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

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS AND ANY PERSONS 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 42/2020
[2021] NZSC 31

BETWEEN	PERI POU Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	W D McKean for Applicant B F Fenton for Respondent
Judgment:	31 March 2021

JUDGMENT OF THE COURT

A Leave to amend the notice of application for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted after a District Court jury trial on seven charges of sexual connection with a young person, a representative charge of supplying

methamphetamine, four representative charges of doing an indecent act on a child and one charge of possession of methamphetamine for supply. He was sentenced to imprisonment for 11 and a half years.[1] He appealed against conviction and sentence to the Court of Appeal, but the appeal was dismissed.[2] He now seeks leave to appeal to this Court against conviction.

[2] The charges of sexual connection with a young person related to a female complainant whom we will call "K", who was 15 years old at the time of the offending (the applicant was around 40 years old). The charges of doing an indecent act on a child related to a female complainant whom we will call "J", who was aged between eight and nine at the relevant time. K and J are sisters.

[3] The applicant filed his application for leave to appeal in June 2020, but then requested that the Court suspend its consideration of the leave application while he pursued an application for recall of the judgment of the Court of Appeal. The Court of Appeal dismissed the application for recall.[3] Following the unsuccessful recall application, the applicant's counsel, Mr McKean, filed an application to amend the application for leave to appeal to this Court, along with the amended application for leave. We are satisfied that there were good reasons for filing the amended application for leave and, in the absence of any indication of prejudice to the respondent, we give leave to file the amended application. This judgment deals with the points raised in the amended application for leave.

[4] The principal basis on which the application is advanced relates to the interventions by the trial Judge during the cross-examination of K at the applicant's trial. This point was advanced in the Court of Appeal. The Court did a thorough examination of each intervention.[4] Ultimately it reached the view that none of the interventions by the Judge was improper, although it accepted that another Judge may

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1 *R v Pou* [2018] NZDC 15058 (Judge Ronayne).
2 *Pou v R* [2020] NZCA 160 (Courtney, Wylie and Muir JJ) [CA judgment].
3 *Pou v R* [2020] NZCA 518 (Courtney, Wylie and Muir JJ).
4 CA judgment, above n 2, at [12]–[37]. The applicant also complained of the interventions during the cross-examination of J, and these were dealt with by the Court of Appeal at [38]–[47]. The points raised in relation to interventions in the present application relate only to K.

have allowed more latitude in relation to some aspects of the cross-examination.[5] The Court was satisfied that the interventions did not result in an unfair trial.[6]

[5] The applicant wishes to argue on appeal, if leave is given, that the Court of Appeal erred in its assessment of the interventions and its application of the relevant provision of the Evidence Act 2006, being s 85.[7] He notes that the Court referred to the Judge intervening to stop questions that were "repetitive", whereas s 85(1) refers to questions that are "needlessly repetitive". He argues that a point of general or public importance arises, namely the circumstances in which it is permissible for a judge to intervene during a cross-examination of a complainant because of repetitive questions.

[6] We do not consider this is a matter of general or public importance, but rather a fact-specific assessment.[8]

[7] The applicant focuses on the age of K, which he says was an important element because the Crown case was that the offences in relation to her occurred in the two months before she turned 16, and it was an element of the offences that had to be proved by the Crown that she was, in fact, under the age of 16 when the sexual activity occurred. He says some of the interventions inhibited questions about when the offending occurred, and the Court of Appeal's assessment of whether the interventions were unwarranted should have taken into account the importance of the age issue.

[8] The applicant argues that a substantial miscarriage of justice will occur if leave is not granted. We are not satisfied that this ground is made out. The Court of Appeal considered the interventions in some depth and we do not see any appearance of error in that Court's evaluation. While some of the questions that were subject to interventions related to the time at which the offences occurred, these questions were focused on dates in June in the relevant year, when the 16th birthday of K was in August. So their relevance to the age aspect of the charges was doubtful.

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5 At [48].

6 At [48].

7 Although the focus of the proposed appeal is on the evidence of K, the proposed appeal would also involve a challenge to the convictions on the charges relating to J. This is on the basis that the evidence of K was used as propensity evidence in relation to the charges involving J.

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

[9] The second ground of appeal also relates to the age issue. The Judge said in his summing up, and recorded in the question trail provided to the jury, that it was an ingredient of the offence that the Crown had to prove that K was under 16 at the time the sexual incidents occurred, but added that there was no dispute about K's age. The applicant wishes to argue on appeal that this was an error that led to a miscarriage of justice. The defence run at trial was that none of the sexual activity had occurred at all, and the age of K was, as the Judge said, not a matter that was put in dispute. The applicant's counsel said nothing about K's age in his closing address to the jury. In those circumstances, we see any argument about this aspect of the case as having insufficient prospects of success to justify the grant of leave to appeal.

[10] We are not satisfied that the miscarriage ground is engaged in this case.[9]

[11] We give leave to amend the notice of application for leave to appeal, but dismiss the application for leave.

Solicitors:
WRMK Lawyers, Whangarei for Applicant
Crown Law Office, Wellington for Respondent

9 Section 74(2)(b).