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

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 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 26/2019
[2019] NZSC 72

BETWEEN	D (SC 26/2019) Applicant
AND	THE QUEEN Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	R M Mansfield and B N Kirkpatrick for Applicant J E L Carruthers for Respondent
Judgment:	10 July 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted after a District Court jury trial of two counts of sexual conduct with a child under the age of 12 years and one count of sexual violation by unlawful sexual connection. The victim was his stepdaughter, who was seven years of age at the time of the offending. One of the allegations against the applicant was that he penetrated the complainant's vagina with his finger on more than one occasion.

[2] On becoming aware of the complaints against him, the applicant sought mental health assistance from a mental health helpline. The call was recorded and a transcript of the call was provided to the police. The Crown decided to introduce this as part of its case, and reached an agreement with the counsel then acting for the applicant on how the transcript would be edited. References to the fact that the call was to a mental health helpline, the fact that the applicant expressed suicidal ideations and had done so previously, and details of past associations with mental health services were all deleted. The agreed transcript is set out in full in the judgment of the Court of Appeal.[1] The transcript records the applicant telling the call taker about the allegations having been made, during the course of which the applicant said "at the moment I've just told my partner that I've been checking her daughter". When asked what he meant by this he said "I've been looking at her private parts for signs of sexual abuse". The Crown case was that this was an inculpatory statement.

[3] The applicant's appeal to the Court of Appeal centred on the helpline call. In the Court of Appeal it was argued that:

(a) the call was protected by medical privilege (s 59 of the Evidence Act 2006) and should not have been admitted;

(b) if that was incorrect, the trial Judge and the applicant's trial counsel erred in allowing the call to go to the jury in edited form thereby excluding from the jury's consideration the proper context in which the call had been made; and

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1 *D (CA54/2018) v R* [2019] NZCA 1 [CA judgment] (Asher, Lang and Moore JJ) at [18].

(c) the Judge erred in denying the applicant an opportunity to advance his full defence when explaining the context of the call.

[4] The Court of Appeal dismissed the appeal. The applicant now seeks leave to appeal against that decision. He advances his application for leave on the same grounds as he pursued in the Court of Appeal. In addition, he argues that the call was confidential and should not have been disclosed at trial pursuant to s 69 of the Evidence Act. The applicability of s 69 was raised for the first time during the Court of Appeal hearing.

[5] The Court of Appeal found that the helpline call was not privileged under s 59. Section 59 provides:

> **59 Privilege in criminal proceedings for information obtained by medical practitioners and clinical psychologists**
>
> (1) This section—
>
> (a) applies to a person who consults or is examined by a medical practitioner or a clinical psychologist for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct; …
>
> …
>
> (2) A person has a privilege in a criminal proceeding in respect of any communication made by the person to a medical practitioner or clinical psychologist that the person believes is necessary to enable the medical practitioner or clinical psychologist to examine, treat, or care for the person for drug dependency or any other condition or behaviour that may manifest itself in criminal conduct.

[6] The applicant wishes to argue that the call to the helpline was privileged under s 59(2). He maintains that, although the call taker was not a medical practitioner or clinical psychologist, a call to someone who acts as a conduit for a clinical psychologist comes within the section. The Court of Appeal did not decide this point.[2] In addition he submits that the call was necessary to enable treatment for his suicidal state, which could lead to the commission of offences. The Court of Appeal rejected this argument on the basis that there was no evidence of a link between the applicant's suicidal thoughts and a sexual attraction to young children. The suicidal ideation was

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2 CA judgment, above n 1, at [22]–[23].

linked to the disclosure of the allegations, rather than to any tendency the applicant had to be sexually attracted to children.[3]

[7] We accept that the interpretation of s 59 does potentially give rise to a point of public importance. But we do not see the present case as an appropriate case for the grant of leave to consider s 59. Even if it were accepted that the call should be treated as a communication to a clinical psychologist, the applicant would need to establish that the Court of Appeal erred in rejecting his argument that the call was necessary to enable treatment for a condition that may manifest itself in criminal behaviour. We do not see sufficient prospects of that argument being successfully advanced to justify the grant of leave.

[8] In relation to s 69, the Court of Appeal accepted that the call to the helpline was confidential information within the ambit of that section, which provides a trial Judge with a discretion to prohibit the disclosure of such information in a proceeding. Section 69(3) sets out a list of factors to which a Judge must have regard in deciding whether to give a direction under s 69 preventing disclosure of confidential information in a proceeding. The Court of Appeal undertook this exercise, which required the balancing of factors that arose from the particular facts of the case.

[9] We accept there is room for argument about the way the discretion under s 69 should be exercised and about the weighing of the factors in s 69(3) on the facts of the present case. But the exercise is fact-specific and we do not consider there is sufficient prospect of the outcome reached by the Court of Appeal being disturbed on appeal to justify the grant of leave on this point.

[10] The applicant wishes to argue that the Court of Appeal erred in rejecting his argument that the call, if it was to be adduced, should have been adduced in an unedited form. The Court of Appeal considered the evidence of the applicant's trial counsel as to why he agreed to this course, and concluded that the trial counsel had sound reasons for the approach he took.[4] Equally, the Court determined that the trial Judge made no

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3 At [27].
4 At [45].

error in allowing the edited transcript to be adduced in evidence and that no miscarriage arose.[5] The applicant acquiesced in the approach taken by his counsel.

[11] We do not see any appearance of miscarriage in the way the Court of Appeal addressed this issue. And, given its specificity to the facts of this case, no point of public importance arises.

[12] The last point follows on from the point just mentioned, which is the fact that the defendant was restricted in his explanation of what he said during the call to the helpline. The Court of Appeal accepted that providing the edited transcript did lead to this restriction.[6] The reason the applicant was restricted was because the trial Judge made directions limiting the applicant's ability to give evidence tending to implicate the complainant's father (to whom the complainant had disclosed the allegations of offending by the applicant). The applicant wished to give evidence of his concern that the complainant's father may have been sexually abusing her, based on reports of sexualised behaviour on her part and an allegation that the complainant's brother had seen the father watching pornography.

[13] The trial Judge ruled that giving evidence of the reports would breach s 44 of the Evidence Act. So the applicant was limited to an explanation for his conduct that he was concerned because of what his wife had told him and that the only reason he had examined the complainant's vagina was to ensure there was nothing wrong. The Court considered the transcript of the evidence in which the applicant provided his explanation for his conduct and concluded that the evidence he gave permitted him to respond to the Crown's submission that his comment to the call taker amounted to an admission of sexual abuse.[7] This included the observation that the applicant and his wife regularly examined the complainant's genitalia together, and that he did so only once without his wife present. The Court considered that this meant that no miscarriage of justice arose and that the applicant was not compromised in his essential defence or prevented from advancing his theory of the case.[8]

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5 At [47].
6 At [49].
7 At [67].
8 At [68].

[14] Again we see no appearance of miscarriage in the way the Court of Appeal addressed this issue and, given its specificity of the facts of the case, no point of public importance arises.

[15] The applicant also wishes to mount an argument about the test that should be applied by an appeal court where trial counsel failed to object to evidence that should not have been admitted. The applicant says that a different standard has been applied in different decisions of the Court of Appeal.[9] Even if the applicant is right about that, the issue would not arise in the present case (given our conclusion on the earlier points raised).

[16] We dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

[9] *R v Horsfall* [1981] 1 NZLR 116 (CA); and *R v P* [1996] 3 NZLR 132 (CA).