

**NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS  
OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL  
JUSTICE ACT 1985.**

**NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF  
WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE  
CRIMINAL JUSTICE ACT 1985.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI**

**SC 31/2020  
[2020] NZSC 64**

BETWEEN	TAITE HEMI KUPA Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: S N B Wimsett for Applicant  
A Markham for Respondent

Judgment: 10 July 2020

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**JUDGMENT OF THE COURT**

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**The application for an extension of time to file an application for  
leave to appeal is dismissed.**

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**REASONS**

**Introduction**

[1] The applicant was convicted after a trial before a jury of sexual offending and assaults against two complainants and of assaults in relation to four other young children. The incidents giving rise to the charges took place over the period between 2011 and 2013 and were all said to have occurred while the complainants were in the

applicant's care in temporary accommodation run by Child, Youth and Family Services.

[2] The applicant appealed to the Court of Appeal against conviction. The appeal was dismissed.<sup>1</sup> He now seeks leave to appeal to this Court almost five years out of time. Three reasons are advanced to explain the delay, namely, difficulties in obtaining a lawyer willing to take on the case; difficulties in meeting and discussing the case whilst in prison; and that the referral of the case to the New Zealand Public Interest Project resulted in significant delay in consideration of the matter and then in finding a lawyer to act on a pro bono basis.

### **The proposed appeal**

[3] The proposed appeal would be brought primarily on the basis that hearing the charges relating to the alleged sexual offending together with those concerning allegations of physical assaults gave rise to a miscarriage of justice. The applicant also says the issues relating to joinder and severance give rise to a question of general or public importance.

[4] The applicant says there has been a miscarriage of justice because the failure to sever the sexual offending charges from the physical assault charges resulted in inadmissible evidence being led at trial and submits that the Court of Appeal did not properly address this. He notes that while the evidence of the two complainants about the alleged sexual offending was brought on a propensity basis, the evidence of physical assaults was not relevant on a propensity basis. The applicant also emphasises that the level of physical violence alleged was not particularly serious, comprising kicks on the bottom or leg along with ear pinching or pulling. He submits that this did not show a climate of violence or abuse in the household relevant to the context of the sexual allegations. He wishes to argue for similar reasons that any probative value in hearing the charges together was outweighed by the risk of unfair prejudice.

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<sup>1</sup> *Kupa v R* [2015] NZCA 135 (Harrison, Fogarty and Dobson JJ) [CA judgment].

[5] It is also noted that the defences advanced by the applicant at trial were different in respect of the groups of charges. In particular, the applicant accepted some physical assaults but his defence was that this was reasonable force used for disciplinary purposes.<sup>2</sup> By contrast, the applicant's defence in relation to the sexual offending was that there was no sexual conduct.<sup>3</sup> Finally, the applicant says the trial Judge did not properly direct the jury on the treatment of the two sets of charges.

[6] The respondent opposes the application for an extension of time and submits that in any event the proposed appeal has no merits.

### **Our assessment**

[7] The matters raised by the applicant provide some explanation for at least some of the delay in filing the application for leave. But a delay of almost five years is significant. We may have been prepared to grant an extension of time if we had been persuaded that there was a risk that a miscarriage of justice had occurred. But, for reasons we will come to, we are satisfied that is not the case. We therefore decline the application for an extension of time. Even if we had granted an extension of time, we would not have granted leave to appeal.

[8] Most of the points the applicant wishes to advance would have this Court revisit arguments made in the Court of Appeal. That Court was not satisfied that hearing both sets of charges in the one trial had given rise to a miscarriage of justice. That was because the "level of violence prevailing within the household was relevant evidence to the sex charges because it inherently informed the nature of [the applicant's] relationships with all complainants".<sup>4</sup> Severance would have been "artificial" as the jury would then have been "acting in a vacuum".<sup>5</sup>

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<sup>2</sup> The applicant's defence at trial invoked s 59 of the Crimes Act 1961 which provides a defence for the use of force by a parent on a child if the force used is reasonable and is used for one of the four purposes set out in s 59(1).

<sup>3</sup> It would also be contended that the applicant was effectively forced to give evidence in relation to both sets of charges despite the different defences. The respondent makes the point that there is no evidence advanced to support this submission.

<sup>4</sup> CA judgment, above n 1, at [14].

<sup>5</sup> At [14].

[9] Although it appears that there had been no challenge to the trial Judge's directions in the Court of Appeal, the Court also considered that aspect and concluded the directions were sufficient. The Judge had "correctly directed the jury to consider only the evidence relevant to each charge when emphasising that [the applicant] faced separate trials on each".<sup>6</sup>

[10] The arguments were carefully evaluated by the Court of Appeal and there is no appearance of a miscarriage of justice.<sup>7</sup> Further, the proposed appeal would involve an assessment of the application of the applicable principles to the particular facts. No question of general or public importance arises.<sup>8</sup>

## **Result**

[11] The application for an extension of time to file an application for leave to appeal is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>6</sup> At [15]. In addition, in the context of directions about the applicant giving evidence, the Judge reiterated the position was different for the assaults and that the jury would deal with those separately.

<sup>7</sup> Senior Courts Act 2016, s 74(2)(b).

<sup>8</sup> Section 74(2)(a).