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

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 71/2017
[2017] NZSC 154

BETWEEN	W (SC 71/2017) Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, Glazebrook and O'Regan JJ

Counsel: T Epati for Applicant
K S Grau for Respondent

Judgment: 6 October 2017

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 convicted after a jury trial on one count of sexual violation by unlawful sexual connection. The offence involved forcing the complainant to perform oral sex on him. He was sentenced to a term of imprisonment of six years.[1] He appealed against conviction and sentence to the Court of Appeal, but the appeal was dismissed.[2] He seeks leave to appeal to this Court against both conviction and

1 *R v [W]* [2016] NZDC 12295 (Judge Ingram).
2 *W (CA378/2016) v R* [2017] NZCA 235 (French, Mallon and Wylie JJ) [*W v R* (CA)].

sentence. His application was filed out of time but the delay was adequately explained and we grant an extension of time.

[2] The applicant and the complainant were in a relationship which was described by the Court of Appeal as "a volatile on-off relationship".[3] The complainant had obtained a final protection order against him some months before the present offending occurred. The sexual violation occurred in the context of a week-long period of the complainant being subjected to episodes involving violence on the part of the applicant. By the time the trial for the sexual violation count commenced, the applicant had pleaded guilty to a number of counts involving offences of violence against the complainant that had occurred during that week-long period. He was sentenced to a term of imprisonment of two years and four months for those offences.[4]

[3] The complainant had been taken to hospital by her sister after one of the applicant's assaults on her. After she was discharged from hospital the applicant took her home. He told her he wanted her to perform oral sex on him. She refused, because her mouth was sore as a result of an earlier assault. The Crown case was that he then forced her to perform oral sex on him. The complainant made the allegation of forced oral sex in a signed written statement and also in an evidential video interview. She also told both her sister and a doctor about it. The defence case was that oral sex had taken place but the complainant had not only consented to it, she had initiated it. The complainant accepted that she and the applicant had consensual vaginal sex later in the same day.

[4] By the time the case came to trial, the complainant had changed position. She said she had consented to the oral sex and had lied to the police about it. She denied telling her sister and the doctor that she had been forced to have oral sex. The trial Judge declared her to be a hostile witness.

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3 At [4].

4 *R v [W]* [2016] NZDC 283 (Judge Bidois). The sentence for the sexual violation was cumulative on this sentence.

[5] The focus of the proposed appeal against conviction is on the direction relating to reasonable belief in consent in the summing up of Judge Ingram and the question trail he provided to the jury.

[6] The Court of Appeal considered the direction on reasonable belief in consent, though brief, was correct and there was no reason to suppose the jury did not know what they were required to do.[5] The applicant wishes to argue on appeal that the direction caused a miscarriage of justice. We do not consider that anything raised by the applicant throws doubt on the conclusion reached by the Court of Appeal on this point and therefore nothing that suggests there may have been a risk of miscarriage of justice.

[7] The applicant also argues that a point of public importance arises, namely the issue of when a direction on reasonable belief in consent must be given in a case where the defendant does not assert such a belief. That issue has recently been addressed by this Court in *C (SC 124/2016) v R* and there is nothing in the present case that requires the Court to revisit that case.[6] In *C v R*, the trial Judge had given no direction on reasonable belief in consent. In the present case, the trial Judge addressed reasonable belief in consent both in the question trail and in his summing up.

[8] The proposed sentence appeal relates to the discount given by the Judge to recognise the applicant's youth (19 years of age). The applicant wishes to argue that a greater allowance for this factor should have been made. We do not see this as giving rise to any point of principle; nor do we consider there has been a miscarriage of justice.[7]

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

Solicitors:
Rishworth Wall & Mathieson, Gisborne for Applicant
Crown Law Office, Wellington for Respondent

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5 *W v R* (CA), above n 2, at [33].
6 *C (SC 124/2016) v R* [2017] NZSC 145.
7 *Burdett v R* [2009] NZSC 114.