IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 79/2022
[2022] NZSC 126

BETWEEN	KYLE ASHLEY KOTZE Applicant
AND	NEW ZEALAND POLICE Respondent

Court:	Ellen France, Williams and Kós JJ
Counsel:	C Mitchell for Applicant H S Cunningham for Respondent
Judgment:	31 October 2022

JUDGMENT OF THE COURT

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

REASONS

Introduction

[1] The applicant was convicted after a Judge-alone trial of assault with intent to injure and strangulation.[1] His appeal against conviction to the High Court was unsuccessful.[2] The Court of Appeal declined to grant leave for a second appeal.[3] As there is no jurisdiction to appeal to this Court against the Court of Appeal decision declining leave,[4] the applicant now seeks an extension of time to apply for leave to appeal directly to this Court from the decision of the High Court.

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1 *New Zealand Police v Kotze* [2020] NZDC 12532 (Judge Field).
2 *Kotze v Police* [2021] NZHC 2551 (Edwards J) [HC judgment].
3 *Kotze v New Zealand Police* [2022] NZCA 303 (Courtney, Thomas and Duffy JJ).
4 Senior Courts Act 2016, s 71; and Criminal Procedure Act 2011, s 213(3).

Background

[2] The relevant facts are set out in more detail in the judgment of the High Court.[5] For present purposes, it is sufficient to note the convictions arose from incidents that took place at a party attended by the applicant and his then partner (the complainant). The Crown case was that the applicant struck the complainant and bit her cheek in their van before following her into the bathroom at the house where he grabbed her by the throat and pushed her against the wall. The complainant made a complaint to the police the next day. The police took photographs of her face which were part of the evidence at trial along with a photograph the complainant said she had taken.

[3] The defence case at trial was that there was no violence and any injuries suffered were self-inflicted, as the complainant had self-harmed before. The applicant gave evidence. There was also evidence from the two hosts of the party. Relevantly, one of these witnesses said she saw the injuries on the complainant's face the next day, specifically the mark on her nose, but did not see bite marks. When the witness asked the complainant what happened, she said she had fallen.

[4] The trial Judge accepted the complainant had a history of self-harming but he also accepted her evidence of the violence relying on the photographic evidence showing clearly the injury to the bridge of the nose, and the minor injury to the back of the neck consistent with the complainant's account that at one point she was pushed into a console in the van. The Judge also said he thought he could see in the photograph that there were marks on her cheek which were not inconsistent with a bite mark, although this was not conclusive. The Judge assessed the evidence in light of various factors including the applicant's intoxication.

[5] On the appeal to the High Court, Edwards J went carefully through the various evidential matters identified by the applicant including the fact the witness referred to earlier did not see a bite mark and credibility more generally. (On the ability to see bite marks, the High Court took the same view as the trial Judge having viewed the photographs.) Edwards J considered that there was an evidential foundation for the

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5 HC judgment, above n 2, at [3]–[15].

findings of the District Court and also found that more generally the weight of the evidence supported the complainant's view of events.

[6] The Court of Appeal in declining leave considered the District Court Judge had provided a fully reasoned explanation for his preference for the evidence of the prosecution and the verdict had been carefully assessed by the High Court. There was no basis for departing from the views of the Courts below.

The proposed appeal

[7] The applicant would have this Court reassess the factual matters raised in the Courts below on the basis there will otherwise be a miscarriage of justice.[6] He is particularly critical of the lack of other forensic evidence and the failure of the police to try to find a young woman the complainant said was outside the bathroom at the time of the alleged assault in that room.

[8] Nothing raised by the applicant calls into question the concurrent factual findings made below. The defence evidence was expressly faced up to in the Courts below and both Courts gave reasons for preferring the complainant's account. The photographic evidence provided at least some support for that account. Other matters the applicant wishes to canvas were all explored in cross-examination. There is accordingly no appearance of a miscarriage of justice. In these circumstances, there are no exceptional circumstances requiring this Court to hear an appeal directly from the High Court.[7]

Result

[9] Given our conclusion that the application for leave to appeal does not meet the leave criteria in the Senior Courts Act 2016, there is no utility in granting an extension of time to make an application for leave. We therefore dismiss the application for an extension of time.

Solicitors:
Crown Law Office, Wellington for Respondent

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6 Senior Courts Act, s 74(2)(b).
7 Section 75.