

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
IDENTIFYING PARTICULARS, OF COMPLAINANT PROHIBITED BY
S 203 OF THE CRIMINAL PROCEDURE ACT 2011.**

**ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS,
OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT
PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011.**

IN THE SUPREME COURT OF NEW ZEALAND

**SC 70/2015
[2015] NZSC 131**

BETWEEN	F (SC 70/2015) Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, Arnold and O'Regan JJ
Counsel:	M M Wilkinson-Smith for the Applicant P D Marshall for the Respondent
Judgment:	1 September 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr F was convicted, after a jury trial in the District Court at Auckland, of five charges of indecent acts with a child under 12 and one of sexual violation by unlawful sexual connection.¹

¹ Crimes Act 1961, ss 128(1)(b) and 132(3).

[2] Mr F's appeal against conviction to the Court of Appeal was dismissed on 10 June 2015.² He now applies for leave to appeal to this Court on two grounds:

- (a) that the complainant's evidential video should not have been replayed during the jury's deliberations; and
- (b) the demeanour direction should have been given closer in time to the replaying of the video.

Background

[3] On the afternoon of 5 June 2014, the jury retired to deliberate. Just after 8 pm the Judge enquired as to whether they were making progress. The jury responded: "we are close to a unanimous decision on some counts but very evenly split on all the others. We are struggling based on the fact that it is 'he said' / 'she said' and the requirement of beyond reasonable doubt".

[4] At 9.28 pm the jury asked to see the video of the complainant's interview, together with her cross-examination and re-examination.³ The following day the complainant's evidential video was replayed and the cross-examination and re-examination read, as well as a passage from the evidence of the complainant's father.⁴

[5] The reading of the other evidence concluded after the lunch adjournment. Defence counsel had requested that the evidence of F's wife also be read but the Judge refused.⁵ He addressed the issue of the evidence of F's wife in the following terms:

You also of course need to consider the evidence of [the applicant's wife] who is a key witness because she was in the house at the time that most of these events were said to have happened and what she said in her evidence and what she said in particular cross-examination is relied on by the defence notwithstanding that she was called as a Crown witness and there are a

² *F(CA411/2014) v R* [2015] NZCA 229 (Randerson, Courtney and Kós JJ).

³ The jury seems to have been under the misapprehension that the cross-examination and re-examination were also recorded on video.

⁴ F did not give evidence at trial.

⁵ The complainant's cross-examination did, however, deal extensively with the discrepancies between her evidence and that of F's wife – see *F(CA411/2014) v R*, above n 2, at [17].

number of contradictions [of] the account given by the complainant in her evidence and you need to consider that. And in particular, if it's of assistance, you should consider passages from page 93 onwards, but overall the whole of her evidence you need to confirm because it is relevant to the defence case.

[6] After this, the Judge gave the following demeanour direction:⁶

So there you have it. Now I do remind you that when you are looking at the issue of assessing the complainant's credibility, both Mr Winter and Mr Webby have clearly, in their closing addresses, focused on the complainant's video interview evidence and her answers and any inconsistencies certainly as far as Mr Winter is concerned that he suggests to you will reveal by that evidence of when you compare it with the evidence of other witness[es], in particular [the applicant's wife].

You need to be aware that there are real risk[s] involved in assessing credibility solely on the basis of the complainant's apparent emotions, pauses and body language that you can see during the interview.

Our assessment

[7] The Court of Appeal applied settled law to the issue of whether the video should have been replayed. The principles were recently reconfirmed in *E(CA799/2012) v R*.⁷ Whether and when evidential video interviews should be replayed may be an issue of public importance. However, in this case the cross-examination and some other evidence was read and the jury pointed to other contrary evidence. Further, the jury were warned, both in the summing up and just before they resumed their deliberations after the playing of the video and the reading of other evidence, of the dangers of relying solely on demeanour in their assessment of credibility. Nothing raised suggests the risk of a miscarriage of justice.

Result

[8] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁶ The Judge had also given a direction on assessing the evidence of witnesses (including demeanour) in the summing up: see *F(CA411/2014) v R*, above n 2, at [23].

⁷ *E(CA799/2012) v R* [2013] NZCA 678.