

NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011 MADE IN THE COURT OF APPEAL REMAINS IN FORCE. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html>

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>

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF DETAILS OF RELATIONSHIP OF COMPLAINANTS AND CARE ARRANGEMENT OF COMPLAINANTS REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 40/2017
[2018] NZSC 29**

BETWEEN	F (SC 40/2017) Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: J C Bonifant for Applicant
J E Mildenhall for Respondent

Judgment: 13 April 2018

JUDGMENT OF THE COURT

- A The application for an extension of time to appeal is allowed.**
- B The application for leave to appeal is dismissed.**
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REASONS

Introduction

[1] The applicant seeks leave to appeal out of time to this Court against the Court of Appeal's dismissal of his appeal¹ against a sentence of 17 years and 10 months with a minimum period of imprisonment (MPI) of eight years and six months.² In support of the application for leave to appeal, the applicant relies on a report prepared in February 2018 to show that the sentence and the MPI were manifestly excessive. The report is written by David Riley, a registered psychologist, and addresses the applicant's risk of reoffending.

Background

[2] The sentence and MPI were imposed after the applicant was found guilty at trial of sexual offending against two young girls in the care of the applicant and his partner and of attempting to pervert the course of justice.³ The applicant had earlier pleaded guilty to five charges of making an objectionable publication under the Films, Videos and Publications Classification Act 1993.⁴ In addition, the applicant had been found guilty after a Judge alone trial of a charge of male assaults female.⁵

[3] The offending against the older complainant occurred over a period of eight to nine months and included multiple occasions of rape and sexual violation by unlawful sexual connection. The offending against the younger complainant involved indecent assaults. The applicant accepted at trial that sexual activity occurred with the older complainant but said it was consensual. He maintained that position at sentencing.

¹ *F (CA126/2016) v R* [2016] NZCA 611 (Kós P, French and Venning JJ) [the CA judgment]. An appeal against conviction was also unsuccessful but that aspect is not pursued.

² *R v [F]* [2016] NZDC 972 (Judge Emma Smith) [the Sentencing Remarks].

³ This charge arose out of attempts made by the applicant to persuade the older complainant to withdraw her complaint.

⁴ Sections 123(1) and 124(1). These charges concerned intimate photographs taken of the older of the two complainants.

⁵ *R v [F]* [2015] NZDC 20182 (Judge Kellar). This related to an incident occurring after the applicant's partner found text messages between the applicant and the older complainant.

The proposed appeal

[4] It is not suggested that the proposed appeal raises an issue of general or public importance. Rather, the application is advanced on the basis a miscarriage of justice may have occurred.⁶ That is because the sentencing judge, Judge Smith, did not have the benefit of a psychological assessment prior to sentencing. The applicant submits that the pre-sentence report from a probation officer that was available to the Judge lacked the necessary expertise for the Judge to properly rely upon.

[5] As the Judge explained, the pre-sentence report writer noted that while the applicant's "limited unrelated offending history" suggested "a low risk of harm in re-offending it is likely [the] actual risk of harm is medium to high due to the nature of offending and [his] lack of insight".⁷ The Judge accepted that assessment.

[6] Mr Riley's assessment is that there has been a "significant change" in the applicant's beliefs about the offending and his risk of reoffending on the Automated Sexual Recidivism Scale puts him in the medium-low category of risk, the second lowest of four categories of risk.⁸

[7] However, as counsel for the applicant accepts, there was no specific reference to the risk of reoffending by the Judge in considering the appropriate length of sentence. The only potential issue arising therefore relates to the MPI. On this aspect, the submission is that the Judge's reference to release after one-third being "an insufficient response in the eyes of [the] community" encompasses concerns about the risk of reoffending.⁹

[8] Although the argument now advanced is new, the Court of Appeal did consider the applicant's submission that the circumstances did not warrant the imposition of an MPI. The Court saw "no reason to depart" from the Judge's view an MPI "was necessary in order to denounce [the] offending and to deter."¹⁰ Nothing raised by the

⁶ Supreme Court Act 2003, s 13(2); Senior Courts Act 2016, s 74(2).

⁷ The Sentencing Remarks, above n 2, at [26].

⁸ Mr Riley also says that the applicant "has a long and challenging road ahead in terms of developing an understanding of his motivation for [the] offending" although his history suggests "he has the intelligence and potentially the drive to meet such a challenge".

⁹ The Sentencing Remarks, above n 2, at [50] and see [47].

¹⁰ CA judgment, above n 1, at [50].

applicant calls that conclusion into question. The psychological report does not raise any issues suggesting a formal clinical assessment was required. And there is nothing to indicate that the assessment of risk of reoffending was central to the decision to impose an MPI. No appearance of a miscarriage arises.

[9] There is no objection to our granting an extension of time to appeal. An extension of time to appeal is granted. The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent