

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>

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>

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 48/2018
[2018] NZSC 77**

BETWEEN	WAYNE WILLIAM SMITH Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: F E Guy Kidd for Applicant
M L Wong for Respondent

Judgment: 21 August 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Smith was convicted after a jury trial of five counts of sexual conduct with a young person under 16, three counts of sexual violation by unlawful sexual connection and of one count of sexual conduct with a child under 12. He was acquitted

of four charges of performing indecent acts. He seeks leave to appeal to this Court against a decision of the Court of Appeal which upheld the convictions.¹

[2] The primary issue raised by the application for leave relates to the Court of Appeal's conclusion there were insufficient grounds to justify interviewing a juror and obtaining that juror's evidence under s 76(3) of the Evidence Act 2006. Section 76(3) provides that evidence about jury deliberations may be given only where "the Judge is satisfied that the particular circumstances are so exceptional" as to provide "a sufficiently compelling reason to allow that evidence to be given".

[3] A brief description of the background is necessary to show how this issue arises. The first point to note is that the incidents giving rise to the charges took place mostly in connection with scouting activities. (Mr Smith, who was involved in the scouting movement, had introduced the complainant to Scouts.) Next, it is relevant that at trial, at the close of the Crown case, there was a discussion about the defence proposal to call one, possibly two, witnesses to give evidence of Mr Smith's good character in the context of his time with the Scouts. The discussion took place in the absence of the jury. The trial Judge, Judge Macdonald, indicated the evidence was inadmissible. There was no challenge to that and the defence case proceeded without that proposed evidence. Mr Smith and his wife gave evidence. Both said there was no opportunity for the offending to have occurred.

[4] The final step in the narrative is that, nearly three years after the trial, Mr Smith filed an appeal with the Court of Appeal. The basis of his appeal was that a miscarriage of justice arose from juror misconduct. He sought the appointment of independent counsel to investigate and interview a juror or jurors. The misconduct alleged related to juror knowledge of the prospect that good character evidence was to be called and as to the impact that knowledge may have had on the jury deliberations. The latter aspect raised the question of the application of s 76(3).

[5] The Court of Appeal declined to order the appointment of independent counsel.² The Court (by a majority) concluded "that knowledge of possible

¹ *Smith v R* [2018] NZCA 158 (Williams, Wylie and Thomas JJ).

² *Smith v R* [2017] NZCA 93 (Harrison, Wild and French JJ).

unspecified character evidence not called by the defence does not constitute sufficiently exceptional circumstances for the purposes of inquiring into jury deliberations”.³ Nor did the Court consider this aspect was capable of affecting the outcome of the trial contrasting this case with that where the jury mistakenly hears highly prejudicial evidence. The Court also noted the following: the jury had not been told in Court that character evidence might be called; the jury had before it Mr Smith’s long history of involvement with Scouts and the fact that he had no previous convictions;⁴ and the jury was directed to consider each charge separately by reference only to the evidence relevant to that charge and the different verdicts suggested that had occurred.

[6] Mr Smith’s application for leave to appeal to this Court from the decision not to appoint independent counsel was declined.⁵ The Court said it was premature and Mr Smith should first proceed with his appeal to the Court of Appeal. He did that and, as indicated above, the appeal was dismissed.

[7] The proposed appeal would rehearse the matters addressed by the Court of Appeal in its first judgment.

[8] This Court may wish, in an appropriate case, to consider the approach to be taken to s 76(3) of the Evidence Act. However, particularly where the jury were told that Mr Smith had no previous convictions and of his long involvement in scouting, we are satisfied that no miscarriage of justice arose from the Court of Appeal’s assessment in this case.

[9] Mr Smith also seeks leave to appeal on the ground that the Court of Appeal erred in finding the jury could reasonably have been satisfied beyond reasonable doubt as to Mr Smith’s guilt on count one (the charge of sexual conduct, namely, indecent acts, on a child under 12 years of age). The arguments made in relation to this

³ At [14].

⁴ This was a matter referred to by defence counsel in closing and mentioned twice in the Judge’s summing up.

⁵ *Smith v R* [2017] NZSC 109.

proposed ground were carefully evaluated by the Court of Appeal and nothing raised by the applicant gives rise to the appearance of a miscarriage on this point.⁶

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

Solicitors:
Crown Law Office, Wellington for Respondent

⁶ See *Smith*, above n 1, at [47]–[58].