NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 83/2016
[2016] NZSC 146

BETWEEN	NARAYAN PRASAD Applicant
AND	THE QUEEN Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: M J Phelps for Applicant
K S Grau for Respondent

Judgment: 3 November 2016

JUDGMENT OF THE COURT

A An extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of five charges involving historic sexual offending against three complainants. The offending against two complainants occurred in the late 1970s and early 1980s while that against the third complainant occurred between 1995 and 1997. It was his third trial.[1] The applicant's appeal against conviction and sentence to the Court of Appeal was dismissed.[2] He now seeks leave to appeal to this Court against his conviction.

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1 There were initially 42 charges involving four complainants. The applicant was convicted on 31 charges at the first trial but his appeal to the Court of Appeal was allowed and a new trial was ordered: *Prasad v R* [2013] NZCA 267. At the second trial he was acquitted on all but five charges, on which the jury could not reach agreement. At the third trial he was convicted on the five remaining charges.

2 *Prasad v R* [2016] NZCA 163 (French, Simon France and Ellis JJ) [*Prasad* (CA)].

[2] The application is made out of time and an extension of time for the filing of the application for leave is sought. The delay is not lengthy and there is no prejudice to the respondent. We therefore grant the required extension of time.

[3] The application deals with two aspects of the third trial:

(a) the reliability warning given by the trial Judge, Dobson J, dealing with prejudice arising from the delay between the alleged offending and the trial; and

(b) the direction given by the trial Judge in relation to evidence given by one of the complainants about an allegation in respect of which the applicant had been acquitted at the second trial.

Reliability warning

[4] The applicant's third trial took place before the delivery of the decision of this Court in *CT (SC 88/2013) v R*,[3] dealing with the application of s 122(2) of the Evidence Act 2006. That provision requires a trial Judge at a jury trial to consider whether to give an unreliability warning in some circumstances. One of these is where evidence is given about conduct of a defendant alleged to have occurred more than ten years before the trial, as happened at the applicant's trial. Although the Judge in the present case did make a direction dealing with the impact of delay on the applicant's defence, it did not meet the requirements set out in *CT*. The Court of Appeal determined, however, that the deficiencies in the reliability warning did not lead to a miscarriage of justice.[4]

[5] The applicant wishes to argue on appeal that this involved watering down the requirements that a reliability warning be given, as set out in this Court's decisions in both *CT* and *L (SC 28/2014) v R*.[5] He wishes to argue that, contrary to the view of the Court of Appeal, there was a miscarriage of justice in this case arising from the inadequacy of the reliability warning.

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3 *CT (SC 88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465.
4 *Prasad* (CA), above n 2, at [49]–[56].
5 *L (SC 28/2014) v R* [2015] NZSC 53, [2015] 1 NZLR 658.

[6] No point of principle arises in relation to s 122, given this Court's recent decisions in *CT* and *L*. The issue is, therefore, whether a miscarriage of justice will arise if leave is not granted.

[7] This Court has declined leave to appeal in other cases that pre-dated *CT* and *L* in respect of which the reliability warning was not given or was inadequate.[6]

[8] We have reviewed the reasoning of the Court of Appeal in the present case and the submissions made on behalf of the applicant contesting its conclusion that the fact that the reliability direction given by the trial Judge did not meet the requirements set out in *CT* did not lead to a miscarriage of justice. We do not consider that the applicant's submissions identify any error in the approach taken by the Court of Appeal and we see no appearance of a miscarriage of justice.

Previous acquittal

[9] One of the complainants was, in error, asked about an episode involving sexual activity between her and the applicant in respect of which he had been acquitted at the second trial. Defence counsel then cross-examined that complainant about the earlier incident, leading to an objection by the Crown. The Judge allowed defence counsel to pursue the cross-examination.

[10] In his summing up, the Judge directed the jury to ignore the fact that there had been earlier trials and concentrate on the counts in the indictment before the jury.

[11] The evidence given by the complainant about the earlier incident was given as a result of an error on the part of the prosecutor. It should not have been given. The Court of Appeal considered that the impact of the evidence was, however, minimal and agreed with the trial Judge that directions could adequately address the matter.[7]

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6 *D (SC 60/2015) v R* [2015] NZSC 119, *K (SC 133/2015) v R* [2016] NZSC 26 and *H (SC 49/2016) v R* [2016] NZSC 103.

7 *Prasad* (CA), above n 2, at [27].

[12] Counsel for the applicant argues that a point of public importance arises as to the relevance of previous acquittals at a retrial. We do not consider that it is a matter in respect of which any kind of definitive guidance is appropriate, given the wide variety of circumstances in which inadmissible or irrelevant evidence can come before the jury and the importance that the trial Judge deals with it in the context of the trial as a whole, as is illustrated by this Court's approach in *Thompson v R*.[8] Nor do we see any appearance of a miscarriage of justice arising on the facts of the present case.

Result

[13] For these reasons we grant an extension of time to the applicant to apply for leave to appeal but dismiss the application.

Solicitors:
Crown Law Office, Wellington for Respondent

[8] *Thompson v R* [2006] NZSC 3, [2006] 2 NZLR 577.