) Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, Arnold and O'Regan JJ
Counsel:	M J English for Applicant A J Ewing for Respondent
Judgment:	20 June 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant is the father of twin boys who were physically abused when aged between eight and ten weeks. He and his partner, the mother of the boys, pleaded guilty to two charges under s 195 of the Crimes Act 1961 of neglecting a child by omitting to discharge their legal duty, the omission of which is likely to cause suffering to the children. The omission was the failure to obtain medical treatment for the twins. The evidence was that the injuries to the twins were significant (and that they would have been in considerable pain for some days before medical treatment was sought). The injuries had been inflicted while the twins were

in the joint care of the applicant and his partner, but it could not be proved who had inflicted them.

[2] Courtney J sentenced the applicant to a term of imprisonment of four years and four months, and sentenced the applicant's partner to a term of imprisonment of three years and six months.[1] Both appealed against sentence to the Court of Appeal, but the appeals were dismissed.[2] The applicant seeks leave to appeal to this Court against the Court of Appeal decision.

[3] The applicant identifies three matters that he seeks to argue if leave to appeal is granted.

[4] The first arises from the Court of Appeal's rejection of an argument made to that Court in support of the appeal. The applicant's counsel submitted that the starting point taken by the sentencing Judge in his case (six years' imprisonment) was excessive by comparison with sentences imposed in relation to offences under s 188(1) of the Crimes Act or other offences of serious violence.[3] The Court said it did not derive any assistance from that comparison noting that s 195 was targeted specifically at children and vulnerable adults and reflected a Parliamentary intention to provide specific protection in that context against violence or neglect.[4]

[5] The applicant wishes to argue that the cases to which his counsel made reference in the Court of Appeal were relevant because they dealt with the commission of serious violence against young children and were therefore broadly comparable. We do not see this as an issue of general or public importance. The Court of Appeal's position reflected its assessment of the relevance of the cases given the different nature of the offending under ss 188 and 195 respectively, the fact that s 188 has its own guideline judgment, *R v Taueki*,[5] and the different maximum penalties.

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1 *R v DK* [2015] NZHC 2137.

2 *M(CA 559/2015) v R* [2016] NZCA 53 (Randerson, Venning and Collins JJ) [Court of Appeal judgment].

3 As a result of mathematical errors in the calculation of the end sentence, the effective starting point was five years and six months: Court of Appeal judgment at [14].

4 Court of Appeal judgment at [25]. Section 188 deals with injuring with intent to cause grievous bodily harm or with intent to injure or with reckless disregard.

5 *R v Taueki* [2005] 3 NZLR 372 (CA).

[6] The second point the applicant seeks to raise is a response to a comment made in the Court of Appeal judgment, namely:[6]

> There are cases, of which this is one, where it is not possible to prove to the criminal standard who is responsible for a child's injuries. In such cases, the protective purpose [of s 195 of the Crimes Act] may be achieved by prosecuting those who are responsible for the child's care.

[7] The applicant wishes to argue that this is a major departure from the principle that, where it is not possible to prove who committed an act, nobody should be held criminally liable. We do not think that is what the Court of Appeal meant. We think that is clear from the fact that it expressly accepted the submission made on behalf of the applicant that "the appellants were not to be sentenced as the perpetrators of the injuries sustained by the two babies involved".[7]

[8] The observation made by the Court of Appeal simply seems to be noting the fact that the maximum penalty of ten years' imprisonment under s 195 applies both to acts of commission (the infliction of violence) and to neglect of the kind that arose in the present case. We do not think this observation is a matter that is appealable, let alone a matter of general or public importance. We think it is clear that the Court of Appeal did not assess the appropriateness of the sentence imposed on the applicant as if he had inflicted violence on the children.

[9] The third point the applicant wishes to raise arises from the Court of Appeal's rejection of the submission that the mother of the children should have been treated as having greater culpability because she had more day to day involvement in the care of the twins during the period between the infliction of the injuries and the seeking of medical attention. The Court rejected this on the basis that both the applicant and his partner had opportunities to identify the injuries and take timely steps to obtain treatment, and were therefore equally culpable.[8] That is a purely factual question and clearly raises no point of public importance.

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6 Court of Appeal judgment, above n 2, at [33].
7 At [35].
8 At [38].

[10] None of the grounds of appeal raises issues meriting the granting of leave, and we see no appearance of a miscarriage of justice if leave is not granted.

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

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