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 53/2018
[2018] NZSC 98

BETWEEN	CORNELIUS HERMANUS HENDRIKS Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: A G V Rogers for Applicant
M H Cooke for Respondent

Judgment: 25 October 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty by a jury on four charges involving sexual offending against a younger relative. At the time of the offending, the applicant was aged between 15 and 18 and the complainant between seven and 11. At the time of his trial, the applicant was 22.

[2] The applicant's appeal against conviction was dismissed by the Court of Appeal and he now seeks leave to appeal to this Court.[1] In support of the application counsel for the applicant contends that there are two points which justify the grant of leave.

[3] The first point arises in this way. At the time of the trial, the applicant had a conviction for driving with an excess proportion of alcohol in his blood but had no other convictions. The applicant did not give evidence but it would have been open to his counsel at trial to have questioned the officer in charge of the case about the applicant's record. Trial counsel did not do so and it is common ground this was an oversight on the part of the trial counsel. Mr Rogers (who did not appear for the applicant at trial) argues that if evidence of the applicant's limited criminal history (or perhaps his lack of apparently relevant convictions) had been led at trial, the trial Judge would have been required to refer to that in his summing-up, and such evidence and the Judge's summing-up would have improved the applicant's chances of being found not guilty.

[4] In dealing with this aspect of the case, the Court of Appeal concluded that the applicant's prospects of an acquittal were not materially diminished by reason of trial counsel's oversight.[2] The applicant was a young man at the time of his trial and appreciably younger at the time of the offending. Given this, there was no occasion for the jury to think that he did have relevant convictions. As well, had the evidence been adduced, it is far from clear that the trial Judge, in summing-up, would have placed the emphasis on it which counsel for the applicant maintained would have been appropriate. The Court of Appeal referred to and cited from this Court's judgment in *Wi v R*.[3]

[5] Counsel for the applicant referred extensively to overseas authority and commentary as to how judges should direct juries where the defendant has no previous convictions. We, however, see this issue as settled by *Wi*. The proposed challenge to the Court of Appeal's judgment on this aspect of the case therefore does not give rise

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1 *H (CA741/2017) v R* [2018] NZCA 218 (Williams, Venning and Mander JJ).
2 At [14].
3 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11.

to a question of law of public or general importance and we see no appearance of a miscarriage of justice in the approach taken by the Court of Appeal.

[6] The second point relied on by counsel for the applicant is the contention that when summing-up on the standard of proof, the trial Judge did not explain to the jury that more than proof on the balance of probabilities is required. This submission is based on remarks made at [48(b)] of the judgment of the Court of Appeal in *R v Wanhalla*, where the need for such an explanation is identified.[4] But, as the Court of Appeal observed in the judgment under challenge, the submission is based on a misunderstanding of *Wanhalla*; this because the standard direction provided in *Wanhalla*, and given by the Judge in this case, incorporates that explanation. This point does not warrant a grant of leave to appeal.

[7] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
McLeod & Associates, Auckland for Applicant
Crown Law Office, Wellington for Respondent

4 *R v Wanhalla* [2007] 2 NZLR 573 (CA).