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

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS AND ANY PERSON UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS 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 16/2020
[2020] NZSC 147

BETWEEN	CHRISTOPHER MARTIN BRADLEY Applicant
AND	THE QUEEN Respondent

Court: William Young, O'Regan and Ellen France JJ

Counsel: R M Lithgow QC and A M Toohey for Applicant
P D Marshall and Z W Q Andrew for Respondent

Judgment: 17 December 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with leave reserved as set out in [21].

REASONS

Introduction

[1] Mr Bradley was convicted after trial of five representative charges of rape of two young relatives, A and R.[1] The charges spanned a period of some two and a half

[1] He was acquitted on a sixth representative charge.

years, when the complainants were aged between seven and nine. He was sentenced to 15 years' imprisonment.[2] His appeal against conviction and sentence was dismissed by the Court of Appeal.[3] He seeks leave to appeal to this Court.

Background

[2] The two girls gave similar accounts at trial describing Mr Bradley getting into bed, having sex with them, ejaculating (complainant R), and then putting their clothes and the sheets into the wash. There was some support for the complainants' accounts in evidence from another young relative, including of recent complaints made to her by A and R.

[3] Mr Bradley's semen was found on an electric blanket on A's bed. It was in a position consistent with it being deposited there in the course of intercourse with a child. There was also evidence of Mr Bradley's semen deposited on R's bed in a similar position. A was also found to have genital warts. The evidence at trial was that "[t]ransmission via sexual contact with another person" was "the most likely explanation [for the presence of these warts] in a child of [A's] age".

[4] Mr Bradley's defence was that the events never happened.

The proposed appeal

[5] Mr Bradley wishes to raise the following grounds on appeal:

(a) his difficulties with verbal tasks likely affected the Court of Appeal's assessment of his credibility;

(b) an incorrect approach was taken to the evidence of genital warts;

(c) the actions of a juror (in bringing in newspaper articles and researching the topic of genital warts online) in the course of the trial were not properly addressed;

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2 *R v Bradley* [2018] NZDC 4082 (Judge Maze).
3 *Bradley v R* [2020] NZCA 10 (Wild, Whata and Katz JJ) [CA judgment].

(d) an incorrect approach was adopted in assessing the effect of trial counsel departing from primary instructions given to them; and

(e) the approach to sentence was not correct.

[6] For reasons that we come to, we need only address the first of these proposed grounds in any detail. On this proposed ground, counsel for the applicant (not trial counsel) says that while Mr Bradley "presents as of normal intelligence", it is anticipated expert evidence would show that in terms of verbal tasks he is significantly impaired.[4] If he had been able to show that impairment, the argument he wishes to run is that the Court of Appeal may not have made adverse credibility findings against him. It is also submitted that if this difficulty had been understood by trial counsel, the need for other evidence such as that from his wife would be viewed differently. Other points are made about the Court of Appeal's approach to credibility, for example, that the Court ignored the fact that Mr Bradley's account as to how the stains came to be on the electric blankets was supported by the unchallenged affidavit from his wife.

[7] In relation to the evidence concerning genital warts, the applicant wishes to make a number of points. These include the submission that the evidence was not substantially helpful because it was no more than evidence of sexual activity, and that the reference in the evidence about the procedure undertaken to remove the warts was simply prejudicial.

[8] On the proposed third ground, the ultimate effect of the applicant's proposed approach is to say that a mistrial should have been declared after it was discovered part-way through the trial that one juror (H) had brought some newspaper articles into the jury room. The Judge made various inquiries including questioning juror H and the foreperson. At the request of Mr Bradley's counsel, the Judge asked juror H whether he had done any other research. He said he had looked at several websites in relation to genital warts but he confirmed he had not discussed this research with other jurors. Juror H was discharged.

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[4] The applicant's submissions note that while in prison Mr Bradley had been administered a Wechsler Adult Intelligence Scale–Revised (WAIS–R) test (an adult IQ test). That test established a full scale intelligence quotient (IQ) of 102 but would support the view his verbal skills were limited.

[9] The Judge then brought the remaining jurors into Court and reminded them of the importance of not making their own inquiries. All of the remaining jurors confirmed that they had not conducted any independent research. After the jury had gone out, the Judge indicated her tentative view that the remaining jurors had not been tainted. Neither counsel asked the Judge to declare a mistrial. The trial continued with 11 jurors.

