NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 146/2016
[2017] NZSC 122

BETWEEN	SAYED REZA HUSSAINI Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: Applicant in person
M H Cooke for Respondent

Judgment: 18 August 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant filed an application for leave to appeal in December 2016. The stated ground of appeal was "The decision was wrong". The applicant applied for, and was granted, five extensions of time to file submissions. Despite this, the applicant has not been able to obtain legal representation and has not been able to prepare submissions in support of his appeal, apart from a short letter seeking review of his sentence.

[2] The decision against which the applicant wishes to appeal is a decision of the Court of Appeal dismissing his appeal against conviction and sentence.[1] The

[1] *Hussaini v R* [2016] NZCA 413 (Wild, Courtney and Woodhouse JJ) [*Hussaini* (CA)].

applicant had been found guilty by a jury in the District Court on charges of sexual violation (involving anal penetration), assault with a weapon and male assaults female. He was sentenced to a term of imprisonment of eight years and nine months.[2] His appeal against conviction to the Court of Appeal challenged the evidence given for the prosecution by a nurse, Ms Kumar, that the complainant had told her that the applicant had sexually abused her. Ms Kumar was a practice nurse at the practice of the complainant's doctor.

[3] The counsel who represented the applicant in the Court of Appeal accepted that the complainant's veracity had been challenged, so that Ms Kumar's evidence was admissible under s 35(2) of the Evidence Act 2006. But he argued that Ms Kumar's evidence was "a graphic and detailed description" of what the complainant had told her that was out of all proportion to what was necessary to answer the challenge to the complainant's veracity. The Court of Appeal did not accept the evidence was excessive. It noted that, in considering the extent of Ms Kumar's evidence, it had to be recognised that some of the evidence related to charges on which the applicant was acquitted.[3]

[4] The applicant's counsel also argued in the Court of Appeal that the applicant was prejudiced because his trial counsel did not have the chance to cross-examine the complainant on Ms Kumar's evidence (because the complainant did not refer to Ms Kumar in her evidence).

[5] The Court of Appeal rejected this for four reasons:[4]

(a) The complainant said in evidence that it was only at her doctor's that she confided about the sexual abuse. She could have been asked to say whom she had told of the abuse but was not.

(b) Trial counsel could have asked for the complainant to be recalled, but did not.

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[2] *R v Hussaini* [2015] NZDC 15273 (Judge Gibson).
[3] *Hussaini* (CA), above n 1, at [12].
[4] At [13]–[14].

(c) Trial counsel was able to make much of the inability to cross-examine the complainant in relation to Ms Kumar's evidence in closing and the Judge endorsed this in his summing up.

(d) In any event, cross-examination would have yielded little because, despite some differences between the complainant's account at trial and the account she was said to have given to Ms Kumar, the two accounts were, in substance, the same.

[6] We have, with the applicant's consent, obtained a copy of the written submissions of his counsel in the Court of Appeal. We asked the respondent to make submissions on these. Having reviewed that material and the decision of the Court of Appeal, we do not see any basis on which leave could be given in relation to the proposed conviction appeal. The Court of Appeal's assessment was fact-specific and no point of public importance arises. Nor do we see any appearance of a miscarriage of justice.

[7] The applicant's appeal against sentence was not pursued by his counsel in the Court of Appeal and was formally dismissed.[5] The applicant says he did not instruct his counsel not to pursue the sentence appeal and asks us to review it. We have considered Judge Gibson's sentencing remarks and have also received submissions on sentence from the respondent.

[8] Judge Gibson took as the lead charge for sentencing purposes the representative charge of sexual violation involving anal penetration and applied the guidelines in the Court of Appeal decision *R v AM (CA27/2009)*.[6] He set a starting point of 10 years, which is in the middle of band 2 in *R v AM (CA27/2009)*. He added six months for the two other charges and deducted 15 per cent for mitigating factors, leading to an end sentence of eight years and nine months' imprisonment.

[9] The respondent submits that the sentence was unremarkable and gives rise to no issue of general principle. We accept that submission. As the criteria for the

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5 At [16].

6 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

grant of leave are not met, the application for leave to appeal against sentence must fail.

[10] The application for leave to appeal against conviction and sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent