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

IN THE SUPREME COURT OF NEW ZEALAND

SC 102/2016
[2017] NZSC 5

BETWEEN	DEAN JAMES CHARLTON Applicant
AND	THE QUEEN Respondent

Court: William Young, Arnold and Ellen France JJ

Counsel: C D Eason for Applicant
P D Marshall and A B Richards for Respondent

Judgment: 9 February 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Following a jury trial before Nation J, the applicant, Mr Charlton, was convicted on one count of indecent assault, one count of sexual violation by rape and one count of injuring with intent to injure, all against the same complainant, B. He was acquitted of another charge of sexual offending against B and of three sexual offending charges involving another complainant, A. He appealed against his conviction on the two sexual offending counts against B, but the Court of Appeal dismissed his appeal.[1] He now seeks leave to appeal to this Court.

[2] To explain the grounds of appeal, it is necessary to say a little of the background. B and Mr Charlton had a brief relationship. The three offences of

1 *Charlton v R* [2016] NZCA 212 (Stevens, Asher and Williams JJ) [*Charlton* (CA)].

which Mr Charlton was convicted occurred on a single evening when they were together in bed. B said that Mr Charlton became angry and aggressive towards her – he hurt her breasts, punched her in the upper chest area, briefly strangled her and finally raped her. Several days later she sent some text messages to the applicant's phone number, which did not mention sexual offending and were consistent with an on-going relationship, for example:

> "Hi hay i of to sleep now i am tied."
>
> "I miss u."

[3] B said in evidence that these texts were intended for other recipients and that she had sent them to Mr Charlton's number in error. The Crown then sought to adduce evidence from Constable Newton that, during the course of the investigation, she had received text messages from B that did not make sense and seemed to have been intended for someone else.[2] Mr Charlton's trial counsel objected to this evidence, but Nation J ruled it admissible.[3] Counsel did not seek an adjournment or apply to recall B.

[4] Against this background, Mr Charlton seeks to raise two grounds, namely that Nation J did not consider and apply:

(a) s 34 of the Criminal Disclosure Act 2008; and

(b) s 8 of the Evidence Act 2006.

Mr Charlton does not suggest that the proposed appeal raises any issue of general or public importance. Rather, his argument is that the deficiencies alleged are such as to give rise to a real risk of a miscarriage of justice.

[5] Although neither of the points identified was a basis for Mr Charlton's appeal to the Court of Appeal, the Court did address the s 8 point of its own volition in the course of dealing with another argument raised by Mr Charlton. The Court considered that Constable Newton's evidence as to the text messages from B was

---

2 Constable Newton organised B's initial evidential interview and took further statements from her subsequently.

3 *R v Charlton* [2015] NZHC 772 [Ruling 4] and *R v Charlton* [2015] NZHC 773 [Ruling 5].

relevant but "at best" of marginal probative value.[4] The Court noted that the "probative value/prejudicial effect" assessment required by s 8 was not carried out and said that if it had been, it was unlikely that the evidence would have been admitted without the defence being given the opportunity to recall B.[5]

[6] The Court did not consider that this was so significant as to raise the risk of a miscarriage of justice, however.[6] The Court noted that there was strong independent support for the Crown case. There was independent medical evidence as to the injuries suffered by B in the course of the incident, which supported her account. In addition, having initially denied that he had physically assaulted B on the night in question, Mr Charlton admitted at trial that he had punched B and had briefly strangled her. Accordingly, we agree with the Court of Appeal that there was no real risk of a miscarriage of justice in relation to this proposed ground of appeal.

[7] As to the s 34 ground, this Court has stated previously that it does not normally permit a second appeal to be brought on grounds not raised before the Court of Appeal.[7] In any event, although s 34 was not drawn to the Judge's attention, the assessment he carried out was similar to that contemplated by s 34, although the defence does not seem to have been offered an adjournment. Again, given the strength of the Crown case, we see no risk of a miscarriage of justice.

[8] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Pegasus Chambers, Christchurch for Applicant
Crown Law Office, Wellington for Respondent

---

4 *Charlton* (CA), above n 1, at [43].
5 At [43].
6 At [44].
7 See, for example, *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643; *Tu'uaga v R* [2014] NZSC 164; and *Old v R* [2015] NZSC 175.