NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.
SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT 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 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 17/2020
[2020] NZSC 77

BETWEEN	C (SC 17/2020) Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, Ellen France and Williams JJ

Counsel: W C Pyke for Applicant
J M Irwin and J A Eng for Respondent

Judgment: 6 August 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

Introduction

[1] Mr C was found guilty on 14 charges of sexual violation and indecent assault. He was acquitted on two further charges connected to a trip to Queenstown. The victim was his partner's daughter, B. His appeal against conviction was dismissed by the Court of Appeal on 21 December 2018.[1] He now applies for leave to appeal to this Court.

Extension of time

[2] Mr C's application for leave to appeal is some 15 months out of time. He has filed an affidavit outlining difficulties in accessing a lawyer to assist with his application. It was only in September 2019 that he found his current counsel, Mr Pyke, who was prepared to act. An interim grant of legal aid was made on 14 October 2019. The application for leave to appeal was made as soon as Mr Pyke had finished reviewing the file and visited Mr C in prison to obtain instructions.

[3] While the delay is long, we consider it is sufficiently explained and an extension of time for leave to appeal is granted.

Court of Appeal decision

[4] In the Court of Appeal, Mr C's then-counsel alleged that his trial counsel, Mr Westgate:

(a) did not adequately prepare for trial;

(b) did not follow instructions; and

(c) did not properly advise Mr C about whether he should give evidence.

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[1] *C (CA159/2018) v R* [2018] NZCA 628 (Winkelmann, Ellis and Whata JJ). His appeal against sentence was allowed in part. The minimum period of imprisonment was quashed.

[5] Mr C, Mr Westgate, and his junior counsel, Ms Neugebauer, gave evidence before the Court of Appeal.

[6] The Court considered that Mr C's evidence-in-chief was largely irreconcilable with the accounts given by both Mr Westgate and Ms Neugebauer in terms of trial preparation, advice and instructions.[2] The Court preferred the evidence of trial counsel on all three points.

[7] The Court of Appeal accepted that the trial preparation "was not a model of its kind".[3] Nevertheless, the Court was satisfied that preparation for trial was adequate. The Court noted that Mr Westgate sent the disclosure documents to Mr C for his review on 8 November 2016, more than 12 months prior to trial. There were then four meetings in the week prior to trial, running for two to four hours each. These were sufficient to prepare for trial. The Court said that B's evidential interview was:[4]

> [A] relatively straight-forward narrative of the alleged offending, and [Mr] C's defence was always, and remains, that it did not happen at all. This was not a case where matters of fine-grained detail on each of the charges needed to be explored and then put to the complainant at trial.

[8] The Court considered that the conduct of the case showed that Mr Westgate had adequately prepared for trial. It said by way of illustration that "matters of detail explored in cross-examination and later in closing must have come from a good understanding of the disclosure materials and from discussion with [Mr] C."[5] The Court said that it was evident that the acquittals in relation to the Queenstown trip charges could be linked to cross-examination about specific details of the Queenstown trip that must have been identified through pre-trial briefing. The complaint about inadequate trial preparation was therefore rejected.[6]

[9] As to the allegations of not following instructions, the evidence of his trial counsel was that Mr C's ideas were discussed, a plan of action agreed and then adopted. The plan was to focus on B's lack of contemporaneous complaint even

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2 At [9].
3 At [12].
4 At [12].
5 At [14].
6 At [15].

though she had ample opportunity to do so. Mr Westgate had discussed risks to Mr C associated with examining B's motivation to lie and her pornography addiction. Mr C agreed these matters should not be explored.[7]

[10] The Court considered that the available notes from pre-trial meetings supported Mr Westgate's account that Mr C was well briefed and that the trial strategy adopted was based on clear instructions derived from a detailed review of the disclosure materials. The notes concluded with the following: "refer to video", "straight denial" and "won't give evidence".[8]

[11] The Court said that the defence at trial clearly followed this strategy, logically culminating in Mr C choosing not to give evidence. That election was recorded in a note signed by Mr C on the third day of trial.[9]

[12] The Court said that it preferred Mr Westgate's and Ms Neugebauer's consistent accounts of the advice given to, and the instructions given by, Mr C as markedly more credible and plausible than Mr C's evidence that they were mistaken or lying. Mr C's actual and apparent acquiescence throughout the trial to the defence strategy (including not giving evidence) was entirely consistent with the fact that clear, cogent advice had been given to Mr C and that Mr Westgate had acted on his instructions following that advice.[10]

[13] Turning to Mr C's allegation that he was never properly advised about whether he should give evidence, the Court seriously doubted the credibility and plausibility of Mr C's allegations. Mr C had contradicted his evidence-in-chief and accepted under cross-examination that:[11]

(a) Mr Westgate told him the "pros and cons to a defendant of giving evidence";

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7 At [19].
8 At [20].
9 At [21].
10 At [22].
11 At [25].

(b) on the day before trial started, Mr Westgate said he was concerned that if Mr C gave evidence he would "talk too much and overexplain under cross-examination";

(c) Mr Westgate advised him the prosecutor would "chew me up in about five minutes"; and

(d) Mr Westgate told him "it's generally better for a defendant not to give evidence if the Crown case isn't going well because cross-examination of a defendant can help the Crown but that [Mr C] would have to make a final decision when [Mr C saw] how the Crown case goes".

[14] It was clear to the Court that Mr C was carefully advised by Mr Westgate as to how he should approach his case and whether he should give evidence.[12]

[15] The Court noted that Mr Westgate openly acknowledged that he did not pursue some matters raised by Mr C and that he made those decisions without recourse to Mr C. For example, he did not cross-examine on B's alleged diary. But the Court considered this tactical decision was plainly open to a competent lawyer, as were the decisions not to pursue allegations of pornography addiction or a jealousy motive.[13] The diary may or may not have existed and, if it did, Mr Westgate could not be sure it would have been helpful to Mr C.[14]

[16] Overall, it was clear to the Court that, "in accordance with [Mr] C's key instructions, [Mr] C's most effective defence was put squarely to the complainant and left with the jury".[15]

The application for leave

[17] The argument sought to be made is that the Court of Appeal was looking at the matter from the perspective of trial counsel and not Mr C, who was new to the criminal justice system and, as a result, under major pressure. In that context, it is submitted

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12 At [26].
13 At [27].
14 At [27].
15 At [28].

that four meetings of two to four hours each in the week before trial did not suffice. Further, it is said that the advice given by his trial counsel about his right to give evidence was at the "last minute". It is said that the advantages of giving evidence were not explained and the disadvantages were not adequately explained. Further, the meetings before trial did not suffice for trial counsel to get an adequate picture of how valuable Mr C might have been as a witness. Further, there had been no written brief of his potential evidence prepared so Mr C was not in a position to do anything other than agree he would not give evidence when the final decision was made and recorded at the end of the Crown case.

[18] Mr C also says that he was only told that his interview with the police was not going to be played at trial by the prosecution on the Saturday before the trial was due to commence. He apparently mistakenly thought it could and would still be played by the defence. This mistaken assumption could, it is submitted, have affected Mr C's decision whether or not to give evidence. This issue was not addressed by the Court of Appeal.[16] Mr C says that his interview contained much more than bare denials and would have been helpful to the defence. There were inadmissible passages in the interview, but it was submitted that these could have been edited out. No attempt was made to do so.

Our assessment

[19] No issue of public importance arises.[17] The matters sought to be raised relate to the particular circumstances of Mr C's trial. The competing evidence of Mr C and trial counsel on all three issues raised in the Court of Appeal was heard and assessed by that Court. Nothing raised suggests that analysis was in error or that there is a risk of a miscarriage of justice.[18] In particular, Mr Westgate's advice to Mr C about not giving evidence was given in the knowledge the police interview would not be played. There is nothing to suggest Mr C's decision to take Mr Westgate's advice would have differed had he realised earlier that the interview would not be played. The criteria for leave to appeal are not met.

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16 The transcript of the interview was provided to the Court of Appeal at the Court's request after the hearing.

17 Senior Courts Act 2016, s 74(2)(a).

18 Section 74(2)(b).

Result

[20] The application for an extension of time for leave to appeal is granted.

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

Solicitors:
Crown Law Office, Wellington for Respondent