NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, AND IDENTIFYING PARTICULARS OF THE APPLICANT (T) AND CO-DEFENDANT (W) REMAINS IN FORCE.

NOTE: PUBLICATION OF NAME(S), ADDRESS, 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/DLM3360352.html

NOTE: PUBLICATION OF NAME(S), ADDRESS(ES), IDENTIFYING PARTICULARS OF ANY PERSON(S) UNDER THE AGE OF 18 YEARS WHO IS A COMPLAINANT OR 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/DLM3360347.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 71/2024
[2024] NZSC 128

BETWEEN	T (SC 71/2024) Applicant
AND	THE KING Respondent

Court: Glazebrook, Kós and Miller JJ

Counsel: N Levy KC for Applicant
M R L Davie for Respondent

Judgment: 3 October 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] T was convicted by a jury of sexual violation by rape and other sexual offending against his daughter when she was aged between 12 and 15.[1] His wife was convicted at the same trial of failing to protect a child under s 195A of the Crimes Act 1961. T was sentenced to 14 years' imprisonment. His appeal to the Court of Appeal failed.[2]

[2] T's application for leave to appeal to this Court centres on two grounds:

(a) the joinder of the two trials;[3] and

(b) the production to the jury of a portion of the transcript of the complainant's evidence from a previous trial, under s 128 of the Evidence Act 2006.

[3] The former ground concerns the fact that the jury were privy to three out-of-court statements by T's wife to witnesses, to the effect that T and their daughter were having sex. These statements were admissible against her but inadmissible against T. In the Court of Appeal the relevant challenges were both to joinder and the directions given on admissibility. Only the former challenge is pursued here.

[4] Ms Levy KC submits that these circumstances are indistinguishable from the decision of the Court of Appeal in *Samson v R* in which severance was ordered, and that the Court of Appeal's approach was also inconsistent with its decision in *Kapene v R*.[4] In her submission there would be some cases where the situation was not amenable to judicial direction,[5] and other cases where severance would be a reflection of common sense, rather than an affront to it, because rather than jurors being denied the full picture, they should instead be confined to the picture they are entitled to see and reason from.[6] This was a case where it was unnecessary to hear the

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1 *R v [T]* [2022] NZDC 7019 (Judge Collins).
2 *T v R* [2024] NZCA 228 (Collins, Churchman and Osborne JJ) [CA judgment].
3 *R v [L]* [2019] NZDC 25882 (Judge Mackintosh).
4 *Samson v R* [2020] NZCA 617; and *Kapene v R* [2013] NZCA 436.
5 Citing *Kapene*, above n 4.
6 Citing *Samson*, above n 4.

charges together for the jury to understand the context of the various relationships engaged.

[5] The latter ground arises from the fact that in the course of giving evidence in his own defence, T claimed that at a prior (aborted) trial the complainant had initially denied sending photographs to men online. That claim was quite incorrect. Three responses potentially were available. First, immediate cross-examination by reference to the transcript of the first trial.[7] Secondly, recall of the complainant to give evidence in rebuttal. Thirdly, production of the transcript direct to the jury under s 128 of the Evidence Act 2006. It is not clear why the first course was not taken. However, the issue was raised in chambers at the end of the day, and revisited the following day. The possibility of rebuttal evidence was considered, but it appears the Crown may have suggested the transcript simply be put to the jury under s 128. There was a discussion with counsel, and then-counsel for T is recorded as saying "I don't think I could have any meaningful defence to that argument, Sir".

[6] Ms Levy submits it was nonetheless wrong to use s 128 to introduce evidence that was available to, but not used by, the Crown to challenge what T had said about the complainant, and when the evidence was relevant only to a collateral, rather than core, issue for the jury. Here the special attention of the Judge elevated a minor point into one of more significance.

Our assessment

[7] We do not consider the criteria for leave are made out here. Neither point raises a matter of general or public importance; rather each turns on the particular facts of the present case.[8] And nor do we consider either direction erroneous, such that a miscarriage of justice may occur if the proposed appeal is not heard.[9] It is not therefore necessary in the interests of justice for this Court to hear and determine the appeal.[10]

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[7] Pursuant to s 90 of the Evidence Act 2006.
[8] Senior Courts Act 2016, s 74(2)(a).
[9] Section 74(2)(b).
[10] Section 74(1).

[8] On the severance ground, the relevant principles are set out in *Churchis v R*.[11] It is not suggested for the applicant that these principles require review by this Court. As the Court of Appeal observed in that decision, the discretion under s 138(4) of the Criminal Procedure Act 2011 is a wide one and "what is required is a balancing between the legitimate interests of an accused and the public interest in the fair and efficient despatch of the Court's business".[12] Here it was open to the Court to strike that balance as it did. The prejudice in *Samson*, involving credible admissions of a killing, was far greater than here. The statements made by T's wife in this case had no particular credibility one way or the other, being unattached to any other supporting detail, such as that she had seen the offending happen. Mrs Samson was charged only as an accessory after the fact, and severance of her trial was a logical response to significant prejudice which directions were unlikely to displace.[13] In the present case, as we have noted, the applicant's challenge to the directions given on admissibility was not pursued beyond the Court of Appeal.

[9] On the s 128 ground, we merely observe that it was inevitable that the correct picture of the complainant's prior evidence was going to be put before the jury one way or another following T's misstatement. One way was by rebuttal evidence being called; the other was by the transcript being tendered under s 128. There was no issue as to the accuracy of the transcript, and the credibility of the complainant was directly in issue. It is entirely understandable that defence counsel would have preferred the less inflammatory option of s 128.

Result

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

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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11 *Churchis v R* [2014] NZCA 281, (2014) 27 CRNZ 257 at [28] citing *R v Anderson* CA144/01, 1 August 2001 at [10].
12 At [28(d)].
13 *Samson*, above n 4, at [36].