NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html

NOTE: ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY CONNECTED PERSON PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

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

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html

NOTE: PUBLICATION OF ANY INFORMATION THAT IDENTIFIES, OR THAT MAY LEAD TO THE IDENTIFICATION OF JURORS PROHIBITED BY S 32B OF THE JURIES ACT 1981. SEE http://www.legislation.govt.nz/act/public/1981/0023/latest/DLM1782661.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 39/2018
[2018] NZSC 76

BETWEEN	D (SC 39/2018) Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	F E Guy Kidd for Applicant J C Pike QC for Respondent
Judgment:	20 August 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of 41 sexual offences against three children in his care. He was acquitted on one charge. He was sentenced to a term of imprisonment of 17 years, with a minimum period of imprisonment of eight years and six months.[1]

[2] He appealed against his convictions to the Court of Appeal. That Court allowed the appeal in part, setting aside the convictions in relation to three counts.[2] The appeal failed in relation to the other 38 convictions and no adjustment was made to the applicant's sentence.

[3] The applicant seeks leave to appeal against his convictions to this Court. The application is advanced on two bases. The first relates to the way in which the trial Judge directed the jury in relation to the demeanour of the complainants when they were giving evidence. The second relates to material that was before the jury which, the applicant argues, was prejudicial and led to a miscarriage of justice. The applicant argues that a miscarriage of justice has occurred or will occur if leave to appeal is not granted.[3] He does not suggest that the proposed appeal involves a matter of general or public importance.[4]

[4] The applicant wishes to argue on appeal that the directions made by the Judge about demeanour of witnesses (in this case, the complainants') in his opening address to the jury and in his summing up led to a miscarriage of justice occurring. The Judge indicated to the jury that they might be assisted by the body language and demeanour of the witnesses if they gave evidence (the complainants' evidence in chief was given

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1 *R v [D]* [2016] NZDC 11300 (Judge Ingram).
2 *D (CA533/2016) v R* [2018] NZCA 109 (Brown, Brewer and Collins JJ) [CA judgment].
3 Senior Courts Act 2016, s 74(2)(b); Supreme Court Act 2003, s 13(2)(b).
4 This Court dealt with the issues relating to demeanour of witnesses in *Taniwha v R* [2016] NZSC 123, [2017] 1 NZLR 116.

by the playing of the evidential video interviews with the police). The Court of Appeal considered these statements carefully and, while expressing some criticism, concluded that they did not lead to a miscarriage of justice, particularly having regard to the fact that the criticised statements appeared as part of a much longer direction about how to evaluate evidence that was otherwise uncontroversial and was prefaced by the observation that the demeanour of witnesses can be overstressed.[5] We do not consider that any miscarriage arises from the way this issue was addressed by the Court of Appeal.

[5] A subsidiary point that the applicant wishes to raise in relation to the demeanour of witnesses is the fact that the Judge told the jury in his summing up that it might help them if they asked for the evidential videos to be replayed and gave an indication that he thought that would be appropriate. The jury did in fact ask for one of the video interview recordings to be replayed and this occurred without any additional directions from the Judge about demeanour. In an earlier Court of Appeal decision, that Court had said that it was not necessary or desirable for Judges or counsel to suggest to juries that they may request to have a video replayed; rather, it was better to leave this to juries to decide for themselves.[6] While the Judge's suggestion was inconsistent with that statement, there is nothing in the material before us to indicate that the Judge's suggestion, the fact that the jury did view one of the evidential video interviews again or the fact that the Judge did not add to the demeanour directions he had given in his summing up led to a miscarriage of justice.

[6] The second issue that the applicant seeks to raise on appeal relates to prejudicial information that came to the attention of the jury. This included references to his time in prison, an earlier complaint of sexual abuse, a suggestion that he had used drugs in the past and a reference to family violence issues. These points were assessed by the Court of Appeal, which concluded that no miscarriage resulted from the information coming before the jury. In effect, the applicant seeks to pursue in this Court the same arguments as were rejected in the Court of Appeal. We do not consider that there is any risk of a miscarriage resulting from the way the Court of Appeal dealt with these points.

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5 CA judgment, above n 2, at [18]–[19].
6 *E (CA799/2012) v R* [2013] NZCA 678 at [67](f).

[7] We decline leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent