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

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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 39/2020
[2020] NZSC 86

BETWEEN	NATHAN RICHARD CROOK Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Williams JJ

Counsel: N P Chisnall for Applicant
J A Eng for Respondent

Judgment: 28 August 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Crook applies for leave to appeal against the Court of Appeal's decision upholding his convictions in the District Court for sexual offending.

Background

[2] The applicant was convicted of five charges of sexual offending against a child and sentenced to three years and three months' imprisonment.[1] He was in a relationship with the complainant's mother and the Crown case was that the offending occurred at times when the mother was absent or asleep. The complainant told her mother about the applicant's conduct some considerable time after the relationship had ended. It is relevant to the issues in the proposed appeal that on hearing of these matters, the mother initially told the complainant that she would be required to take a lie detector test. The complainant was frightened by this and retracted her allegations, saying the whole story was a joke.

[3] Two features of the trial were the subject of the applicant's conviction appeal in the Court of Appeal. First, in a pre-trial ruling, the District Court held that the Crown was not obliged to call the complainant's mother, who the defence considered was likely to give evidence sympathetic to the defendant.[2] Second, the complainant's evidential video interview (EVI) was replayed to the jury, on request, immediately before closing addresses.

[4] In respect of the first issue, the trial Judge held that the Crown was justified in considering the mother unreliable and unworthy of belief.[3] Not only was the mother's account contrary to her own statements to Child Youth and Family Services and to that of other witnesses, it was also contrary to comments the applicant himself had made.[4] Accordingly, the Judge declined to direct the Crown to call the mother as witness.[5]

[5] As to the second issue, the applicant elected to give evidence and was the last witness to be called. Immediately after his evidence, the jury asked for the complainant's EVI to be replayed. When the interview was replayed, no contemporaneous direction was given by the Judge in relation to it, but relevant

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1 *R v Crook* [2019] NZDC 7669 (Judge Duncan Harvey).
2 *R v Crook* [2018] NZDC 21091 (Judge Duncan Harvey).
3 At [40], distinguishing *Rapana v R* [2015] NZHC 2286 as to the circumstances in which the prosecution is obliged to call a witness.
4 At [41].
5 At [42]. See Criminal Procedure Act 2011, s 113(3).

directions were given during his summing up. Closing addresses followed the replaying of the EVI.

Court of Appeal

[6] The applicant appealed his conviction to the Court of Appeal on two grounds:[6]

(a) that the trial Judge should have directed the Crown to call the complainant's mother as a witness; and

(b) that the trial Judge's jury directions in summing up were insufficient to deal with the risks arising from the complainant's evidential video interview being played to jurors a second time before closing addresses.

[7] On the first issue the Court accepted that "[t]here is no doubt that in the ordinary course of events a person in this situation would be called by the prosecution".[7] But the Court also noted this was subject to the principle that the prosecution is not obliged to call a witness whom it believes on valid grounds to be untrustworthy.[8] The Court also considered that the mother was "relevant to the narrative but … not the central player", and that there were factors beyond inconsistent statements to indicate untrustworthiness.[9]

[8] The applicant then submitted that the Crown took unfair advantage of the mother's absence at trial. The Crown did this by suggesting to the jury that the complainant had no motive to lie, by exploring with the complainant the circumstances of her disclosure of the abuse allegations to her mother and her subsequent retraction, and by engaging in speculation about why the applicant remained in contact with the mother after he was made aware of the allegations.

[9] The Court rejected this submission as itself speculative because it depended on what the mother may have said had she been called to address these issues. Further, the Court noted that the defence could have called the mother but did not and there

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6 *Crook v R* [2020] NZCA 148 (Clifford, Simon France and Lang JJ).
7 At [7].
8 At [11], citing *R v Wilson* [1997] 2 NZLR 500 (HC) at 509–510.
9 At [11].

was no complaint about trial counsel's decision in that regard.[10] Finally, the Court agreed with the trial Judge's ruling for the reasons he gave.[11]

