NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 MADE IN THE COURT OF APPEAL REMAINS IN FORCE.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

SC 75/2017
[2017] NZSC 141

BETWEEN	C (SC 75/2017) Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, William Young and O'Regan JJ

Counsel: N M Dutch for Applicant
I R Murray for Respondent

Judgment: 19 September 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was charged with 15 counts of sexual offending against two girls who were living in his house at the relevant time. We will call them G and M. He was convicted after a jury trial of five counts of sexual violation by unlawful sexual connection in relation to G. He was acquitted in relation to 10 similar charges in relation to M.

[2] Prior to his trial, the applicant applied to adduce evidence under s 44 of the Evidence Act 2006 about alleged sexual activity between G and M. He wished to

cross-examine both G and M about this, and also to cross-examine G's mother about it. The application was declined in the District Court.[1]

[3] The applicant's appeal against his conviction related only to the s 44 issue that had been dealt with in the pre-trial ruling.

[4] The applicant advanced three reasons for admission of the evidence, but all three were rejected by the Court of Appeal.[2]

[5] The first reason was that the evidence would be relevant to whether G and M had a motive to lie about the offending. The Court considered this did not meet the heightened relevance test in s 44 because a sexual relationship would not have provided a motive for G to fabricate her complaint.[3]

[6] The second was that if there were a sexual relationship between G and M, this would have explained the similarity in the allegations they made against the applicant given that there was evidence that the sexual relationship between G and M would have involved sexual acts that were similar to those that G and M said the applicant had done to them. The Court considered this also did not meet the heightened relevance test.[4] The sexual activities in question were not, of themselves, unusual and there was nothing in the proposed evidence that would support a suggestion that the allegations made by the complainants against the applicant were based on their own activities.

[7] The third reason was that, if there were a sexual relationship between G and M, this would be relevant to explaining why they knew about the sexual activities they attributed to the applicant. The Court considered this did not meet the heightened relevance test. The jury had before them an admission of facts including an admission that the fact that the child has sexual knowledge does not necessarily mean they have been sexually abused, given the numerous potential sources of such knowledge. The Court considered that this admission meant that there was no basis

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1 *R v [C]* [2016] NZDC 21139 (Judge Harding).
2 *C (CA634/2016) v R* [2017] NZCA 275 (Cooper, Mallon and Wylie JJ).
3 At [21].
4 At [23].

for the jury to consider that the fact that the complainants had knowledge of sexual matters supported the contention that they had been sexually abused by the applicant.[5]

[8] The applicant seeks to raise these arguments again in this Court in what would be essentially a third rehearsal of the same arguments. He argues that a substantial miscarriage of justice has arisen from the exclusion of the evidence under s 44 and also argues that the interpretation of s 44 is a matter of general public importance.

[9] This Court has dealt with the principles arising in relation to the interpretation of s 44 in two recent cases.[6] We do not see any need for further consideration of the principles set out in those cases. Nor do we see any appearance of a miscarriage of justice in the way the principles were applied in the present case.

[10] In those circumstances we dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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5 At [26].

6 *B (SC 12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261; and *Best v R* [2016] NZSC 122, [2017] 1 NZLR 186.