[10] The next proposed appeal ground encompasses a number of aspects. The first of these is that prior to trial, Mr Bradley had told his trial counsel that he wanted a judge-alone trial. Trial counsel acknowledged he had "overlooked" this instruction and the matter proceeded by way of trial by jury. Similarly, counsel accepted that he overlooked the instruction to seek a change of venue. The next issue under this head is that Mr Bradley said he mistakenly took two sleeping pills rather than his anxiety medicine prior to giving evidence and that he told his counsel about this. The final issue in this category was the decision not to call other evidence, and in particular that of Mr Bradley's wife. She would have given evidence about household routines, that she and Mr Bradley had sex on an electric blanket on the bedroom floor, that the girls had warts on their fingers, and that Mr Bradley told her and trial counsel that he took sleeping pills prior to giving evidence at trial.

[11] Finally, on sentence, Mr Bradley wishes to challenge what he says was a "rigid application of the categories" in *R v AM* about intra-familial sexual offences particularly where high frequency cannot be established.[5]

The approach in the Court of Appeal

[12] The first of the proposed grounds is new and so was not addressed in the Court of Appeal. On the second proposed ground, the Court said that the evidence of genital warts was properly admissible because it was substantially helpful on the issue of whether A had been sexually abused. The Court said this evidence established it was likely that she had been. Further, the Court said, "[a]s the Crown accepted in closing,

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5 *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.

… the evidence did not implicate Mr Bradley as the abuser, but it was one strand in the circumstantial case against him".[6]

[13] The Court agreed it would have been better for the evidence about the removal of the warts to have been excluded because it was not relevant.[7] The Court also accepted that the Judge "perhaps" could have been more helpful in directing the jury about the use of this evidence, "although the Judge was entitled to the view that no direction was needed".[8]

[14] On the question of the response to juror H's activities, the Court rejected the submission that the Judge should have questioned all of the other jurors about whether they had discussed the research about genital warts. The Court did not consider that a fair-minded member of the public would have had "any reasonable concern that the remaining 11 jurors could discharge their task impartially".[9] Accordingly, it was not accepted this had given rise to a miscarriage.[10]

[15] On the issue of the two instructions which were overlooked, the Court of Appeal considered that if Mr Bradley had remained of the view he wanted trial by judge-alone, he would have raised that again.[11] In any event, the Court did not accept any unfairness or injustice resulted from trial by jury and counsel did not say how that may have arisen. A similar approach was taken to the question of change of venue. The Court also accepted trial counsel's evidence that he was not instructed to brief the various witnesses (including Mr Bradley's wife) and that the decision not to call Mr Bradley's wife was reasonable. The Court did not consider her proposed evidence explained how the semen stains were on two electric blankets, nor did it explain how those stains came to be at the specific location on each of the two electric blankets.

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6 CA judgment, above n 3, at [44].
7 The evidence of the procedure occupied a sentence in the evidence.
8 CA judgment, above n 3, at [46].
9 At [54].
10 The Court of Appeal accepted the evidence of trial counsel that the applicant had accepted there was no basis on which he could argue the juror's activities were capable of affecting the verdict.
11 Mr Bradley's evidence that he had raised the topic again was rejected.

[16] Finally, the Court preferred the evidence of trial counsel that he had no recollection of being told during the course of the trial that Mr Bradley had taken the wrong medication.

[17] On sentence, the Court of Appeal considered Mr Bradley "might consider himself exceedingly lucky" that his offending was placed in the middle of band three in *R v AM* particularly given there were two child victims.[12]

Our assessment

[18] Putting to one side for the moment the question of the effect of the applicant's abilities to respond verbally, none of the other matters the applicant wishes to raise give rise to any question of general or public importance.[13] Rather, the proposed appeal on these matters would turn on the particular facts. Nor does anything raised by the applicant in relation to these matters suggest the appearance of a miscarriage of justice in the Court of Appeal's assessment of the issues.[14]

[19] Turning then to the question of the applicant's abilities to respond verbally, the Court has not been provided with any evidence about his verbal difficulties. And, in any event, it would not be ideal for this Court to be attempting to resolve this sort of evidential issue effectively as a court of first instance. In these circumstances, the criteria for leave to appeal to this Court are not met.[15]

[20] We are of the view that if the applicant wishes to pursue this aspect, he will need to go back to the Court of Appeal with evidence as to his abilities to respond verbally and seek a recall of that Court's judgment. We reserve leave to seek to appeal to this Court again if that application is unsuccessful.

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12 CA judgment, above n 3, at [120].
13 Senior Courts Act 2016, s 74(2)(a).
14 Section 74(2)(b).
15 Section 74(2).

Result

[21] The application for leave to appeal is dismissed with leave reserved to seek to appeal to this Court if an application for recall to the Court of Appeal is unsuccessful.

Solicitors:
Crown Law Office, Wellington for Respondent