**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY PERSON UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 152/2016**
**[2017] NZSC 18**

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| BETWEEN | MICHAEL KRISTIAN OLSEN<br>Applicant |
| AND | THE QUEEN<br>Respondent |

Court: Glazebrook, Arnold and O'Regan JJ

Counsel: Applicant in person
F G Biggs for Respondent

Judgment: 2 March 2017

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## JUDGMENT OF THE COURT

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**A The application for an extension of time is granted.**

**B The application for leave to appeal is dismissed.**

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## REASONS

[1] On 20 August 2014, Mr Olsen was convicted, after a jury trial, of one count of wounding with intent to injure. His appeal against conviction was dismissed by the Court of Appeal on 18 June 2015.[1] He now seeks leave to appeal to this Court.

[2] The application for leave to appeal is out of time. We grant an extension of time. The Crown does not appear to oppose the extension and it is appropriate for this Court to consider the issues of non-disclsoure discussed below.

[1] *Olsen v R* [2015] NZCA 256 (Winkelmann, Andrews and Gilbert JJ).

## Background

[3] The incident giving rise to the charge occurred on the evening of 24 December 2012. The victim and her young daughter were walking along Queen Street in Auckland when Mr Olsen and an associate approached them. Mr Olsen muttered something. When the victim asked him what he wanted, he spat in her face. The victim grabbed Mr Olsen's shirt and he punched her in the face, breaking her glasses and causing her to fall over. Mr Olsen then ran off.

[4] Mr Olsen and his associate were located by police a short distance away at a bus stop in Victoria Street. Mr Olsen was handcuffed but escaped. He was found again shortly afterwards in Albert Street and taken into custody.

[5] At trial the victim and her daughter gave evidence describing the offence and giving a description of the offender. This in general terms matched that of Mr Olsen, including the fact he was wearing a red basketball singlet.

[6] Evidence was also called from a taxi driver parked nearby when the incident occurred. He saw the punch but not the events leading up to it. He had chased Mr Olsen after the incident, lost sight of him in Elliott Street but caught sight of him again in Victoria Street. He followed Mr Olsen to the bus stop where the arrest occurred and confirmed to the police that they had detained the correct person.

[7] The arresting officer gave evidence that, when he entered Mr Olsen's cell in the morning, Mr Olsen said "I stuffed up," that he could not remember much from the previous day but that he would plead guilty to a charge of male assaults female.

[8] At trial, Mr Olsen gave evidence. He said that he had just wanted to wish the victim a merry Christmas. He said she grabbed him and he was struck by a heavy object on the side of his head.[2] He then attempted to push her away with an open hand. This hit her on the head, although he said he had intended to make contact with her shoulder. He denied spitting at her. He also denied taking the route

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[2] The victim was asked in cross-examination if she had struck Mr Olsen with her purse.

described by the taxi driver. Nor did he accept making the partial admission to the arresting officer.

## Grounds of application

[9] Before the Court of Appeal, Mr Olsen asserted that his trial counsel, Mr Gerard, had erred in conducting a defence of lack of intent, rather than a defence of identity. He sought to adduce in the Court of Appeal the evidence of three witnesses in support of the contention that he was not the offender. Mr Olsen renews these complaints in his application for leave to appeal to this Court.

[10] In a ground not raised in the Court of Appeal, Mr Olsen also says that there was a prosecution failure to disclose evidence going to identity. The non-disclosed information he complains of is:

(a) A photo montage which was shown by a police officer to the victim and her daughter. There is no record of whether the witnesses picked anyone from the montage. It appears neither the defence counsel nor the prosecutor was made aware a montage procedure had been carried out. It was not referred to or relied on at trial (or on appeal). Since that time it appears to have been disposed of or otherwise cannot be located.

(b) Closed circuit television (CCTV) footage capturing the assault and Mr Olsen's flight. It was explained at the trial and accepted by parties on appeal that no relevant CCTV footage exists.

(c) Two pages of a five page police event chronology relating to the assault. The missing pages were the result of an administrative error by police (only the front pages of a double sided document were scanned). The pages were provided to Mr Olsen in May 2016.

