NOTE: DISTRICT COURT ORDER ([2022] NZDC 11230) PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.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 NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT 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 O AOTEAROA

SC 54/2023
[2023] NZSC 120

BETWEEN	H (SC 54/2023) Applicant
AND	THE KING Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: J D Lucas for Applicant
E J Hoskin for Respondent

Judgment: 8 September 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted, following a jury trial in the District Court, of sexual offending against his daughter when she was between six and nine years old. He was sentenced to 10 years and four months' imprisonment.[1] His conviction appeal was dismissed in the Court of Appeal,[2] and he now seeks leave to bring a second appeal on a single ground. That ground is neatly described by the applicant's counsel Mr Lucas, as follows: what should happen when trial counsel does not fully advance the defence in front of the jury that had been agreed upon prior to trial?

Factual background

[2] In two EVIs at the end of 2014, when the complainant was 11, she disclosed offending by the applicant including digital penetration of her anus and vagina, masturbating in front of her, putting his tongue in her mouth, and rape. The applicant denied the allegations. As the complainant did not wish to proceed further, no charges were laid at the time, but in 2019 the complainant reactivated her complaint. Charges were laid.

[3] In the Court of Appeal the applicant advanced two grounds—trial counsel error and several challenges to the trial Judge's summing up. It is necessary only to traverse that Court's treatment of the first ground.

[4] In that respect trial counsel filed an affidavit. In it counsel confirmed that the applicant believed the complainant's mother (the applicant's ex-wife) had prompted the complainant to make allegations against him. His view was the complainant's mother either encouraged the complainant to lie or manipulated her recall and implanted false memories. Either way the mother (who also gave evidence) was lying, and the complainant was either lying or mistaken as a result of her mother's manipulation. The agreed theory of the case was recorded by trial counsel in two pre-trial file notes.

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1 *R v [H]* [2022] NZDC 11230 (Judge Zohrab).
2 *H (CA308/2022) v R* [2023] NZCA 135 (Brown, Lang and Palmer JJ).

[5] When trial counsel cross-examined the complainant (now 19 years old) he pursued the false memory limb of the defence with some vigour but made the decision, on his feet as it were, not to pursue the credibility limb. In closing, counsel focussed on reliability only.

[6] In his affidavit, counsel accepted that he had made a "split–second decision" not to pursue credibility and that he was at fault for not doing so. He discussed the issue with the applicant either immediately before or after closing the defence case (he could not recall which). He admitted he had made a mistake but thought recalling the complainant to pursue this line "would have done more harm to [the applicant's] case". He felt that the complainant was a formidable witness.

[7] On this ground the Court of Appeal accepted that trial counsel were entitled to some latitude as to the conduct of cross-examination and the court ought to be slow to second-guess strategic decisions necessarily made in the heat of a trial.[3] The Court also accepted that trial counsel had found the complainant to be a formidable witness and that, had her credibility been challenged, it was inevitable the complainant would simply have replied firmly that she was not lying. The Court concluded that the fundamental obligations discussed in *Hall v R* had not been breached and that there was no miscarriage.[4]

Submissions

[8] The applicant submits that the third of the three fundamental decisions in *Hall*—to advance a defence based on the accused person's version of events—requires further consideration by this Court. The Court of Appeal's view was that the focus of the third *Hall* category is the applicant's version of events—in this case that the offending never happened. Within that, counsel's choice not to advance a credibility challenge was not fundamental and so not within the third *Hall* category. The applicant submits such approach is wrong and this Court should correct it. He argues that trial counsel's failure to put to the complainant that she was lying was a failure to

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3 Citing *S (CA361/2010) v R* [2013] NZCA 179 at [60]; and *W (CA272/2017) v R* [2018] NZCA 11 at [15].

4 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26.

follow his instructions as to the defence he wished to advance and so came within the third *Hall* category.

[9] For its part, the respondent adopts the reasoning of the Court of Appeal. Trial counsel did put forward the applicant's version of events. Further, even if it was an error not to challenge the complainant's credibility as instructed, this could not have affected the outcome of the trial. The key challenge was that the allegations were false, rather than the reason for their falsehood, whether it was the complainant's reliability or credibility. Finally, had a credibility challenge been put to the complainant, she would plainly have refuted it in terms similar to her refutation of the reliability challenge.

Analysis

[10] As the Court of Appeal noted in *Hall*, whether a decision by counsel at trial is a significant one cannot meaningfully be defined in advance and without a proper factual context. Further the ultimate test is whether there has been a miscarriage of justice.[5] In this case, counsel made a split-second tactical decision based on his assessment of the implications for the defence of a direct challenge to the complainant's credibility. While what matters come within the third *Hall* category may be a question of public importance,[6] we are not satisfied that in the factual context of this case, even assuming trial counsel's tactical decision was an error, that decision gives rise to any plausible risk of miscarriage.[7]

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent

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5 At [77].
6 Senior Courts Act 2016, s 74(2)(a).
7 Section 74(2)(b).