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

IN THE SUPREME COURT OF NEW ZEALAND

SC 136/2015
[2016] NZSC 38

BETWEEN ROBERT CRAIG WINTERBURN
Applicant

AND THE QUEEN
Respondent

Court: Elias CJ, William Young and O'Regan JJ

Counsel: M J Phelps for Applicant
S K Barr and Y Moinfar for Respondent

Judgment: 15 April 2016

JUDGMENT OF THE COURT

A An extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] This is an application for leave to appeal against a decision of the Court of Appeal in which it dismissed the applicant's appeal against his convictions and upheld an appeal by the Solicitor-General against sentence.[1] The application is out of time but the respondent does not oppose an extension of time and we are satisfied it is appropriate to grant one.

[1] *R v Winterburn* [2015] NZCA 384 (Wild, Keane and Kós JJ) [*Winterburn* (CA)].

[2] The applicant faced 17 charges and just prior to the commencement of his District Court jury trial, he pleaded guilty to four charges.[2] Following the trial, he was convicted of five further offences, four of which involved the same female complainant, whom we will call "S".[3] S was in a relationship with the applicant at the times at which these offences were committed. In addition, he was convicted of attempting to pervert the course of justice resulting from his attempt to direct S to withdraw her complaint.

[3] The applicant was acquitted of six counts involving S.[4] He was also acquitted of charges of threatening to kill S's sister and mother.

[4] The applicant wishes to advance the proposed appeal against conviction on the basis that the jury's decision to acquit on the charges relating to S exhibits inconsistency with the decision to convict on the other counts relating to S and that the convictions are therefore unreasonable.

[5] This does not raise a point of public importance, because the Court has recently set out its views on the approach to take in cases of allegations of inconsistent verdicts in *B(SC 12/2013) v R*.[5]

[6] In the present case, the Court of Appeal undertook a careful analysis of the inconsistency argument, applying the approach set out in *B(SC 12/2013) v R*, and concluded that the inconsistencies were explicable and that the convictions were not unreasonable.[6] This was an intensely facts-based analysis. Having considered carefully the Court of Appeal's decision and the arguments that the applicant wishes to advance in support of his appeal, we have concluded that there is no basis for concern that a miscarriage would occur if leave were not granted on this ground.

---

2 These were unlawful possession of firearms, possession of cannabis for supply, offering to supply cannabis and offering to supply methamphetamine.
3 These four counts were male assault female, threatening to kill, sexual violation by unlawful sexual connection (digital penetration) and rape.
4 These were three counts of male assaults female, one count of threatening to kill, one count of kidnapping and one count of commission of a crime with a firearm.
5 *B(SC 12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261.
6 *Winterburn* (CA), above n 1, at [23]–[49].

[7] The applicant was sentenced in the High Court, because the Crown sought a sentence of preventive detention. The High Court Judge declined to impose a sentence of preventive detention, instead sentencing the applicant to imprisonment for 11 years and four months, with a minimum period of imprisonment of four years and 11 months.[7]

[8] The Solicitor-General sought, and was granted, leave to appeal to the Court of Appeal against that decision. The Court of Appeal allowed the Solicitor-General's appeal and imposed a sentence of preventive detention with a minimum period of imprisonment of seven years.

[9] The applicant wishes to argue that the Court of Appeal gave excessive weight to the fact that the applicant had been warned on two previous occasions about the risk of an indeterminative sentence being imposed if he were to offend in the future. These warnings were given in 1993 and in 1997. The applicant's counsel invites the Court to offer guidance on the circumstances in which, and the extent to which, sentencing Judges ought to rely on previous warnings in the context of preventive detention sentencings.

[10] Having considered the Court of Appeal decision, we do not share the applicant's view that the Court of Appeal gave undue weight to the previous warnings. It is true that they highlighted the fact that the High Court Judge had not taken the warnings into consideration.[8] But the Court of Appeal's decision involved a careful consideration of all relevant factors. These included:

(a) the fact that the applicant was convicted for wounding a police officer with intent to injure which took place after the applicant had undergone an intensive psychological group treatment programme at the Violence Prevention Unit;[9]

---

7 *R v Winterburn* [2014] NZHC 2313 (Williams J).
8 *Winterburn* (CA), above n 1, at [65].
9 At [73]–[74].

(b) the fact that the applicant resumed offending almost immediately after being released from prison in January 2012;[10]

(c) the applicant's poor conduct record in prison;[11]

(d) the pre-sentence assessment of the psychologist that the applicant was "at very high risk" of offending violently in the future and at "high risk" of offending sexually;[12]

(e) the psychiatrist's assessment that the applicant's capacity to offend had not reduced with age as would normally occur;[13] and

(f) the seriousness of the current offending, which was committed after the applicant's terms of release had ceased and he had resumed gang membership, abandoned whanau support, resumed using alcohol and drugs to excess, begun dealing in drugs and begun carrying firearms.[14]

[11] We do not, therefore, accept that the issue which the applicant seeks to raise on appeal is appropriately raised in the circumstances of this case. And we see no risk of a miscarriage if leave is declined on this ground.

[12] The application for leave to appeal is therefore dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

---

10 At [76].
11 At [75] and [77].
12 At [78].
13 At [79].
14 At [80].