[11] The Crown accepts that the photo montage and event chronology pages should have been disclosed.

## The Court of Appeal decision

[12] In the Court of Appeal Mr Olsen said that the evidence he gave at trial was based on a false account of events he and his trial counsel had worked through for a sentencing indication. He gave that account in his evidence at trial as a result of pressure by his trial counsel, after counsel had failed to follow his instructions to run an identity defence.[3]

[13] In evidence before the Court of Appeal Mr Olsen's trial counsel said that, while Mr Olsen had occasionally mentioned an identity defence, his instructions had been to run a defence based on intention. Trial counsel said that he understood Mr Olsen's statement, upon which his evidence at trial was based, to be Mr Olsen's account of the true version of events.[4]

[14] The Court of Appeal accepted the evidence of trial counsel.[5] It said further that, in any event, there was no real risk of an unsafe verdict because of the prosecution evidence proving identity.[6]

[15] As to the three proposed witnesses, the Court of Appeal held that it was evidence Mr Olsen could have called at trial had he pursued the matter with due diligence.[7] In any event, the Court was of the view that, although the three witnesses gave evidence as to Mr Olsen's movement in the evening of the assault, the time frames they described were not inconsistent with the prosecution case. Even if admitted therefore the evidence would not cast doubt on the safety of the conviction.[8]

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3 *Olsen v R*, above n 1, at [15]–[20].
4 At [22]–[25].
5 At [30]–[34].
6 At [37].
7 At [39].
8 At [40].

## Our assessment

*Non-disclosure*

[16] Non-disclosure does not automatically mean a miscarriage has occurred. The Court of Appeal has stated that the crucial issue is whether the non-disclosure is material so as to give rise to a risk of a miscarriage of justice.[9] The approach is similar in Australia,[10] Canada[11] and the United Kingdom.[12] We agree that this is the relevant question.

[17] We accept the Crown submission that, taken at its highest, the non-disclosed information may have allowed Mr Olsen to challenge identity on the basis that either the victim or her daughter (or both) failed to identify him in a photo montage. It is unclear how the event chronology could have assisted the defence. We note that it contains a description of the attacker generally matching Mr Olsen.

[18] We make two points about the non-disclosure of the photo montage First, the montage could only be relevant to identity and Mr Olsen conceded identity at trial. Secondly, even if identity had been in issue, the photo montage information could not have rebutted the other prosecution evidence on identity. For these reasons, we do not consider that there is any risk a miscarriage of justice will occur if we do not grant leave on this point.

*Other grounds*

[19] The issue of Mr Olsen's instructions to his trial counsel was thoroughly canvassed in the Court of Appeal which came to its conclusions after hearing from both Mr Olsen and his trial counsel. Nothing put forward by Mr Olsen suggest a risk that the Court of Appeal may have come to the wrong conclusion or indeed any risk of a miscarriage of justice.

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9 *Beckham v R* CA351/01, 19 March 2002 at [26]; citing *R v Quinn* [1991] 3 NZLR 146 (CA).

10 See, for example, *Mallard v R* [2005] HCA 68, (2005) 224 CLR 125 at [83].

11 See *R v Illes* 2008 SCC 57, [2008] 3 SCR 134 at [24] (per McLachlin CJ, Binnie, LeBel, and Fish JJ) and at [64] (per Deshamps, Charron and Rothstein JJ); and also *R v Dixon* [1998] 1 SCR 244 at [34].

12 *Macklin v Her Majesty's Advocate (Scotland)* [2015] UKSC 77, [2017] 1 All ER 32 at [14].

[20] Further, nothing put forward by Mr Olsen throws doubt on the Court of Appeal's analysis with regard to the further evidence he sought to have admitted on appeal and in particular the conclusion the Court drew that, even if admitted, it would not cast doubt on the safety of the conviction.[13]

## Result

[21] The application for an extension of time is granted.

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

Solicitors:
Crown Law Office, Wellington for Respondent

[13] *Olsen v R*, above n 1, at [40].