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**ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 56/2021  
[2021] NZSC 73**

BETWEEN ALLISTAIR MICHAEL MOOSA  
Applicant

AND THE QUEEN  
Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: J D Munro and J N Olsen for Applicant  
B C L Charmley for Respondent

Judgment: 25 June 2021

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**JUDGMENT OF THE COURT**

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- A The application for leave to appeal is dismissed.**
- B We make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.**
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## REASONS

[1] The applicant faces two charges of indecent assault and one of sexual violation by unlawful sexual connection. The complainant was 16 at the time of the alleged offending. She is a friend of the applicant's younger sister and the applicant has known her for a number of years. The defence at trial will be that the complainant consented to the sexual activity in question and, presumably, in the alternative, that the applicant believed she was consenting (in respect of the indecent assault charges) and had honest and reasonable belief in consent (in relation to the charge of sexual violation).

[2] The Crown wishes to lead at trial evidence of three other incidents. Two of those occurred when the complainant was eight years old. The third was when she was 12 and was confined to sexually suggestive conduct. The District Court found this was admissible propensity evidence<sup>1</sup> and this conclusion was upheld by the Court of Appeal.<sup>2</sup> The applicant now seeks leave to appeal against the Court of Appeal judgment.

[3] The evidence bears on the relationship between the applicant and the complainant and, if accepted, would show that he has had a longstanding sexual interest in the complainant on which he has acted:

- (a) By engaging in sexual activity with her when she was eight. In respect of this activity, any consent on the part of the complainant would not have provided a defence and there was, in any event, no consent.
- (b) By suggesting sexual activity with her when she was 12. In respect of the activity suggested, consent would not have been a defence given her age and there was, in any event, no occasion for him to think that she would consent.

[4] The Court of Appeal's legal approach is not challenged. In issue is its assessment of the relevance and likely prejudicial effect of the evidence. So, no

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<sup>1</sup> *R v Moosa* [2020] NZDC 22730 (Judge Sainsbury).

<sup>2</sup> *Moosa v R* [2021] NZCA 168 (Miller, Brewer and Dunningham JJ).

question of principle arises and if we were to grant leave, the appeal would simply be a re-run of the arguments addressed by the Court of Appeal.

[5] The disputed evidence is of sexual activity with a child, actual or suggested, which was or would have been illegal irrespective of consent and to which the child could not sensibly be taken to have consented. The applicant's argument is that this evidence does not bear on the likelihood of the applicant engaging in non-consensual sexual activity with the same child when she attained the age of 16. The Court of Appeal rejected this argument.<sup>3</sup> As well, it saw the prejudicial effect of this evidence as substantially just the other side of the coin to its probative value.<sup>4</sup> We see no apparent error in the Court of Appeal's approach.

[6] This is a pre-trial application for leave to appeal. Accordingly, s 74(4) of the Senior Courts Act 2016 is engaged. We are not persuaded that it is necessary in the interests of justice for this Court to hear and determined the proposed appeal before the applicant's trial.

[7] The application for leave to appeal is accordingly dismissed. For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.

Solicitors:  
Tucker & Co, Auckland for Applicant  
Crown Law Office, Wellington for Respondent

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<sup>3</sup> At [19].

<sup>4</sup> At [21].