

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

IN THE SUPREME COURT OF NEW ZEALAND

**SC 117/2015
[2016] NZSC 96**

BETWEEN MICHAEL JOHN PENMAN
 Applicant

AND THE QUEEN
 Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: P V C Paino for Applicant
 Z R Johnston for Respondent

Judgment: 28 July 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of sexual offending against an eleven year old girl. At the time of the offending he was 65. His challenge to his conviction and sentence in the Court of Appeal was filed out of time.¹ His explanation for the delay in filing his appeal was seen as unconvincing. Despite this, an extension of time was granted in relation to sentence and the sentence imposed by the trial Judge (12 years six months) was reduced to nine years. An extension was refused in respect of his proposed conviction appeal.² An explanation for the delay in filing was seen by the Court as unconvincing.

¹ *Penman v R* [2015] NZCA 364 (French, Heath and Mallon JJ) at [3].

² At [53] and [64]–[67].

[2] The applicant now wishes to challenge his conviction in this Court.

[3] The basis of the proposed challenge is Mr Penman's poor hearing meant that his trial was not fair. In an affidavit in this Court of 15 June 2016, the applicant discussed his hearing difficulties and said that during his trial he was not able to follow the case properly and that, for this reason, he had been reluctant to give evidence. He complained that his counsel had not arranged for him to use the headphones which were available at the court. We have been supplied with a report as to the applicant's hearing (as at May 2014) and it is clear that he currently does suffer from hearing loss in both ears.

[4] The applicant addressed his hearing difficulty in the notice of appeal to the Court of Appeal which he prepared. It was also referred to in a memorandum lodged with the Court by counsel who appeared for the applicant in the Court of Appeal. Counsel also appears to have made contact with the applicant's trial counsel. In the end, however, counsel did not pursue the argument. According to the applicant in his affidavit, counsel told him that his hearing difficulties did not provide him with "a ground of appeal in the Court of Appeal".

[5] There is a jurisdictional issue as to the proposed appeal. Our jurisdiction in criminal cases is provided for by s 10 of the Supreme Court Act 2003 in terms which do not encompass appeals against decisions determining extension applications. So there is no jurisdiction to entertain an appeal from the Court of Appeal decision refusing an extension of time for the conviction appeal. It follows that if we were to hear a challenge to the conviction, it would have to be by way of direct appeal from the District Court. The jurisdiction to grant leave for such an appeal is circumscribed by s 14 of the Supreme Court Act, in that leave may not be granted unless we are satisfied that there are "exceptional circumstances" which warrant the taking of an appeal directly to this Court.

[6] The Court of Appeal's refusal of an extension of time is not necessarily exhaustive of its jurisdiction to address the applicant's challenge to his convictions. In particular it seems to us that he could, if he wishes, renew his application for an extension of time in the Court of Appeal, but relying this time on his hearing

difficulties. Given that it would not usually be appropriate for this Court to engage in the sort of fact finding exercise which would be required if leave to appeal were granted and in light of the alternative course of action open to the applicant, we are not satisfied that the s 14 test is satisfied.

[7] The reference to a further application to the Court of Appeal for an extension should not be taken as indicative of a view as to the merits of such an application or whether it should be filed.

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