

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT/PERSON UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS OR NAMED WITNESS UNDER 18 YEARS OF AGE PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html>

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 61/2020
[2020] NZSC 111**

BETWEEN ROSS EASTON BARBER
 Applicant

AND NEW ZEALAND POLICE
 Respondent

Court: Glazebrook, O'Regan and Williams JJ

Counsel: Applicant in person
 J A Eng for Respondent

Judgment: 15 October 2020

JUDGMENT OF THE COURT

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

REASONS

Introduction

[1] Mr Barber was convicted on one charge of assaulting a child (who was at the time of the assault aged around nine).¹ He was sentenced to 100 hours of community work and ordered to pay \$1,000 in emotional harm reparation.²

¹ *New Zealand Police v Barber* DC Palmerston North CRI-2013-054-000585, 21 March 2014 (Judge Atkins).

² *New Zealand Police v Barber* DC Palmerston North CRI-2013-054-000585, 30 May 2014 (Judge Atkins).

[2] His appeal to the High Court against conviction and sentence was unsuccessful.³ He seeks leave to appeal to this Court against the High Court decision.

[3] Mr Barber's application to this Court is some six years out of time. We will treat his application for leave as also including an application for an extension of time to make his leave application.

Background⁴

[4] The assault occurred when the child was visiting Mr Barber on his farm. The child had become upset and had walked off. Mr Barber followed. The child ended up on the ground. Mr Barber put his foot on the child's chest and also pulled on his arm to bring him to his feet, allegedly taunting him at the same time. The incident was videoed by Mr Barber. He said this was for the purpose of showing it to the child when he calmed down.

[5] The video came to light some five years after the incident and the charges were brought. The child was interviewed. He remembered the incident but not the details. At trial the child's memory was somewhat better. The High Court said that, standing on its own, the child's evidence was possibly not of a quality to sustain a conviction but his account was firmly corroborated by the video record.

[6] Mr Barber was represented at trial. The child was cross-examined but there was little headway to be made given his general lack of recall. Mr Barber did not testify but he had been interviewed by police prior to trial and this video interview was played.

Decisions below

[7] The District Court analysed the reasonableness of Mr Barber's conduct in terms of s 59 of the Crimes Act 1961.⁵ The Judge concluded the force was not of a

³ *Barber v New Zealand Police* [2014] NZHC 2057 (Simon France J) [HC judgment].

⁴ This background is taken from the High Court judgment, above n 3, at [2]–[6].

⁵ As it was before the Crimes (Substituted Section 59) Amendment Act 2007.

kind that could be considered reasonable. Nor could it be interpreted as being by way of correction.⁶

[8] On appeal, the High Court considered that Mr Barber's complaints about the findings of the trial Judge were unsustainable in light of the video.⁷ His sentence appeal was also without merit, given the context and purpose of the offending and the fact of three previous convictions for assault on a child.⁸

This application

[9] Mr Barber seeks to raise similar issues before this Court as he did in the High Court. He asserts that the High Court misunderstood the evidence and also seeks to raise other issues he says have arisen because of what he contends was the wrongful conviction.

Our assessment

[10] As noted above, the application is out of time. No explanation has been given for the delay in seeking leave.

[11] In addition, the proposed appeal does not meet the criteria for leave to appeal and certainly does not meet the test of exceptional circumstances for a direct appeal to this Court.⁹

[12] The matters Mr Barber seeks to raise are all related to the particular facts in this case. No matter of general or public importance arises.¹⁰ Nor do any of the issues Mr Barber seeks to raise suggest any risk of a miscarriage of justice.¹¹

⁶ HC judgment, above n 3, at [7].

⁷ HC judgment, above n 3, at [10].

⁸ At [8] and [16].

⁹ Senior Courts Act 2016, s 75.

¹⁰ Senior Courts Act, s 74(2)(a).

¹¹ Section 74(2)(b).

Result

[13] The application for an extension of time to apply for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent