

IN THE SUPREME COURT OF NEW ZEALAND

**SC 4/2008
[2008] NZSC 23**

A

v

THE QUEEN

Court: Elias CJ, Blanchard and Anderson JJ

Counsel: G King for Applicant
A Markham for Crown

Judgment: 9 April 2008

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal, being out of time from a decision of the Court of Appeal delivered on 28 November 2005 in respect of his conviction on one count of sexual violation by rape. The victim was the applicant's three year old daughter who lived with her mother during the week but stayed at the applicant's home on weekends.

[2] In the course of a weekend visit the child became infected, intra-vaginally, with gonorrhoea. The source of the infecting bacterium was, undoubtedly, the

applicant. The child's genitalia showed no evidence of penetration but the Crown case depended, crucially, on the proposition that the bacterium was introduced into the vagina by sexual penetration of the genitalia.

[3] Two experts on the issue were called by the Crown. One is a paediatrician with expertise in child abuse; the other is a specialist venereologist. Their evidence was to the effect that there must have been direct contact between at least the tip of the applicant's penis and the entrance to the child's vagina, inside the labia minora. That of course would amount to penetration for the purposes of the offence.

[4] The applicant had told the Police that his daughter slept in his bed but with both him and her fully clothed; that they shared a bath but that he had not touched her genitalia with his hands; that he used a bar of soap to wash her and she used her own separate towel. Crucial to the applicant's defence was acceptance by the jury of a reasonable possibility that the infection could have been transmitted non-sexually. His counsel did not lead expert evidence but did cross-examine about non-sexual transmission of the bacterium via bathwater or inanimate objects, relying on a selection of medical writings. The jury must have been satisfied that in all the circumstances there was no reasonable possibility that the child contracted the disease from a non-sexual transmission of the bacterium.

[5] The leave application to this Court is founded on a recent article published in the Journal of Forensic and Legal Medicine during 2007, some years after the applicant's trial, by Dr Felicity Goodyear-Smith, an Associate Professor in the Faculty of Medical and Health Science at the University of Auckland. Her thesis is that although international consensus guidelines state that gonorrhoea in pre-pubertal children is always, or nearly always, sexually transmitted, a systematic review of the literature does not concur with that. It is submitted on behalf of the applicant that Dr Goodyear-Smith's article is fresh evidence indicating that a miscarriage of justice has or may have occurred, warranting a further appeal to this Court; but we are not persuaded that leave should be granted.

[6] A reading of the article shows that its scope is too general to be of assistance in this case. The authority of the article seems very questionable, in any event,

having regard to writing criticising it, exhibited by the Crown. Further, it examines literature, all of which was in existence at the time of the applicant's trial, some of it for decades and up to more than a century. In short, the article is neither new nor cogent.

[7] The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington