

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

IN THE SUPREME COURT OF NEW ZEALAND

**SC 71/2011
[2011] NZSC 84**

A

v

THE QUEEN

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: R M Gould for Applicant
C A Brook for Crown

Judgment: 10 August 2011

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The Court of Appeal dismissed the applicant's appeal in 2007.¹ This application for leave to appeal relating to a conviction for sexual violation is thus made about three and a half years out of time.

[2] Both the applicant and his brother (who was the complainant's stepfather) were charged with separate acts of sexual offending against the complainant. Shortly

¹ *R v A* (CA305/07) [2007] NZCA 541.

before the applicant's trial, the brother indicated that he would plead guilty in respect of the offending alleged against him, no doubt because DNA evidence showed that he was the father of a child conceived by the complainant.

[3] The basis for the present application is that the complainant is said to have stated to one of her relatives before the trial that the complainant's mother had told her to blame the applicant for the pregnancy in order to divert blame away from the mother's partner (the man who eventually pleaded guilty). It is said that trial counsel was informed of this but did not call that relative as a witness nor make any other use of the information. There has belatedly been a waiver of privilege. Trial counsel does not recall speaking with the relative or anyone else about the conversation the relative has described with the complainant and says that if he had been told of the conversation he would have made an issue of it at trial.

[4] Trial counsel conducted the appeal to the Court of Appeal. He says that the only person who told him after the trial about a possible retraction by the complainant was the applicant and that there was no other evidence to support what the applicant then said.

[5] Turning to the criteria for leave to appeal, it is plain that the application does not raise any question of public or general importance. The other criterion is whether there may have been a substantial miscarriage of justice but the Court has not been provided with sufficient probative material to support such a contention. Furthermore, even if more such material were available and had been provided, the Court would be being asked to consider resolving conflicting factual assertions and to do so would have to hear from the complainant, who has made no affidavit.

[6] A case of that kind, involving a substantial factual inquiry, is far better dealt with as a Governor-General's reference under s 406 of the Crimes Act 1961 rather than by way of appeal to this Court.