NOTE: HIGH COURT ORDER IN [2019] NZHC 2664 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: DISTRICT COURT ORDER IN [2019] NZDC 16211 PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF APPLICANT'S WIFE AND CHILDREN REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 43/2020
[2020] NZSC 82

BETWEEN	H (SC 43/2020) Applicant
AND	NEW ZEALAND POLICE Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	C Mitchell for Applicant P D Marshall and J M Irwin for Respondent
Judgment:	13 August 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant pleaded guilty to one charge of knowingly distributing an objectionable publication,[1] six charges of possessing objectionable publications with

[1] Films, Videos, and Publications Classification Act 1993, s 124(1) (the maximum penalty is 14 years' imprisonment).

knowledge,[2] and one charge of indecency with an animal.[3] For this offending he was sentenced by Judge Dawson to a term of 26 months' imprisonment.[4] The applicant appealed unsuccessfully to the High Court against sentence.[5] He later sought the leave of the Court of Appeal to appeal against the High Court judgment. The Court of Appeal dismissed the application for leave to appeal, albeit the Court also addressed the merits of the appeal.[6] The applicant now seeks leave to appeal to this Court.

Background

[2] By way of background, the first point to note is that the distribution charge related to an image of what the District Court Judge described as "child exploitation material" which was sent to another user through an instant messaging application.[7] Second, the other charges related to items found when, some time later, police executed a search warrant at the applicant's home. They found an iPad and a cell phone with over 1,100 images depicting sexual conduct involving young people and children (some very young) and bestiality.

[3] Finally, it is helpful to summarise briefly the approach to sentencing in the District Court. Relevantly, from a starting point of 33 months' imprisonment, the District Court Judge gave a discount for the applicant's guilty pleas of six months (20 per cent, as rounded up). There was a further one-month (approximately four per cent) discount for the applicant's "relatively limited" remorse.[8] The Judge accepted the applicant may suffer from attention deficit hyperactivity disorder (ADHD) and impulsive behaviour but did not consider that mitigated his actions.

The proposed appeal

[4] The applicant submits that leave to appeal should be granted because otherwise there is a risk of a miscarriage of justice. He wishes to argue that in the circumstances,

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2 Section 131A(1) (the maximum penalty is 10 years' imprisonment or a $50,000 fine). Three of these charges were representative.
3 Crimes Act 1961, s 144 (the maximum penalty is three years' imprisonment).
4 *New Zealand Police v [H]* [2019] NZDC 16211 [Sentencing remarks].
5 *H v New Zealand Police* [2019] NZHC 3349 (Gwyn J) [HC judgment].
6 *H (CA36/2020) v New Zealand Police* [2020] NZCA 155 (Clifford, Mallon and Dobson JJ) [CA judgment].
7 Sentencing remarks, above n 4, at [2].
8 At [18].

where it was apparent from the outset he would plead guilty, a discount of 25 per cent was appropriate. The applicant also seeks to argue that the discount given for remorse should have been 17 per cent reflecting, among other things, both his willingness to plead and the impact of his ADHD.[9]

Our assessment

[5] The issues the applicant wishes to raise concern the particular circumstances of his case. No issue of general or public importance arises.[10] Nor does any matter raised by the applicant indicate a risk of a miscarriage of justice.[11] The matters the applicant wishes to pursue would repeat arguments addressed in the High Court, as well as in the Court of Appeal.

[6] In the High Court, the Judge rejected the submission that the discount for the guilty plea should have been 25 per cent because the guilty pleas were not entered at the earliest available opportunity. (They were entered nearly six months after the first appearance.) Nor did the Judge accept the submission that the discount for remorse should have been about 17 per cent. In considering the weight to be placed on the applicant's ADHD, the Judge said that, "[g]enerally", for this to be a mitigating factor there has to be some relationship between the ADHD and the offending.[12] There was no evidence establishing that relationship or why that should increase the discount for remorse. The other issue on remorse related to the applicant's general level of remorse. The Judge did not consider the factors identified warranted a greater discount.

[7] In declining leave to appeal, the Court of Appeal concluded, first, that the discount for guilty pleas was within range because the pleas were not entered at the first opportunity and the Crown case was strong. Second, the Court considered the

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9 The applicant submits a "robust evaluation of all the circumstances" that may show remorse was required, relying on *Hessell v R* [2010] NZSC 135, [2011] 1 NZLR 607 at [64]. He also says his case is on all fours with that of *R v Gallie* HC Auckland CRI-2010-044-514, 20 September 2011 where a discount of 17 per cent was given along with a discount of 25 per cent for the guilty plea. In addressing this submission in the High Court, the Judge noted that in that case "ADHD was not the key feature": HC judgment, above n 5, at [22].

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

11 Section 74(2)(b).

12 HC judgment, above n 5, at [21].

discount for remorse was within the available range. The Court accepted that if a discount for remorse was available it should be "meaningful" and "not a token one".[13] But, having considered further letters from medical practitioners, the Court did not see any prospect of a miscarriage because the discount given in this case was not greater.

[8] We see no error in the assessment of these points by the High Court. We add that the evidence on which the applicant would rely on the question of the impact of his ADHD does not appear to advance the position.[14] The criteria for leave to appeal are not met.

[9] In addition, we note that because this is an application for leave to appeal direct from the High Court, this Court must also be satisfied there are exceptional circumstances justifying that course.[15] That criterion is also not met.

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent

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13 CA judgment, above n 6, at [17].

14 Because of our view that the proposed appeal does not meet the threshold for a grant of leave, we do not need to deal with the question of whether leave to adduce fresh evidence is necessary.

15 Section 75(b).