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

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 110/2018
[2019] NZSC 57

BETWEEN	REX LAWRENCE WILSON Applicant
AND	THE QUEEN Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: E Huda for Applicant
S K Barr for Respondent

Judgment: 18 June 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Wilson was found guilty after trial of 15 charges of sexual offending against two girls who were in his care (he was a foster parent). His appeal against conviction was dismissed by the Court of Appeal.[1] He seeks leave to appeal to this Court against conviction.

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[1] *Wilson v R* [2018] NZCA 489 (Miller, Woolford and Collins JJ). The Crown's appeal against Mr Wilson's sentence of 12 years' imprisonment was also dismissed. See also the sentencing notes of Judge Kellar: *R v Wilson* [2018] NZDC 7462.

The proposed appeal

[2] Mr Wilson seeks leave to appeal on the basis that a miscarriage of justice has occurred and that the propriety of an aspect of the reasoning advanced by the prosecutor in closing gives rise to a question of general or public importance. In particular, Mr Wilson seeks to raise the following three arguments:

(a) The prosecutor in closing incorrectly said that Mr Wilson had only ever fostered two boys thereby bolstering in an improper manner the prosecution submission he had a sexual interest in young girls.

(b) The prosecutor in closing improperly gave his opinion about why one of the complainants was better placed to give her evidence in 2018 than she had been at the time she first made a complaint.

(c) The prosecutor wrongly suggested in closing that the complainants did not try to embellish, exaggerate or fill in gaps and improperly invited speculation as to what they might have said if inclined to give false testimony.

[3] The first of these points relates to the following remarks made by the prosecutor in closing:

> The state of mind, the Crown says, is to have a sexual interest in young females. That is something quite unusual and a striking feature of this case. Having regard to this, was it simply a coincidence that over the many years he fostered children for CYFS there were only ever two boys and the defendant had no issue with getting rid of one of the boys because he was violent but tolerated that exact behaviour from [K]?

[4] This proposed ground of appeal was addressed by the Court of Appeal. The Court noted the appellant's submission that the official records showed at least five boys stayed at the Wilson home over the years. The Court also observed there was "some evidential basis" for the prosecutor's statement.[2] That evidence came from the complainant (K) in the context of questions as part of her evidence in chief about the

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2 At [12].

living arrangements such as people coming and going. She was asked about the gender (and age) of the children coming through the house. She said that "from what [she could] remember there were only two boys".[3]

[5] The Court considered the remarks nonetheless should not have been made by the prosecutor noting the Court's understanding was that Mr Wilson could not "select particular children to foster".[4] The Court concluded however that in the circumstances the remarks were "immaterial in the overall case as presented to the jury".[5] The Court stated in this respect that:

> [13] There was no suggestion that Mr Wilson had sexually abused any other foster children (girls or boys) in his care. The ratio of girl to boy foster children was of little or no relevance in the case and nothing more was said apart from this passing remark in the prosecutor's closing address. … .

[6] That conclusion reflects an assessment of the particular circumstances of the trial not any point of principle. No question of general or public importance accordingly arises.[6] Nor is there any appearance of a miscarriage of justice arising from the Court's assessment of the facts.[7] In addition to the matters referred to by the Court, we note also that the Judge in summing up did not refer to the submission about the number of boys as forming any part of the Crown case.

[7] Neither of the other two proposed grounds of appeal were raised in the Court of Appeal. This is not one of those unusual cases in which the Court should grant leave to consider new points.[8] Neither point gives rise to a question of general or public importance. Rather, each turns on the particular facts. The factual issues arising in relation to both of these points were ventilated at trial. Further, in terms of the proposed ground concerning the remarks about the earlier complaint, Judge Kellar in

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3 Defence counsel asked the other complainant whether "there were various other girls and boys coming and going over the years who would change bedrooms etc". She accepted that was so.

4 At [12].

5 At [13].

6 Senior Courts Act 2016, s 74(2)(a).

7 Section 74(2)(b).

8 For example, in *Pavitt v R* [2005] NZSC 24, it was said that "It would be unusual for this Court to permit a second appeal to be brought on grounds not raised in the Court of Appeal. It would not allow this to occur unless convinced that there was a real possibility that it could be demonstrated by reference to those grounds that there had been a miscarriage of justice at the trial which therefore went uncorrected on the first appeal": at [4]. See also *Charlton v R* [2017] NZSC 5 at [7].

summing up gave a direction about delay in making a complaint in the context of which the Judge noted that "after Police made some further inquiries, no further action was taken" in relation to the earlier complaint.[9] We note also that the Judge brought the jury back after the summing up had concluded and made it clear the defence had no onus. We are satisfied that no miscarriage will arise if we decline leave to pursue these points for the first time in this Court. The criteria for leave to appeal are accordingly not met on these proposed grounds.

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

Solicitors:
Patient & Williams, Christchurch for Applicant
Crown Law Office, Wellington for Respondent

[9] The Judge noted the Crown submission K's account had not altered since the complaint in 2007 but that is a different point. The Judge also noted the defence relied on the other complainant's denial of any offending when she was interviewed in 2007.