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

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 112/2021
[2021] NZSC 181

BETWEEN	SAYMORE MUTSAMWIRA Applicant
AND	THE QUEEN Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	A M S Williams for Applicant B F Fenton for Respondent
Judgment:	15 December 2021

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant was convicted after trial of sexual violation by rape.[1] His appeal against conviction to the Court of Appeal was unsuccessful.[2] He now seeks leave to

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1 He was acquitted of one charge of unlawful sexual connection involving the same complainant.
2 *Mutsamwira v R* [2021] NZCA 177 (French, Ellis and Muir JJ) [CA judgment].

appeal out of time to this Court. There were a number of issues before the Court of Appeal. Relevantly for present purposes, there were complaints about the failure of trial counsel, Mr Philip Hall QC, to call an expert toxicologist, Dr Leo Schep, and about the applicant's election not give evidence.

Background

[2] The Crown case was that the applicant went to the lounge the morning after a family gathering in late 2015 and raped the adult complainant on the couch where she had slept. The complainant protested and the applicant left the house. The police were called. Scientific evidence at trial, including analysis of DNA on the outside and the inside of a condom found at the house, provided some support for the complainant's account that sexual activity with the applicant had occurred.

[3] When interviewed by the police, the applicant said he was very drunk and did not remember much. His defence at trial was that if there was any sexual contact, it was not possible for the jury to be sure it was intentional and/or non-consensual or without a reasonable belief in consent.

[4] The applicant's instructions to Mr Hall were that he had taken a double dose of two prescribed medications. Dr Schep was retained, and a report and brief of evidence obtained, addressing the extent to which the medication taken in combination with alcohol might help the defence as to lack of specific intent. The proposed evidence of Dr Schep was based on the assumption the applicant had in fact taken the quantity of tablets he said he had. This was not something the applicant had mentioned to police and he had made it clear he did not want to give evidence himself.

[5] The question of the need for a factual foundation for the proposed expert evidence was raised initially by the Judge in the course of the trial. Ultimately, the Crown said it would object to admission of the evidence in the absence of an evidential foundation. The Crown also produced, late, a brief from a forensic psychiatrist about the effects of the medication. Dr Schep accepted some adjustments of a concessionary nature were required to his approach. The trial was adjourned to enable the defence to consider its position. Various options were canvassed, including conducting a voir dire. In the end, the applicant agreed that he did not want to call Dr Schep, and it is

common ground that his earlier decision not to give evidence himself remained as before.

Proposed appeal

[6] The applicant wishes to argue that a miscarriage of justice has occurred because the Court of Appeal erred in deciding that the applicant made an informed decision not to give evidence and that this decision was made on sound advice. It is said that the initial legal advice was incorrect and when the correct legal position was explained, the applicant had not had sufficient time within which to make an informed decision. The Court of Appeal's findings about the evidence the Court heard on these issues are also challenged. The applicant also submits that the proposed appeal involves a matter of general or public importance; given the fundamental nature of a defendant's election to give or call evidence, the question of what amounts to informed consent in this area is important.

[7] We are not satisfied the proposed appeal raises any question of general or public importance.[3] Rather, it would turn on the particular facts. The relevant matters were considered carefully by the Court of Appeal. The Court found Mr Hall had determined that the risks of calling both Dr Schep and the applicant "far outweighed the benefit".[4] The concern was that calling this evidence could do damage to the defence, but without this evidence, the issue of intoxication and the applicant's account of events would still be before the jury. The Court also took the view that while Mr Hall could have anticipated the opposition to admission of the evidence, he was justified in his concerns about calling the applicant to establish a factual foundation. The Court listed a number of problematic matters for which the applicant would have had to provide a credible account.

[8] The Court rejected the arguments that Mr Hall's evaluation of the expert evidence was inadequate or erroneous. The Court also reviewed the decision of the applicant not to give evidence, concluding that the applicant's account of the discussions with Mr Hall on the relevant day of trial was not reliable. He overstated

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3 Senior Courts Act 2016, s 74(2)(a).
4 CA judgment, above n 2, at [82].

the pressure he was under and the time constraints. The Court also said that "while the [Crown's expert's] brief of evidence was late, the question of the evidential foundation for Dr Schep's evidence and how that might be resolved were issues that had been traversed for several days".[5] The decision made was an informed one and based on sound advice.

[9] The matters the applicant wishes to raise in this Court would reprise the arguments addressed by the Court of Appeal. Nothing raised by the applicant gives rise to any appearance of a miscarriage of justice in that Court's assessment of these matters.[6] Essentially, the applicant asks us to reconsider the factual findings made by the Court of Appeal. Nothing advanced provides a basis on which we should do so.

Result

[10] The applicant's delay in filing the notice of application is explained and there is no objection to our granting an extension of time. Accordingly, we grant the application for an extension of time to file the application for leave. The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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5 At [122].
6 Senior Courts Act, s 74(2)(b).