[10] On the second issue, the applicant submitted that directions on balance and demeanour should have been given at the time the EVI was replayed. The Court considered there was no merit in this point.[12] It held that it was significant the EVI was replayed prior to the closing addresses, as opposed to during deliberation. This meant the closing addresses and the Judge's summing-up applied to the replay as they did to all other evidence.[13] As to the lack of a contemporaneous demeanour warning, the Court considered first that there was no reason to assume the jury was motivated by demeanour thinking in relation to the EVI. They had already seen the complainant give evidence in court over an extended period and so had ample opportunity to assess her demeanour, including while under cross-examination. It was equally possible, the Court considered, that, having just heard the defendant, the jury simply wished to refresh their memory of the content of the complainant's evidence as they were yet to receive the transcript.[14] Second, the Court considered the appellant was going too far when he sought to critique the internal structure of the Judge's summing-up (the Judge gave demeanour warnings in opening and summing up, and repeatedly reminded the jury to consider all the evidence).[15]

Applicant's submissions

[11] On the issue of the need for directions in relation to replaying the EVI, the applicant submits that contrary to the Court of Appeal's conclusion, the timing of the replay did not matter: replaying a complainant's EVI may reinforce the Crown's case through the mere fact of repetition irrespective of timing. The error was, it is submitted, that the trial Judge failed to give the relevant direction and warning at the "critical, first reasonable opportunity to do so".

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10 At [13].
11 At [14].
12 At [19].
13 At [20].
14 At [22].
15 At [23].

[12] The applicant also submits that the Court was wrong to "presuppose" that the reason the jury asked for a replay was to refresh their memory because they did not have the transcript, as this was speculative. On the other hand, it is argued, the Court penalised the applicant by pointing to a lack of basis for assuming the jury was motivated by demeanour thinking. The applicant says that the jury could well have been motivated by demeanour thinking and the trial Judge would not have known because he was not able to inquire as to the jury's reason.

[13] Further, the applicant submits that the structure of the trial Judge's summing-up is relevant on appeal.

[14] The applicant submits that his application is a "useful opportunity … to consider the approach that ought to be taken when a trial judge is confronted with a request by the jury to re-watch an EVI".

[15] As to the trial Judge's decision not to direct the prosecution to call the complainant's mother, the applicant first submits that the Court of Appeal erred by not expressly addressing the interests of justice test contemplated by s 113(3) of the Criminal Procedure Act 2011.[16] The applicant submits that the Court misapplied the test when it suggested that the defence could have called the mother. The Court failed to recognise that it may be unfair to oblige the defence to call certain witnesses.

[16] Second, the applicant submits that the Court was wrong to say that what the mother might have said in evidence was speculative. The Court had the mother's statement regarding what the complainant told her when she retracted her complaint. The Crown took unfair advantage of the mother's absence. The Crown submitted to the jury that there was no evidence that the complainant had a motive to lie, when the Crown knew the witness it had refused to call would have provided such evidence.

[17] The applicant then submits s 113(3) engages important fair trial principles and has not yet been subject to close appellate scrutiny. The applicant says that the proposed appeal provides an opportunity to consider whether the "forward-looking"

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16 Citing *Wilson*, above n 8; and *McGinty v Attorney-General* [2001] NZAR 449 (HC).

interests of justice test in s 113(3) should be aligned with the retrospective inquiry of whether there is a miscarriage of justice under s 232(4) of the Criminal Procedure Act.

Analysis

[18] As to the lack of contemporaneous directions when the EVI was replayed, there may be circumstances where further guidance will be of assistance to judges confronted with a jury request to that effect, but we are not satisfied this is the appropriate case for such further consideration. In light of the fact that, without exception, the authorities relied on by the applicant relate to requests made during deliberations and that in this case the replay was followed immediately by Crown and defence closings, there are insufficient prospects of success in relation to this ground to warrant the grant of leave.

[19] As to the failure to call the complainant's mother, the Court of Appeal applied settled authority to these facts. We are not persuaded that further guidance on the application of s 113(3) is required generally. Nor are we of the view that such assessment, if made, has a reasonable prospect of producing a different result in this case.

[20] We are therefore satisfied that the proposed appeal involves no matter of general or public importance, nor is there a substantial risk of a miscarriage of justice.[17]

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent

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