

ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF EF, TPM, MT AND KNF PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.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 NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT AND ANY PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS 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 146/2021
[2022] NZSC 6**

BETWEEN	CHRISTIAN DESMOND MILLAR Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: J W Griffiths for Applicant
R E King for Respondent

Judgment: 17 February 2022

JUDGMENT OF THE COURT

- A The application for leave to appeal against the Court of Appeal judgment refusing an extension of time is dismissed for want of jurisdiction.**
- B The application for an extension of time to appeal direct to this Court against conviction is dismissed.**

C We make an order prohibiting publication of names, addresses, occupations or identifying particulars of EF, TPM, MT and KNF pursuant to s 202 of the Criminal Procedure Act 2011.

REASONS

[1] The applicant was tried in August 2014 on charges alleging sexual offending against a single complainant. He was subsequently sentenced to two years eight months' imprisonment.¹ Almost six years later, he lodged a notice of appeal in the Court of Appeal and sought an extension of time to do so. The case fell to be determined under the relevant provisions of the Crimes Act 1961, in particular, s 388(2) which conferred a power to extend the time for appeal and s 385(1) which provided the criteria for determining appeals against conviction.² The application for an extension of time was refused by the Court of Appeal in a judgment delivered on 20 October 2021.³ The applicant now seeks leave to appeal against that judgment or, in the alternative, leave to appeal (along with the necessary extension of time) against his conviction in the District Court.

[2] We are satisfied that we have no jurisdiction to entertain an appeal from the Court of Appeal judgment,⁴ as is apparent from a number of judgments of this Court, including *Petryszick v R*⁵ and *Fergusson v R*.⁶ In dismissing the application for an extension of time, the Court of Appeal naturally had regard to the s 385(1) criteria. Contrary to the submissions on behalf of the applicant, this does not mean that its judgment should be treated as the dismissal of an appeal.

¹ *R v Millar* DC Wellington CRI-2013-085-2668, 18 November 2014 at [13] (Judge Tompkins) [DC sentencing notes].

² As the proceeding was commenced before 1 July 2013, ss 385 and 388 of the Crimes Act 1961 apply: Criminal Procedure Act 2011, s 397(2).

³ *Millar v R* [2021] NZCA 548 (Goddard, Venning and Peters JJ) [CA judgment].

⁴ As the proceeding was commenced before 1 March 2017, the Supreme Court Act 2003 applies. Section 10(a) established the Supreme Court's jurisdiction to hear and determine appeals authorised by Part 13 of the Crimes Act (later Part 6 of the Criminal Procedure Act). Section 383A(1) of the Crimes Act allowed a convicted person to appeal to the Supreme Court (with leave) against a decision of the Court of Appeal on *appeal* under s 383. Section 383(1)(a) allowed a convicted person to appeal against conviction to the Court of Appeal (or, with leave, to the Supreme Court).

⁵ *Petryszick v R* [2010] NZSC 105, [2011] 1 NZLR 153 at [26].

⁶ *Fergusson v R* [2013] NZSC 28, (2013) 26 CRNZ 173 at [8].

[3] This Court has jurisdiction to grant leave for a leapfrog appeal against the applicant's conviction,⁷ but this is subject to the Court being satisfied that there are exceptional circumstances which warrant an appeal direct to it.⁸ It would also require an extension of time.⁹

[4] The explanations advanced by the applicant for his delay (such as no legal representation, difficulties in communicating with the lawyer assigned to assist him at trial, alleged errors in what he was told by that lawyer, practical impediments associated with his imprisonment and him generally being at a low ebb) provide at most justification for some limited delay. They are, however, inadequate to explain the delay that occurred. This was also the view of the Court of Appeal.¹⁰

[5] The merits of the proposed appeal were also thoroughly addressed by the Court of Appeal as part of its consideration of the application for an extension of time.¹¹

[6] As that Court concluded, there is substantial scope for argument that there were errors on the part of counsel assigned to assist the applicant; most particularly in (a) not cross-examining the complainant's aunt about the complainant having told her that the applicant had not touched her vagina and (b) not seeking permission to cross-examine the complainant under s 44 of the Evidence Act 2006 on her failure to refer to the applicant when being interviewed about her sexual activity with other males.¹²

[7] The inherent significance of these errors was limited. Evolving disclosure by young complainants is common. As well, there was evidence which the Crown could have adduced to rebut the allegation of recent fabrication which would have been implicit in such cross-examination. Further, and more importantly, the Crown case relied on not just the evidence of the complainant but more substantially on that of her

⁷ Supreme Court Act, s 14; and Crimes Act, s 383.

