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 18/2020
[2020] NZSC 52

BETWEEN	B (SC 18/2020) Applicant
AND	THE QUEEN Respondent

Court:	William Young, O'Regan and Williams JJ
Counsel:	E P Priest and S J Gray for Applicant A Markham for Respondent
Judgment:	5 June 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted on 10 charges of sexual offending against his two younger sisters (S and K) between 1962 and 1972, when the victims were between nine and 17 years old. His appeal to the Court of Appeal was dismissed.[1]

[2] The applicant acknowledged two acts of sexual intercourse with K, but said that both were consensual and that the first one was when K was 15 (her evidence was that this encounter was non-consensual and she was 13). He denied that there were

1 *B (CA463/2018) v R* [2020] NZCA 18 (French, Gilbert and Courtney JJ).

any other sexual encounters between them. In relation to S, the applicant denied any sexual activity and said they had a normal sibling relationship.

[3] The defence case was that K was in love with the applicant but had come to hate herself for it. Her complaint was said to be motivated by a desire to prevent the applicant from returning to North America to re-marry. In relation to S, the defence case was that she was lying to support K and blackmail the applicant into giving her property.

[4] The applicant applied to the Court of Appeal for leave to adduce expert evidence in support of his appeal to that Court. This evidence was a report from a professor of psychology involved in the study of human memory, Dr Strange. The Crown then sought leave to adduce evidence from another expert on memory, Professor Brewin, who took issue with a number of aspects of Dr Strange's report. Ultimately both Dr Strange and Professor Brewin gave oral evidence and were cross-examined in the Court of Appeal.

[5] The application to adduce Dr Strange's evidence was in support of an argument that a miscarriage of justice had occurred at the applicant's trial because the jury had not heard from an expert on memory. The applicant filed an affidavit from his trial counsel in which counsel said that, in hindsight, he considered he erred by not calling a memory expert. However, the appeal was not advanced on the basis of trial counsel error but rather on a more generic ground that a miscarriage of justice occurred because no expert evidence on memory was before the jury.

[6] Ultimately the Court of Appeal refused leave for Dr Strange's evidence to be adduced in support of the applicant's appeal. The Court accepted that evidence that was not fresh could be admitted on appeal if it was cogent, but determined that the evidence of Dr Strange was not cogent.[2]

[7] The Court considered that Dr Strange's report lacked impartiality. It did not consider that the evidence at trial raised special memory issues as had been claimed.[3]

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2 At [19]–[20].
3 At [22].

It considered that a defence predicated on the victims having false memories faced obvious difficulties in light of the fact that they had made similar allegations, the applicant had admitted to having sexual intercourse with K and that other corroborative evidence tended to support the victims' account.[4] Dr Strange was asked to comment on an admission by the applicant that on two occasions he lay on top of S and ground his penis against her lower body. This admission was not before the jury. Dr Strange said this experience could have formed the basis for memory distortion later. The Court pointed out that this was contrary to the applicant's evidence at the trial, which was that he never sexually assaulted S and had a normal sibling relationship with her.[5]

[8] The corroborative evidence included evidence of a phone call between the applicant and his son after the charges had been laid. The son said he confronted the applicant about K's and S's allegations, and the applicant admitted he had "done it". After this phone call, the son sent his father a heated email asking him how he could put his sisters through a trial when they were telling the truth. The applicant did not respond to this email. The applicant did not dispute that this conversation took place. It is now suggested that the conversation referred to a consensual sexual encounter between the applicant and K, but that interpretation was never put to the applicant's son.

[9] The Court of Appeal concluded that the applicant's trial counsel had made no error in deciding not to call expert evidence on memory.[6]

[10] The applicant advances the application for leave on the basis that the proposed appeal raises a matter of general and public importance relating to expert evidence on memory in the context of historic sexual offending.

[11] The applicant criticises the Court of Appeal's reliance on corroborating evidence, particularly the phone call between the applicant and his son. But whether

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4 At [25].
5 At [27].
6 At [30].

the applicant's admission to his son was equivocal or not was a matter squarely before the jury.

[12] Although not specifically articulated, we assume it is intended that, if leave to appeal is granted, an application will be made to adduce Dr Strange's evidence in this Court. Such an application will face the same hurdles as it faced in the Court of Appeal. We do not consider that it would have sufficient prospect of success to grant leave in circumstances where the appeal could not proceed unless leave to adduce the evidence was granted.

[13] Nor do we consider that this case raises an issue of general and public importance or that there is a risk of a miscarriage of justice.[7]

[14] We accept that the admissibility of expert memory evidence at trial may be a topic that should be considered by this Court, but we do not see this case as an appropriate vehicle for that to occur.

[15] We accept the Court of Appeal's view that Dr Strange's evidence was somewhat diminished by her failure to confront evidence contrary to her view. But the more important context was the applicant's admission to his son and the fact that he had effectively admitted lying to the jury on the important issue of whether he indecently assaulted S at any stage. That context meant that, whatever its quality, the absence of memory evidence at trial is unlikely to have resulted in a risk of miscarriage.

[16] In these circumstances, we consider that the grounds for the grant of leave are not made out.

[17] We dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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