ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 140 CRIMINAL PROCEDURE ACT 1985.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 119/2015
[2016] NZSC 10

BETWEEN	R (SC 119/2015) Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, Glazebrook and Arnold JJ

Counsel: G H Allan for Applicant
I R Murray for Respondent

Judgment: 16 February 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was tried on 18 charges involving sexual and other violent offending against his wife, daughters and disabled son over a number of years. He was convicted on a total of seven of the charges, involving offences against his wife and a daughter, A, and was sentenced to imprisonment for 17 years.[1] He appealed against both conviction and sentence. The Court of Appeal dismissed his conviction appeal but allowed his sentence appeal, reducing his sentence to 14 years

1 *R v [R]* DC Wellington CRI-2011-032-3813, 5 August 2014 (Judge Tompkins).

imprisonment.[2] The applicant now seeks leave to appeal against conviction to this Court.

[2] The background is that at trial, the Crown was permitted to lead "contextual" evidence of the relationship between the applicant and the members of his family over the relevant period. This "family dynamic" evidence was that the applicant was domineering, intimidating and physically aggressive towards all the members of his family. In the course of their evidence, several Crown witnesses described the applicant in highly pejorative terms. The applicant says that all the contextual evidence was unfairly prejudicial and unnecessary, or in the alternative, that if some such evidence was admissible in principle, the evidence as it came out was unfairly prejudicial, at least to the extent that some of it was little more than invective.

[3] It is well established that evidence of underlying family dynamics is admissible to enable complainants in cases such as the present to give a coherent account of what they say happened and the reasons for it.[3] Undoubtedly such evidence was, in principle, admissible in this case. The question is whether some of the comments of Crown witnesses went too far, so as to be unfairly prejudicial, and, if so, whether the Judge did sufficient to address any such prejudice in his summing up.

[4] Most of the pejorative observations complained of by the applicant were made by his daughter, A, in her evidence in chief. The Crown said in closing that A had made it clear that she hated her father and had used some "quite expressive" language to describe him. The defence argued that A was the instigator of false complaints against her father and counsel described A in his closing as viewing matters through a biased, twisted and distorted lens. She was, he said, manipulative and dysfunctional and wanted to make things as bad for her father as she could.

[5] In his summing up, Judge Tompkins cautioned the jury that they should not allow sympathy or prejudice to influence their decision and said this was particularly important given the evidence the jury had heard about the family's "somewhat

---

2 *R (CA477/2014) v R* [2015] NZCA 394 (French, Heath and Mallon JJ).
3 *Mahomed v R* [2011] NZSC 52, [2011] 3 NZLR 145 at [56] per McGrath and William Young JJ.

chaotic and difficult history". The Judge later reminded the jury of the defence case, and in particular its contention that A had a distorted, dysfunctional and exaggerated perspective and had fabricated the allegations.

[6] Against this background, we do not consider that any issue of general or public importance is raised, nor do we consider that there is any risk of a substantial miscarriage of justice. The nature of A's evidence was such that (a) the Crown had to acknowledge that she hated her father and (b) it lent support to the defence contention that A was out to get her father and had fabricated the allegations for that reason. In other words, the vehemence with which A spoke of her father was an issue which the Crown had to confront and which provided support for the defence theory of the case. Accordingly, we consider that the way in which the Judge instructed the jury was appropriate to the particular circumstances of the case.

[7] In light of our conclusion on this point, we need not address the second point raised by the applicant, namely that the Court of Appeal was wrong to place weight on the fact that the jury acquitted the applicant on a majority of the charges against him as tending to indicate that the jury was able to approach its task in a rational and dispassionate way.

[8] For these reasons, the application for leave to appeal is dismissed.

Solicitors:
Paino and Robinson, Upper Hutt for the Applicant
Crown Law Office, Wellington for Respondent