NOTE: PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 39/2017
[2017] NZSC 169

BETWEEN	S (SC 39/2017) Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	Applicant in person J A Eng for Respondent
Judgment:	16 November 2017

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is allowed.

B The application for leave to appeal is dismissed.

REASONS

[1] The applicant applies for an extension of time to apply for leave to appeal against a decision of the Court of Appeal in which that Court dismissed his appeal against conviction and, if the extension is given, for leave to appeal.[1] The Court of Appeal decision was delivered on 30 May 2013 and the present application was made on 18 April 2017, nearly four years out of time.

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1 *S (CA361/2010) v R* [2013] NZCA 179 (Stevens, Allan and Clifford JJ) [*S v R* (CA)].

[2] The convictions against which the applicant appealed to the Court of Appeal were entered after a District Court jury trial before Judge Gittos in 2010. The applicant was convicted of four counts of rape (two of which were representative charges) and three counts of sexual violation by unlawful sexual connection (one of which was representative). The victim was his stepdaughter, J. The offending occurred over a period of about five years, when J was between nine and 14 years of age.

[3] Although the applicant has delayed in seeking to appeal to this Court for nearly four years, he has challenged his convictions (directly and indirectly) in a number of different fora in the years since his conviction.[2]

[4] The applicant wishes to argue on appeal that the Court of Appeal judgment contains an error of fact and this error has led to a substantial miscarriage of justice.

[5] The background to this is the evidence given at his trial by a Crown witness, Dr McLaren, who conducted a medical examination of J soon after J's complaint to the police. In the Court of Appeal, the applicant argued that his trial counsel failed to cross-examine Dr McLaren adequately on her evidence relating to her examination of J's hymen. J's account in her evidential video interview (EVI) and in her evidence in Court, was that she had been raped every day or second day from the time she was 12 years old.

[6] Dr McLaren's evidence was that she conducted a thorough external inspection of J's vagina and hymen but J's distress prevented a full internal examination. She did not detect any tear in the hymen. In the Court of Appeal it was argued that the applicant's trial counsel should have put to Dr McLaren the fact that there had been 800 alleged rapes. The Court of Appeal disagreed, saying Dr McLaren knew from the EVI the number of alleged rapes.[3]

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2 Two applications for habeas corpus: *S v Chief Executive of the Department of Corrections* [2014] NZHC 1157 and *[S] v Attorney-General* [2014] NZHC 1232; three applications for recall of *S v R* (CA), above n 1: *S (CA361/2010) v R* [2013] NZCA 359, *S (CA361/2010) v R* [2015] NZCA 259 and *S (CA361/2010) v R* [2015] NZCA 358; an appeal against the habeas corpus decisions: *[S] v Chief Executive of the Department of Corrections* [2014] NZCA 308; an application to this Court to appeal against the Court of Appeal decision in [2014] NZCA 308: *[S] v Chief Executive of the Department of Corrections* [2014] NZSC 120; and an application for recall of that decision: *[S] v Chief Executive of the Department of Corrections* [2014] NZSC 128.

3 *S v R* (CA), above n 1, at [72]–[73].

[7] The applicant has been provided with a police jobsheet dated 24 November 2016 responding to a complaint he made that the police officers involved in his case had engaged in misconduct. In that jobsheet, it is stated that Dr McLaren informed the officer investigating the complaint that she was not given a copy of the victim's EVI, contrary to the statement in the Court of Appeal judgment.

[8] The applicant argues:

(a) this relatively recent disclosure provides justification for his application for leave to appeal to this Court being made so long after the Court of Appeal decision; and

(b) it can be assumed Dr McLaren thought the victim had been raped four times, not 800 times, thus compromising her evidence as to the state of J's hymen and her opinion that the lack of visible damage to the hymen did not support or negate the victim's evidence.

[9] We accept the first of those arguments and grant the required extension of time.

[10] We do not accept the second of those arguments. Dr McLaren was asked in cross-examination about whether she was more likely to have found evidence of damage to the hymen "if [the victim] was sexually active on almost a daily basis and sexually active going back a number of years" and answered in the negative. She could not have been under a misapprehension about the scale of the alleged offending, given that express statement. In any event the limited nature of the examination reduced the utility of the medical evidence.

[11] We have considered the other arguments put forward by the applicant about Dr McLaren's evidence but none of them provides a basis for apprehension that a substantial miscarriage of justice has occurred. In these circumstances, we dismiss his application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent