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 134/2021
[2021] NZSC 190

BETWEEN	NITIN MITTAL Applicant
AND	THE QUEEN Respondent

Court: Winkelmann CJ, William Young and Glazebrook JJ

Counsel: W C Pyke for Applicant
E J Hoskin for Respondent

Judgment: 23 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

[1] The applicant pleaded guilty to a charge of doing an indecent act on a young person in his Uber vehicle.[1] There was a disputed facts hearing during which both the applicant and complainant gave evidence. On the applicant's evidence, his engagement in the act of indecency was not voluntary but rather had been initiated by the complainant who had claimed to have a gun. The Judge rejected the

[1] Crimes Act 1961, s 134(3).

applicant's evidence.[2] When she came to sentence the applicant, she did not discharge him without conviction as his counsel sought. She instead sentenced him to two months' community detention and 12 months' intensive supervision.[3] His appeal against conviction and sentence was dismissed on 25 February 2019.[4] In the course of that hearing, the presiding Judge asked the applicant's then counsel (who had not represented him in the District Court) if he accepted his guilt and she, after consulting with the applicant, confirmed that he did.

[2] After some delay, the applicant applied to the Court of Appeal for a recall of the 25 February 2019 judgment. This was on the basis that his plea of guilty should be set aside. He claimed that before he pleaded guilty, he had made it clear to his counsel that he believed that he was not guilty. He said he had not received adequate advice and had been put under pressure. He now also contends that it was only because of the pressure that he felt he was under that he told counsel appearing for him in the Court of Appeal that he accepted that he was guilty. He says that, throughout, he has maintained his innocence but that there have been misunderstandings.

[3] The applicant now seeks leave to appeal against the judgment of 25 February 2019. He wishes to argue, as he did on the recall application, that his plea of guilty should be set aside. As will be apparent, this argument was not advanced in the Court of Appeal on the conviction and sentence appeal, and indeed through his then counsel the applicant explicitly conceded that he accepted that he was guilty.

[4] The merits of the position that the applicant now wishes to advance were reviewed by the Court of Appeal in the recall judgment.[5] It concluded, for reasons that it gave, that in pleading guilty, the applicant had taken "the only course realistically open to him".[6]

[5] The applicant wishes us to treat the recall application and recall judgment of the Court of Appeal as no more than part of the narrative (for instance, as one of the

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2 *Mittal v R* [2017] NZDC 19320 (Judge Cunningham) at [5].
3 At [18]–[19].
4 *Mittal v R* [2019] NZCA 20 (Miller, Simon France and Peters JJ) [CA judgment].
5 *Mittal v R* [2020] NZCA 412 (Miller, Simon France and Peters JJ).
6 At [7].

reasons for the delay in applying to this Court for leave to appeal). His counsel contends that we ought to confine our consideration of the evidence to the affidavits of the applicant filed in this Court and on the recall application and, in particular, he submitted that we should not take into account the affidavits filed on behalf of the Crown in the Court of Appeal in relation to the recall. The submissions for the applicant therefore do not engage with the reasons given by the Court of Appeal for dismissing the recall application.

[6] We are not prepared to deal with the application on the basis suggested; this given that the applicant:

(a) throughout has had legal advice;

(b) pleaded guilty in the District Court;

(c) advised the Court of Appeal hearing his conviction appeal that he accepted he was guilty;

(d) now wishes to challenge the Court of Appeal judgment on the basis of a contention that he was not guilty and was pressured into both his plea in the District Court and acknowledgement of guilt on appeal; and

(e) wishes this challenge to be addressed at this stage without having regard to the rejection by the Court of Appeal on the recall application of a substantially identical application.

[7] The conclusion of the Court of Appeal on the recall application that the plea of guilty by the applicant was "the only course realistically open to him" and the other reasons it gave for rejecting the recall application are strong indicators that there has been no miscarriage of justice. We appreciate that there is no right of appeal against that decision but it is of note that counsel for the applicant has not attempted to impeach the substance of that conclusion and the other reasons.

[8] The proposed appeal does not raise any question of general or public importance.[7] As well, having regard to the Court of Appeal's recall judgment, which the applicant has not sought to impeach, we see no appearance of a miscarriage of justice.[8]

[9] The application for leave to appeal was filed out of time. An extension of time is granted, as requested, but we dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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7 Senior Courts Act, s 74(2)(a).
8 Section 74(2)(b).