

**PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF
COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985.**

IN THE SUPREME COURT OF NEW ZEALAND

**SC 22/2006
[2006] NZSC 27**

T

v

THE QUEEN

Court: Elias CJ, McGrath and Anderson JJ

Counsel: P J Davey for Appellant
M D Downs for Crown

Judgment: 11 April 2006

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] T was convicted by a jury in the District Court on a charge of permitting a girl under twelve years of age to do an indecent act on him. He has applied for leave to appeal to this Court against a judgment of the Court of Appeal which dismissed his appeal against conviction. The Court of Appeal also dismissed his appeal against the sentence of ten months imprisonment that was imposed on him.

[2] The appellant wishes to challenge in this Court three aspects of the Court of Appeal's judgment. We have considered written submissions on each ground and are satisfied that the application for leave to appeal can fairly be determined without an oral hearing.

[3] The appellant's first ground concerns the trial Judge's decision to agree to the jury's request that it be able to view the videotape of the complainant's evidence during their deliberations. The Judge and the Court of Appeal described the evidentiary videotape as an exhibit, which is true only in a technical sense. Its true character is part of the evidence at the trial. But no harm resulted from the misdescription, because the request by the jury to view the video again during the course of its deliberations was treated by the Judge as though it was an application to have the record of part of the proceedings read over again. The tape was played back in Court and the Judge read to the jury the transcript of the cross-examination which completed the evidence of the complainant. The Court of Appeal was satisfied that in the particular circumstances of the case the course of action taken was fair and would not have led to the video evidence assuming disproportionate importance in the context of what was a short trial. No general principle of criminal procedure arises. Nor do the interests of justice otherwise indicate there is any need for further appellate review of the Judge's handling of this aspect of the trial.

[4] The appellant's second ground concerns the absence of a direction to the jury that they should not give the complainant's videotaped evidence, having seen it for a second time, disproportionate weight in relation to the other evidence at the trial. The Court of Appeal correctly stated the principles that apply when there is a request for an interview to be replayed and recognised the general desirability of a direction not to give disproportionate weight to the videotaped evidence. As the Court of Appeal recognised, however, it is not mandatory to give such a caution in every case and in the circumstances of the appellant's trial, the Court of Appeal decided it was unnecessary to do so. The Court was satisfied that the absence of a warning had presented no risk of disadvantage to the appellant.

[5] A challenge to that conclusion in a second appeal would raise questions of fact and degree, in relation to the Court's assessment of the circumstances, rather

than any question of legal principle. The interests of justice do not require this Court to hear an appeal that would be brought on that basis.

[6] The third ground concerns whether the Court of Appeal correctly decided that cross-examination should not be permitted concerning an incident which had taken place several years prior to the trial which, the trial Judge decided, might have indicated previous sexual contact by the complainant with someone other than the accused. The Judge treated the circumstances as requiring leave to cross-examine under s 23A of the Evidence Act 1908 and refused leave. The Court of Appeal inclined to the view that the Judge was right concerning the application of the statute but was also satisfied that the evidence was, in any event, too remote in time and circumstance to be relevant at the trial. Refusal to permit the defence to cross-examine on it accordingly occasioned no unfairness to the accused whether or not s 23A applied. The basis for the Court's decision means that the question of whether s 23A did apply to evidence of the incident in question would not be determinative of the appellant's rights. Accordingly no purpose is served by giving leave to appeal on that ground alone. The Court of Appeal's alternative basis for its decision, that in any event the evidence was too peripheral to be relevant, gives rise to no question of legal principle that would warrant a second appeal.

[7] For these reasons we are satisfied that no question of public importance is served by any of the grounds of appeal. Nor is there any basis for an argument that there has been a miscarriage of justice. Under the Supreme Court Act 2003, the interests of justice do not require that leave be given to appeal to the Court in this case. The application for leave to appeal is accordingly dismissed.