IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 16/2018
[2018] NZSC 46

BETWEEN	W (SC 16/2018) Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and Ellen France JJ
Counsel:	L A Andersen for Applicant S K Barr for Respondent
Judgment:	14 May 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant, Mr W, was convicted after trial of sexual offending in relation to his two step-daughters. This was the second trial on these matters, the initial trial

having been aborted.[1] Mr W's appeal against conviction to the Court of Appeal was dismissed.[2] He now seeks leave to appeal to this Court.

The proposed appeal

[2] Mr W wishes to argue on the proposed appeal that a miscarriage of justice has occurred because trial counsel did not follow instructions to cross-examine the complainants as to inconsistencies in their evidence as to particulars of their complaints. It is also said that a question of general or public importance arises as to trial counsel's obligations in relation to a client's instructions.

[3] The first aspect of the proposed appeal was considered by the Court of Appeal. In concluding the approach of trial counsel did not give rise to a miscarriage of justice, the Court made two main points.

[4] First, the Court noted that trial counsel had told Mr W he would be running the trial differently from the way in which Mr W's previous counsel had run the first, aborted, trial. In particular, counsel told Mr W he would not be cross-examining the complainants with the same level of detail as had occurred at the first trial.[3] Mr W did not object to the way in which the trial was being conducted at the time.

[5] Second, having reviewed the transcripts of the complainants' evidential video interviews and the cross-examination of the complainants at the first trial, the Court said there was no error in trial counsel's assessment of the approach to be taken to cross-examination. Trial counsel, who was cross-examined in the Court of Appeal on his affidavit evidence, had put the defence to the complainants.[4] In addition, "[s]ome specifics" were canvassed.[5] But the Court agreed with trial counsel's assessment that further focus on details would not have advanced matters; indeed, given the complainants' responses in cross-examination in the first trial, this would have had a negative impact.

---

1 There had also been a previous abandonment.
2 *W (CA272/2017) v R* [2018] NZCA 11 (Brown, Courtney and Toogood JJ).
3 Mr W said he had not been told counsel had decided to take a different approach.
4 Mr W denied the offending and maintained the complaints were fabricated.
5 At [20].

[6] In conclusion, the Court was "satisfied" the defence had been conducted "in accordance with Mr W's broad instruction that the allegations were fabricated".[6] In the circumstances, the approach adopted had not resulted in a miscarriage of justice.

[7] The matters the applicant wishes to raise on this aspect of the case were accordingly all evaluated by the Court of Appeal. We see no appearance of a miscarriage of justice arising from that assessment.

[8] In respect of the second proposed ground of appeal, the applicant relies on the decision of the Court of Appeal in *Fahey v R*.[7] In particular, the applicant points to the statement in *Fahey* that the defendant's protected rights confer on a defendant "a power of decision over central rights" including "how to challenge the prosecution witnesses".[8]

[9] It may be a question of general or public importance may arise as to how the approach taken in a case like the present one fits with that adopted in *Fahey*, which was addressing trial counsel's obligations in the context of a consideration of court-appointed counsel. But the Court's observations in the present case were very much a response to the particular factual situation. In these circumstances, no question of general or public importance arises.

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

Solicitors:
Crown Law Office, Wellington for Respondent

---

6 At [52].
7 *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392.
8 At [41](a).