⁸ Supreme Court Act, s 14. It must also be necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal: ss 13 and 14.

⁹ Supreme Court Rules 2004, r 11(4).

¹⁰ CA judgment, above n 3, at [15].

¹¹ At [16]–[87]. The applicant contended that there was a miscarriage of justice pursuant to s 385(1)(c) of the Crimes Act, due to alleged errors, irregularities and occurrences at trial that created a real risk the outcome of the trial was affected or rendered it unfair: at [7].

¹² At [75] and [78].

cousin, whose account of events was not affected by prior inconsistent statements and, indeed, was supported by contemporaneous diary entries.

[8] The significance of these errors was further diminished by the underlying dynamic of the trial. When first interviewed by the Police, the applicant denied not only the offending but also knowing the complainant or her cousin.¹³ As both the Judge at sentencing and the Court of Appeal in dismissing the application for an extension of time concluded, this denial was shown at trial to be completely untrue.¹⁴ The contact which was established (including the gift of an MP3 player and telephone calls) provided substantial support for the evidence of the cousin and correlated well with her diary entries.¹⁵ Against this background the Court of Appeal concluded that there was not a real risk that the errors made had affected the outcome of the trial.¹⁶

[9] We see the approach of the Court of Appeal to the fairness of the trial and the corresponding absence of a risk of a miscarriage of justice as convincing. The errors made in the presentation of the defence were all fully addressed by the Court of Appeal with the case addressed very much as if counsel assisting had been the applicant's counsel,¹⁷ an approach which seems to us to have been appropriate. Counsel for the applicant maintained that the applicant's dishonesty at interview did not preclude the jury from acquitting the applicant if not satisfied that the Crown had proved its case. While this is so, the applicant's obviously dishonest denial of association meant that the jury did not receive from the defence a plausible innocent explanation for proven conduct on his part that provided substantial support for the evidence of the complainant and particularly her cousin.

[10] The Court of Appeal also rejected the view that the complainant's lack of legal representation made the trial unfair; this on the basis that the applicant had received substantial assistance at trial from counsel appointed to assist him and from the way in which the Judge had conducted the trial.¹⁸ We see no appearance of error in this approach.

¹³ DC sentencing notes, above n 1, at [5].

¹⁴ At [5]; and CA judgment, above n 3, at [42] and [82].

¹⁵ CA judgment, above n 3, at [82].

¹⁶ At [83] and [85].

¹⁷ At [55]–[79].

¹⁸ At [57] and [58].

[11] In terms of the application for leave to appeal direct to this Court against conviction, nothing has been advanced to suggest that the exceptional circumstances test has been satisfied. Further, the extraordinary delay in challenging the conviction has not been acceptably explained. As well, the time that has elapsed since the trial and substantial later developments, including the Court of Appeal decision in *Fahey v R*,¹⁹ mean that there would be no substantial utility in exploring as a point of general or public importance the role of counsel assisting in a trial of this sort.²⁰ This is all the more so as it is difficult to see how such exploration would be likely to assist the applicant in terms of outcome. Finally, we see no appearance of a miscarriage of justice.²¹

[12] The application for leave to appeal from the Court of Appeal judgment is therefore dismissed for want of jurisdiction and the application for an extension of time to appeal direct to this Court against conviction is likewise dismissed.

[13] To protect the identity of the complainant, we make an order prohibiting publication of names, addresses, occupations or identifying particulars of EF, TPM, MT and KNF pursuant to s 202 of the Criminal Procedure Act 2011.

Solicitors:
Main Street Legal Limited, Upper Hutt for Applicant
Crown Law Office, Wellington for Respondent

¹⁹ *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392.

²⁰ Supreme Court Act, s 13(2)(a).

²¹ Section 13(2)(b).