NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 14/2018
[2018] NZSC 38

BETWEEN	JOHN WILLIAM ROSS Applicant
AND	THE QUEEN Respondent

Court:	William Young, Glazebrook and Ellen France JJ
Counsel:	M J Phelps for Applicant Z R Johnston for Respondent
Judgment:	30 April 2018

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The application for leave to appeal is dismissed.

REASONS

Background

[1] Mr Ross was convicted, after a jury trial, of sexually assaulting two girls, M and R.[1] The Crown's case was that some of the offending occurred while the girls and another young family member were staying with the applicant and M's mother

[1] The offending took place in 1980. The complainants initially complained to the police in the 1990s. Through a police blunder, Mr Ross was not spoken to until 2012.

temporarily and that there had been offending against R when the applicant came to stay in Auckland.

[2] Mr Ross denied the offending and, in addition, denied that the complainants had ever lived with him, contrary to the evidence of the three children, the two mothers and the enrolment records at a local school.

[3] Mr Ross appealed against his conviction on a number of grounds.[2] His appeal was dismissed. The only ground he now maintains is the alleged inadequacy of the s 122 warning dealing with the effect of the lengthy delay between the trial and the conduct in question.[3]

[4] Mr Ross maintains that his defence was hampered by the passage of time and in particular that witnesses were unavailable who could have proved the children did not live with him and that he never stayed in Auckland.

The Court of Appeal judgment

[5] The Court of Appeal held that the s 122 warning was deficient in that it did not identify the specific prejudice caused by the delay.[4] It said, however, that there was no miscarriage of justice as the possible prejudice had been highlighted throughout the trial and the jury would, as directed by the Judge, have realised the evidence had to be approached with caution.[5]

[6] In the event this was wrong, the Court of Appeal would have applied the proviso found in s 385(1) of the Crimes Act 1961 (on the basis of a strong Crown case).[6] The Court found it noteworthy that potential witnesses who had been tracked down were not called by Mr Ross because their evidence would not have unequivocally supported Mr Ross' denial that the children stayed with him.[7]

---

2 *Ross v R* [2017] NZCA 587 (Winkelmann, Wylie and Whata JJ).
3 Evidence Act 2006, s 122.
4 *Ross v R*, above n 2, at [57].
5 At [58]–[60].
6 At [61]–[63].
7 See at [63].

Our assessment

[7] This Court has already dealt with s 122 warnings[8] and so no issue of general or public importance arises. Nothing raised by the applicant suggests that the Court of Appeal was wrong to conclude there was no risk of a miscarriage of justice.

Result

[8] The application for leave to appeal was approximately two weeks late. The Crown does not object to an extension of time and the delay is short. The application for an extension of time to appeal is granted.

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

Solicitors:
Crown Law Office, Wellington for Respondent

[8] *CT v R* [2014] NZSC 155, [2015] 1 NZLR 465; and *L v R* [2015] NZSC 53, [2015] 1 NZLR 658.