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 50/2016
[2016] NZSC 79

BETWEEN	MALCOLM RAYMOND CLARKE Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Arnold JJ

Counsel: J H M Eaton QC for Applicant
A Markham and S L Graham for Respondent

Judgment: 4 July 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Mr Clarke, was convicted following a jury trial before Judge Crosbie of two charges of sexual violation by unlawful sexual connection. The charges were historical, relating to a period in the late 1980s/early 1990s when the applicant was in his late teens and the complainant was between nine and 11 years of age. The Court of Appeal dismissed Mr Clarke's appeal against conviction and sentence.[1] Mr Clarke now seeks leave to appeal against his conviction.

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1 *Clarke v R* [2016] NZCA 91 (Ellen France P, Keane and Dobson JJ).

[2] The grounds on which Mr Clarke seeks leave relate to the complainant's motive to lie. His counsel, Mr Eaton QC, submits that the prosecutor improperly questioned Mr Clarke about the complainant's motive to lie and then made improper submissions to the jury about it. In addition, he submits that the Judge did not direct the jury in relation to motive to lie but should have.

[3] These grounds were addressed by the Court of Appeal.[2] Referring to its decision in *Tuhaka v R*,[3] the Court said that there was no requirement that a judge must always give a specific direction when motive to lie is raised. Rather, the critical issue was whether there is any risk that the jury might have thought that the burden of proof had shifted from the Crown to the accused as a consequence. The Court considered that the references to motive to lie in the evidence in the present case were brief and that the issue had been brought up by Mr Clarke, first in his interview with the police and secondly through his counsel's cross-examination of the complainant. Moreover, the prosecutor had made only a passing reference to the point in closing. Accordingly, the Court said, it was unlikely that this was something that the jury would have focussed on. As a consequence, there was no need for the Judge to instruct on it.

[4] We agree with this assessment. In both his opening statement to the jury and his summing up, the Judge emphasised that the burden of proof remained at all times on the Crown. The Judge also instructed the jury correctly on the significance of the fact that Mr Clarke had given evidence. The question trail which he distributed to the jury also made it clear that the Crown bore the burden of proof, and both counsel emphasised the point in their closing addresses. Finally, very experienced defence counsel (not Mr Eaton) did not see the need to raise the issue with the Judge after the summing up was completed, even though an opportunity to do so was provided. Like the Court of Appeal, we see no risk that the jury might have thought the burden of proof rested on Mr Clarke as a result of the references to motive to lie.

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2 At [23]–[31].
3 *Tuhaka v R* [2015] NZCA 540.

[5] In the result, then, we are not satisfied that it is necessary in the interests of justice that we hear and determine this appeal. It raises no issue of general or public importance and we see no risk of a substantial miscarriage of justice.

Solicitors:
Crown Law Office, Wellington for Respondent