NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT 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 26/2018
[2018] NZSC 49

BETWEEN	GREGORY DAVID WATERS Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, O'Regan and Ellen France JJ
Counsel:	W C Pyke for Applicant J E L Carruthers for Respondent
Judgment:	5 June 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant was convicted after trial of five charges of indecent assault. He was acquitted on another charge relating to the same incident.[1] His appeal against conviction to the Court of Appeal was unsuccessful.[2] He seeks leave to appeal to this Court.

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1 A further charge had been dismissed at the close of the Crown case.
2 *Waters v R* [2018] NZCA 84 (Asher, Brewer and Collins JJ).

The proposed appeal

[2] The applicant wishes to argue two points. First, he says s 32 of the Evidence Act 2006 was engaged and accordingly the Judge should have directed the jury not to draw an adverse inference from the exercise of the right to silence. Second, the applicant says a miscarriage of justice has arisen because of the failure of the Judge to summarise the defence case in summing-up.[3] The applicant also wishes to argue that this aspect of the proposed appeal raises a point of general or public importance about the approach to a miscarriage of justice as defined in s 232 of the Criminal Procedure Act 2011.

[3] The first proposed ground arises out of the complainant's evidence. She said she was indecently assaulted in the course of a martial arts lesson from the applicant. Her evidence was that at one point he took off his trousers and she saw that he had bruises on his thighs. When cross-examined about this she expressed disappointment that the police had told her the applicant "refused to take his trousers off and prove there were no bruises there". Before being stopped by the Judge, she said she was "appalled that he said he was exercising his human rights".

[4] The complainant's evidence on this point was not correct. The police had not alleged the applicant was asked to remove his trousers but refused to do so. That much was apparent from the video of the applicant's police interview which was played at trial and confirmed by the unchallenged evidence of the applicant at trial.

[5] The application of s 32 was considered by the Court of Appeal. The Court noted s 32 applies where "it appears" a defendant has relevantly failed to answer a question or disclose a defence. The Court said the section was not engaged, noting "the informal nature of the complainant's aside, the Judge's intervention, and the fact that it was clearly unsupported by the Crown, and unsupportable on the evidence".[4] Further, the Court said that "[g]iven Mr Waters' unchallenged evidence denying being asked, it would not 'appear' to the jury that he had failed to do anything".[5]

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3 Senior Courts Act 2016, s 74(2)(b); Supreme Court Act 2004, s 13(2)(b).
4 At [24].
5 At [24].

[6] That assessment was a factual one. No question of general or public importance arises. Nor do we see any appearance of a miscarriage of justice arising from that assessment. The defendant was not asked and did not exercise his right to silence and his unchallenged evidence to that effect confirmed what the jury saw on his interview with police.

[7] The second proposed ground of appeal arises from the summing-up. Judge Dawson told the jury the case was one "sometimes referred to … as a he says, she says case". The Judge then said the complainant's evidence was that the offending occurred and that the applicant said it did not. Judge Dawson added:

> Counsel for the Crown and the defendant have outlined their arguments about who you should believe and why. Those arguments will still be fresh in your memory.

[8] The Court of Appeal said the failure to summarise the defence and Crown cases meant "[g]ood practice was not observed".[6] The Court was nonetheless satisfied, because of various factors, that the defence case would have been understood. Those factors included the lack of complexity in the case; the fact the closings and summing-up were in one day; and the fact the jury were given "detailed question trails" which would have necessitated consideration of the evidence of the complainant and the applicant as well as counsels' submissions.[7]

[9] The Court may wish to address the approach to s 232 of the Criminal Procedure Act at some stage. However, the point does not arise in the present case. The Court of Appeal identified an error but concluded that the error had not resulted in any miscarriage of justice. Nothing raised by the applicant suggests that assessment should be re-visited.

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

Solicitors:
Gavin Boot Law, Hamilton for Applicant
Crown Law Office, Wellington for Respondent

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6 At [9].
7 At [11].