

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: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS 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

**SC 77/2018
[2018] NZSC 103**

BETWEEN	PATRICK MAURICE O’SULLIVAN Applicant
AND	THE QUEEN Respondent

Court: William Young, O’Regan and Ellen France JJ

Counsel: Applicant in person
M H Cooke for Respondent

Judgment: 7 November 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Following a Judge-alone trial, the applicant was found guilty of two charges of doing indecent acts, the first in respect of X (a girl, then aged 11 or 12) and the second in respect of Y (a girl, then aged 6).¹

¹ *R v O’Sullivan* [2016] NZDC 25428.

[2] The issue in respect of the charge in relation to X was purely factual; the allegation being that the applicant had his hand down the back of her clothes while masturbating. The trial Judge concluded that the Crown had proved the alleged offending against X had taken place.² In respect of Y, the findings of fact by the trial Judge were that the applicant requested Y to massage him on his leg, foot and neck while he was on a couch and that he then asked her to lift up her top.³ It was this last element of what happened that satisfied the trial Judge that the applicant's actions were indecent.⁴ He was sentenced to 11 months' imprisonment.⁵

[3] His appeal against conviction and sentence was dismissed by Dunningham J⁶ and his subsequent application for leave to appeal was dismissed by the Court of Appeal.⁷ He now seeks leave to appeal against the Court of Appeal decision.

[4] This Court does not have jurisdiction to entertain an appeal against the refusal by the Court of Appeal of leave to appeal; this by virtue of s 213(3) of the Criminal Procedure Act 2011.

[5] The judgment of the Court of Appeal in this case was delivered before this Court delivered its decision in *Rowe v R*,⁸ which overturned the decision of the Court of Appeal in that case.⁹ Given that both Dunningham J and the Court of Appeal referred to the Court of Appeal's judgment in *Rowe* when considering the charge against Y, we have considered whether it might be appropriate to grant leave to appeal on a leapfrog basis from the judgment of Dunningham J in respect of the conviction relating to Y. Given, however, that the trial Judge drew the critical inference of indecency from the externalities of the applicant's conduct at the time of the offending – the request to Y to lift up her top – we do not see the reasoning of the Courts below as arguably impeached by the later decision of this Court.

² At [68].

³ At [137] and [139].

⁴ At [138].

⁵ *R v O'Sullivan* [2017] NZDC 8184.

⁶ *O'Sullivan v R* [2017] NZHC 2628.

⁷ *O'Sullivan v R* [2018] NZCA 201 (Williams, Wylie and Thomas JJ).

⁸ *Rowe v R* [2018] NZSC 55, [2018] 1 NZLR 875.

⁹ *Rowe v R* [2017] NZCA 316, [2017] NZAR 1211.

[6] Accordingly, leave to appeal is declined.

Solicitors:
Crown Law Office, Wellington for Respondent