NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 14/2024
[2024] NZSC 96

BETWEEN	SHANE KEITH BULLOCK Applicant
AND	THE KING Respondent

Court:	Ellen France, Kós and Miller JJ
Counsel:	H G de Groot for Applicant S C Baker and W J Harvey for Respondent
Judgment:	7 August 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant, Mr Bullock, applies for leave to appeal against the decision of the Court of Appeal, in which his appeal against conviction on a number of charges of sexual offending relating to two victims, B and V, was dismissed.[1] The proposed appeal would challenge the Court of Appeal's finding that Mr Bullock was adequately

[1] *Bullock v R* [2024] NZCA 3 (Collins, Brewer and Muir JJ) [CA judgment].

advised to make an informed decision as to whether to give evidence at trial (the election decision).

Background

[2] To put the application for leave in context, we need to say a little about developments prior to trial, the defence case and the approach of the Court of Appeal.

Issues as to representation

[3] Prior to trial, various issues arose as to the assignment of counsel by the Legal Services Agency including a breakdown of professional relationship with three of the six counsel assigned. The resultant absence of representation also raised issues. That was because the effect of s 95 of the Evidence Act 2006 was that the applicant could not personally cross-examine the complainants. The upshot of all of this was that Mr Hewson was appointed as standby counsel for the applicant.

The trial

[4] The trial took place in March 2021. The defence case differed as between B and V, both of whom had been in domestic relationships with the applicant when the respective offending occurred. In terms of B, the applicant's instructions to Mr Hewson were that he never had sexual connection with B during the relevant period. Regarding V, his instructions were that sexual connection between them was less frequent than alleged, and when it took place, it was consensual, or he believed it to be consensual on reasonable grounds. The applicant had not provided a statement to the police and he accepted the advice of Mr Hewson that he should not give evidence at trial.

[5] Mr Hewson said, and the Court of Appeal accepted, that the defence in relation to B was "problematic" given the couple's sexual history and the fact that they were living together in a domestic relationship at the time.[2] Mr Hewson was more confident

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2 At [27].

in challenging V's complaints by challenging her reliability and credibility on the basis of weaknesses in her evidence.[3]

[6] On conclusion of the trial, the applicant was convicted of 15 charges of sexual violation against B and V.[4] Three charges in relation to V were dismissed during the trial, and the applicant was acquitted of a further five charges in relation to V.

Court of Appeal

[7] On the applicant's appeal to the Court of Appeal, there were two grounds of appeal. The first ground was that the applicant did not receive a fair trial because he became unwillingly self-represented shortly before the trial's commencement; and the second ground was that he received inadequate advice from Mr Hewson as to his election decision, and that this gave rise to a miscarriage of justice. The Court of Appeal dismissed the first ground, and the appeal turned on the second ground, which is the subject of the present application. The Court of Appeal also dismissed the second ground of appeal, finding that there was "no error on the part of Mr Hewson".[5]

The proposed appeal

[8] The applicant's case on the proposed appeal is essentially that this was a case where he should have been advised that his defence of reasonable belief in consent could not succeed unless he gave evidence. The alleged failure of Mr Hewson to inform the applicant of this in their discussion at the conclusion of the Crown case meant that a fully informed election decision was not made. The applicant relies in this respect on what he says is the inconsistency between the approach in this case and that taken by the Court of Appeal in the earlier decision of *Luki v R*.[6] The Court in *Luki* concluded that the appellant in that case had not been given the opportunity to make a fully informed election decision. The argument is that the inconsistency

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3 At [27].
4 *R v Bullock* [2021] NZDC 10157 (Judge Rowe) at [2] and [56]–[57].
5 CA judgment, above n 1, at [51].
6 *Luki v R* [2021] NZCA 500.

between the two decisions must be resolved as a matter of general and public importance, and that counsel's failure has given rise to a miscarriage of justice.[7]

Our assessment

[9] There is no challenge to the applicable legal principles applied by the Court of Appeal concerning defence counsel's duties in relation to their client's election decision.[8] The Court proceeded on the basis that a defendant's election must be fully informed. Rather, the challenge is to the application of these settled principles to the particular facts. Nor do we see the different outcome in *Luki* as giving rise to any question of general or public importance. That is because it is apparent that the two decisions are distinguishable on the facts.

