NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS 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 90/2020
[2020] NZSC 138

BETWEEN	P (SC 90/2020) Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: W C Pyke for Applicant
A Markham for Respondent

Judgment: 8 December 2020

JUDGMENT OF THE COURT

A The application for 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 on five charges of historic sexual offending. The victims were his sisters, whom we will call A and S. In relation to A, the applicant was convicted of one representative charge of rape and two specific charges of rape. In relation to S, he was convicted of one representative charge of rape and one specific charge of rape.

[2] In relation to A, the representative charge covered the period from November 1962 to August 1969 and the trial Judge sentenced the applicant on the basis that he raped her on almost a daily basis.[1] In relation to S, the representative charge covered the period from September 1964 to September 1970 and the Judge sentenced the applicant on the basis that he raped S repeatedly during that period.[2] During the period of the offending, the applicant was aged between 14 and 21 years, A between 9 and 15 years and S between 10 and 15 years.

[3] The applicant appealed to the Court of Appeal against his convictions, but his appeal was dismissed.[3]

[4] The applicant now seeks leave to appeal to this Court. The application was made out of time. The respondent does not oppose an extension of time and the reasons for the delay are explained. We grant an extension of time accordingly.

[5] The application focusses on one of the grounds of appeal that was rejected by the Court of Appeal. The applicant argues that this ground of appeal raises an issue of general or public importance and also that a miscarriage of justice will occur unless leave is granted.[4]

[6] The applicant also faced charges of sexual offending against two other complainants, who were foster children in the care of his wife and him. We will call these complainants E and K. The offending against E and K is said to have occurred between 1999 and 2004, when the applicant was aged between 46 and 56 years, E between 12 and 17 years and K between 6 and 14 years.

[7] In a pre-trial decision, Judge McDonald ruled that there should be two separate trials, one for the offending relating to A and S and one for the offending relating to E and K.[5] The Judge ruled that the probative value as between the charges relating to A

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1 *R v [P]* [2017] NZDC 15515 (Judge McDonald) at [4].
2 At [6].
3 *P (CA470/2017) v R* [2020] NZCA 304 (French, Gilbert and Courtney JJ) [CA judgment].
4 Senior Courts Act 2016, s 74(2)(a) and (b).
5 *R v [P]* [2016] NZDC 25650.

and S on the one hand and E and K on the other was weak and the risk of unfairness was great.[6]

[8] In his evidential video interview with the police, the applicant suggested that A was vindictive towards him because of a dispute about a power of attorney granted by their mother, and his subsequent refusal to contribute to the cost of his mother's funeral. He described A as "wanting money, wanting money".

[9] A had said in her evidential video interview that she decided to make a complaint after she learned that the applicant had been accused by one of his foster daughters of sexual abuse.[7] A said that she had once confronted the applicant about his abuse at a time when she returned to him his daughter and son who had been placed in her care by Child, Youth and Family. A said she was worried about the daughter's safety and had said so to the applicant. She said he responded by apologising for sexually abusing her. She agreed not to tell anyone but said if she ever heard that he had done it to any other young girl, she would go to the police.

[10] After the severance ruling, this aspect of the evidential video interview given by A was excised from the version heard by the jury.

[11] The applicant's evidential video interview was also edited prior to the trial in conjunction with his trial counsel, but the material relating to his dispute with A about the power of attorney, the funeral expenses and money remained in the version seen by the jury.

[12] The applicant's trial counsel raised the issues relating to the power of attorney and the funeral costs with A. A denied there had been any dispute about these. Trial counsel also cross-examined the Crown expert on counter-intuitive evidence about the significance of delay in assessing the credibility of a complaint.

[13] The Crown applied to the trial Judge to ask A in re-examination what her reason for coming forward was. A voir dire was conducted and the Judge gave permission

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6 At [19].
7 She did not specify whether this was E or K.

for the question to be asked. A was told to read out the evidence she had given in the voir dire to ensure that her evidence did not stray beyond what the Judge had permitted.[8] A then read her evidence to the effect that she had received an email from the applicant's foster daughter saying "This is what your f-ing brother did to me". She recounted her conversation with her brother years before when she had said she would complain to the police if she ever heard about him sexually offending against another young girl. Having received this email, she then made her complaint to the police.

[14] In the Court of Appeal it was argued that this evidence of the foster daughter's email was inadmissible hearsay and that it defeated the purpose of the severance ruling and should not have been allowed. The Court considered the real issue was whether the evidence should have been excluded under s 8 of the Evidence Act 2006 on the basis that its probative value was outweighed by the risk it would have an unfairly prejudicial effect.[9] The Court considered that the cross-examination of A about her motivation for complaining made the reason for the delay in her complaint a live issue and opened the door to the question being asked of A in her re-examination.[10] The Court considered the Judge was right to admit the evidence and that he had appropriately dealt with the prejudice in his evidential directions.[11] The Court recorded that, in asking A the questions he did in cross-examination about her motive for complaining, trial counsel was acting on the applicant's instructions and the evidence that the applicant himself wanted to give.[12]

[15] The applicant seeks to argue again that the evidence of the foster daughter's email is a hearsay statement that should not have been allowed. In addition, he seeks to argue that the questions asked by the applicant's trial counsel in his cross-examination of A were open questions about the disputes as to money, power of attorney and funeral and did not "open the door" as the trial Judge ruled. He also wishes to argue that the evidence of the applicant's account of motive contained in his evidential video interview was Crown evidence, not defence evidence and therefore did not open the door.

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8 *R v [P]* [2017] NZDC 12727 at [13].
9 CA judgment, above n 3, at [70].
10 At [72].
11 At [76]–[77].
12 At [78].

[16] It is clear from the evidence given by trial counsel in the Court of Appeal that the applicant stood by his comments about A's motive in his evidential video interview and would give evidence to that effect. He did in fact do so, essentially adopting the evidential video as his evidence-in-chief.

[17] Counsel for the applicant argues that A should have been limited to stating that she went to the police "after speaking to someone" about the applicant. We cannot see how that would have responded to the challenge regarding a motive to complain, and it would have invited further speculation by the jury.

[18] The appellant's hearsay argument would confront the response that the words used in the email from the foster daughter to A were not evidence offered to prove the truth of the contents,[13] but rather to establish the fact that the email had been received. In assessing the case from the post-trial point of view, that is, determining whether there has been a miscarriage of justice, the reality is that the delay in complaining was an issue squarely in front of the jury and the applicant's evidence gave an explanation that was at odds with A's true position. The applicant's evidential video interview was edited, but not in relation to the comments about motive. This reflected his instructions to his counsel. The combination of the statement in the evidential video by the applicant, and the cross-examination of both the expert witness and A meant that the issue relating to motive to complain after a long delay was alive. We do not see an argument that a miscarriage of justice occurred because the Judge allowed A to give an explanation in re-examination of her motive to complain as having sufficient prospect of success to justify a further appeal. Nor, given the specific factual situation, do we see any matter of general or public importance arising.

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

Solicitors:
Crown Law Office, Wellington, for Respondent

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[13] Evidence Act 2006, s 4(1) definition of "hearsay statement", para (b).