

**NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE**

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html>

**NOTE: ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF APPLICANT'S WIFE, MOTHER AND BROTHER PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE**

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html>

**NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS V, K, H AND L 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 K, H AND L 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 10/2020  
[2020] NZSC 40**

BETWEEN	I (SC 10/2020) Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: W C Pyke for Applicant  
J E L Carruthers for Respondent

Judgment: 29 April 2020

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

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## REASONS

[1] The applicant faced 19 charges of sexual offending against four young female relatives. After a trial in the District Court, he was convicted on 13 of those counts.

[2] The applicant appealed against conviction to the Court of Appeal but his appeal was dismissed.<sup>1</sup> His appeal to the Court of Appeal was advanced on grounds of trial counsel incompetence and unfairness in the prosecutor's closing address. It is only the former ground that remains in issue. The focus of the present application is on one aspect of the trial counsel incompetence ground, which was upheld by the Court of Appeal.

[3] The applicant argued that his trial counsel failed to cross examine one of the complainants (referred to in the Court of Appeal judgment as "L") about a statement she made when she was 10 years old to two social workers for Child, Youth and Family, her school principal and school social worker (we will call this "L's statement"). In the course of L's statement, she said the applicant and his wife "keep me safe", that there was nothing she wished to change about the applicant and his wife's household and that she was happy, felt safe and had no worries about living with them.<sup>2</sup>

[4] The Court of Appeal held that, although there would have been risks in doing so, L's statement ought to have been put to L by the applicant's trial counsel.<sup>3</sup> However, the Court of Appeal was not satisfied that, had the statement been put to L, there was a real possibility that the jury would have reached different verdicts.<sup>4</sup> Accordingly, it found no miscarriage of justice had been occasioned by the fact that L's statement had not been put to her.<sup>5</sup>

[5] The present application is advanced on the basis that the Court of Appeal erred in its determination that no miscarriage of justice arose from the failure by the applicant's trial counsel to put L's statement to her. Counsel for the applicant,

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<sup>1</sup> *I (CA128/2018) v R* [2019] NZCA 625 (Kós P, Venning and Thomas JJ).

<sup>2</sup> The precise exchange is set out in the Court of Appeal judgment at [45].

<sup>3</sup> At [54].

<sup>4</sup> At [57].

<sup>5</sup> Criminal Procedure Act 2011, s 232.

Mr Pyke, argues that the Court of Appeal did not find that the error by counsel was trivial or that it was an irregularity that was not capable of affecting the result. Thus, he argued, the case raises the issue of whether the proviso to s 385 of the Crimes Act 1961 survives in s 232 of the Criminal Procedure Act 2011. He argues that the obiter view of the Court of Appeal in *Wiley v R* that the replacement of s 385 of the Crimes Act by s 232 of the Criminal Procedure Act did not point to any change to the approach to appellate review is wrong and should be reviewed by this Court.<sup>6</sup>

[6] We accept that the correctness or otherwise of that aspect of *Wiley* is a matter of public importance that may justify the grant of leave to appeal to this Court.<sup>7</sup> But we do not see the issue as truly arising on the facts of this case. We think it is clear from the Court of Appeal's analysis that the Court considered the failure to put L's statement to her was not capable of affecting the result. This was not a case where the Court considered there was an error that was capable of affecting the result of the trial but nevertheless concluded that the applicant was guilty beyond reasonable doubt.

[7] Nor do we see any appearance of a miscarriage in the way the Court of Appeal addressed the issue.<sup>8</sup> We see no proper basis on which the Court's conclusion that the error of trial counsel was not capable of affecting the result could be challenged.

[8] For these reasons the application for leave to appeal is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>6</sup> *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [55].

<sup>7</sup> Senior Courts Act 2016, s 74(2)(a).

<sup>8</sup> Section 74(2)(b).