NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 109/2019
[2020] NZSC 10

BETWEEN	SHANE KARI HENRY Applicant
AND	THE QUEEN Respondent

Court: Winkelmann CJ, Glazebrook and O'Regan JJ

Counsel: W C Pyke for Applicant
A J Ewing for Respondent

Judgment: 19 February 2020

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 District Court jury trial of a number of sexual and violent offences against his then partner, E, and also pleaded guilty to attempting to pervert the course of justice by sending text messages to E to ask her to drop the charges against him. The trial Judge, Judge Taumaunu, sentenced him to a term of imprisonment of ten years and six months.[1]

[1] *R v Henry* [2015] NZDC 18033.

[2] The charges arose from two incidents, one in May 2013 and one in September 2013.

[3] In relation to the May incident, the applicant was convicted of kicking E in the leg, the head and on her body, while he was wearing steel capped boots. He was also accused of kicking her in her genital area after she refused to have sex with him, but was acquitted on the charge of indecent assault that resulted from that part of the incident.

[4] In relation to the September incident, the applicant was convicted of sexual violation by rape, sexual violation involving digital penetration and male assaults female.

[5] The applicant appealed to the Court of Appeal against both conviction and sentence. His conviction appeal was dismissed but his sentence appeal was allowed in part and the effective sentence was reduced by six months.[2]

[6] The applicant now seeks leave to appeal to this Court against his convictions. His application was filed out of time but the respondent does not object to an extension of time being granted and we are satisfied it is appropriate to grant the extension.

[7] The grounds of appeal that the applicant wishes to advance if leave is granted are:

(a) *Admission of evidence of bizarre statements and behaviour*: In his evidential video interview, the applicant made some rather bizarre statements. The complainant also referred to such statements and some bizarre behaviour by the applicant in her evidential video interview. A District Court Judge had agreed that some of these references should be excised in a pre-trial ruling, but the applicant's counsel asked for some of them to be left in the version of the video that was played during the trial.[3] The applicant wishes to renew the argument he made

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2 *Henry v R* [2019] NZCA 407 (Williams, Simon France and Toogood JJ) [CA judgment].

3 *R v Henry* [2015] NZDC 849 (Judge Marshall).

in the Court of Appeal that this evidence should not have been admitted because it was unfairly prejudicial.

(b) *Admission of evidence of other allegations by the complainant*: When the victim described the offending against her in the September incident in her evidential video interview, which was later used as her evidence-in-chief, she mentioned that the applicant had also tried to penetrate her anus during the incident, and described earlier conduct, in respect of which no charges had been laid. She said: "It's not the only time he's raped me. Probably the third time … He's tried to shove a cucumber up me and … It could have been that spade, I'm not sure, it was too dark … But I know the cucumber cause I grabbed it off him and hit him with it." The applicant wishes to argue that this evidence was inadmissible because he was not charged in relation to this conduct.

[8] In relation to the bizarre statements and behaviour, the applicant argues that the proposed appeal would provide the opportunity for the Court to determine whether statements and conduct of a mentally ill defendant should be admitted at his or her trial. We do not accept that argument. The Crown case was that the background to the incidents in both May and September was that the applicant was using methamphetamine, leading to his paranoia that the complainant was being unfaithful to him. That, in turn, had led to the offending. The trial Judge addressed the bizarre statements in his summing up. We do not see the point the applicant wishes to pursue as arising on the facts of this case, given the expert evidence was that the applicant showed no sign of being mentally ill when his evidential video interview took place.

[9] In his submissions, Mr Pyke indicates that he wishes to argue in this Court for the first time that there are Māori dimensions to this issue (both the applicant and E are Māori). There is, however, no factual foundation for the argument he wishes to make in the Court record and, in any event, advancing such argument in this Court for the first time would be undesirable.

[10] The comment about attempted anal intercourse was part of the description of the rape incident and we see no point of public importance arising from the

complainant giving evidence of that aspect of the incident. In relation to the cucumber incident, the argument that counsel wishes to make is that this was propensity evidence, but it was admitted without proper consideration under s 43 of the Evidence Act 2006. He describes the incidents as "propensity allegations" rather than propensity evidence because, he says, if no charge was made in respect of them, then they could not be used to prove propensity.

[11] The Court of Appeal considered the earlier incidents were non-consensual and saw the evidence as admissible on the basis outlined in the minority judgment in *Mahomed v R*.[4] We are not persuaded that there is any reason for this Court to address this issue again and, in any event, we do not consider this would be a suitable case to do so. Nor do we consider any risk of a miscarriage of justice arises.[5]

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

Solicitors:
Crown Law Office, Wellington for Respondent

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4 CA judgment, above n 2, at [26]–[28], referring to the decision of this Court in *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145.

5 Senior Courts Act 2016, s 74(2).