[10] We need only note the following. The appellant in *Luki* was appealing against conviction following a retrial. The Court of Appeal concluded defence counsel had erroneously proceeded on the assumption the appellant would not give evidence, just as he had not in the first trial. The question of whether the appellant might give evidence at the retrial had not been considered prior to its commencement, so that, "at best", counsel "had only a general impression of how the appellant might perform as a witness".[9]

[11] By contrast here, the Court of Appeal found that the decision of whether the applicant would give evidence was, with the applicant's informed consent, left open until after the close of the Crown case. Progress of the case was reviewed with the applicant during the adjournments and Mr Hewson "was prepared to lead Mr Bullock's evidence if he chose to give evidence" in a situation where the "defence positions" for each complainant "were clear".[10] Further, the Court of Appeal found that Mr Hewson's assessment of the risks to the applicant if he gave evidence, both "from cross-examination and adverse impression — was sound".[11]

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7 Senior Courts Act 2016, ss 74(2)(a) and (b).

8 The Court adopted the description of the principles in the Crown submissions: CA judgment, above n 1, at [37].

9 *Luki v R*, above n 6, at [35].

10 CA judgment, above n 1, at [38(c)].

11 At [38(g)].

[12] It is relevant that, as further points of distinction, the Court in *Luki* found that, by the time the appellant gave instructions that he would not give evidence, any other course had become "unrealistic".[12] Nor had there been any "considered assessment" of the appellant's "prospects as a witness".[13] Finally, the Court in *Luki*, in contrast to the findings in this case, considered "there was something to be gained and nothing to be lost by the appellant giving evidence".[14]

[13] The Court of Appeal in *Luki* recognised that it can be hard to run a defence of reasonable belief in consent without giving evidence. However, as the Court of Appeal observed in this case, it is not uncommon for a defendant, as here, to advance a general defence. The Court also made the point that nor was "it unusual for the defence to put the Crown to the proof", relying on cross-examination and address.[15] Whether it was necessary for a defendant to give evidence in such a case is a factual question.

[14] We see no appearance of a miscarriage of justice in the Court of Appeal's rejection of the submission that on the facts of this case, conviction was inevitable unless the applicant gave evidence. In this respect, the Court accepted Mr Hewson's analysis that B was a good witness. While B had not made concessions, the Court set out various factors which meant "there was scope for challenge to her reliability".[16] The Court saw the defence position for V as "stronger" given that "[h]er credibility had been significantly attacked".[17]

[15] In terms of the Court of Appeal's assessment, it is relevant that there was no finding trial counsel erred in the approach to cross-examination. Rather, the argument for the applicant assumes that to put up a defence the applicant had to deny the specific complaints. However, here it was clearly before the jury that he denied the charges on general grounds applicable to all of the counts. Nor is it suggested that he had something in the nature of, for example, a verifiable alibi or that there was other, new,

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12 *Luki v R*, above n 6, at [36].
13 At [39].
14 At [44]. The Court in *Luki* also made something of the fact that if the appellant had given evidence, that would have avoided the trial Judge drawing the jury's attention to where there was an absence of evidence from the appellant. No similar direction was made in the present case.
15 CA judgment, above n 1, at [44].
16 At [42].
17 At [43].

evidence. Further, that conviction was not inevitable is apparent from the fact the applicant was acquitted on a number of charges relating to V.

[16] Finally, counsel considered matters could only go badly for the applicant if he gave evidence. The Court of Appeal, having heard from both the applicant and Mr Hewson, found that advice reasonable. Nothing advanced by the applicant calls that finding into question.

[17] The criteria for leave to appeal are not met.

Result

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

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