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IDENTIFYING PARTICULARS OF “[C]” PROHIBITED BY S 203 OF THE
CRIMINAL PROCEDURE ACT 2011. SEE**

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html>

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CRIMINAL PROCEDURE ACT 2011. SEE**

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html>

**NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR
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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 O AOTEAROA

**SC 89/2022
[2022] NZSC 132**

BETWEEN **AUVAE TUPA’I**
Applicant

AND **THE KING**
Respondent

Court: **Ellen France, Williams and Kós JJ**

Counsel: **N Levy KC for Applicant**
 J A Eng for Respondent

Judgment: **16 November 2022**

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant faced two charges of sexual offending against a young family member (C) and 16 charges involving physical violence against C and her sibling. Three of the violence charges were dismissed at the close of the Crown case.¹ In the course of jury deliberations on the remaining charges, a juror (Juror 1) was discharged by the trial Judge. The jury proceeded with 11 members. The applicant was acquitted on three of the violence charges and found guilty of the remainder of the charges. He was sentenced by Judge Snell, the trial Judge, to seven years' imprisonment.²

[2] The applicant appealed unsuccessfully to the Court of Appeal against conviction.³ He has made an application for leave to appeal to this Court. The proposed appeal would focus on the circumstances of the discharge of Juror 1. Those circumstances are set out in some detail in the judgment of the Court of Appeal.⁴ The following background material will suffice.

Background

[3] Jury deliberations commenced on 19 February 2021, a Friday, and continued on the Monday, 22 February 2021. At about 10.23 am on 22 February the Judge received a letter from the foreperson indicating concerns about two jurors. No issue arises about the second of the two jurors so we say no more about that.

[4] In terms of Juror 1, the foreperson expressed concerns the juror had at many points expressed beliefs, such as that children were liars, which the foreperson considered should have been brought up during the jury selection process. The foreperson also referred to the juror's reference to a family member who was "reportedly the victim of a spurious allegation of sexual assault". The foreperson was also concerned about what the foreperson saw as difficulties Juror 1 had in participating in discussion.

¹ Criminal Procedure Act 2011, s 147.

² *R v Tupa'i* [2021] NZDC 8272.

³ *Tupa'i v R* [2022] NZCA 356 (Collins, Peters and Downs JJ) [CA judgment].

⁴ At [21]–[33].

[5] The Judge undertook a careful process to investigate these issues interviewing both the foreperson and Juror 1. The Judge initially was inclined to consider Juror 1 could continue on. But, before the juror returned to the jury room, the Judge was made aware of comments made by Juror 1 in the corridor which as the Court of Appeal said were “to the effect that she was reluctant to return to the jury room”.⁵ The Judge and Juror 1 had a further discussion. In this context, the juror said she would prefer to leave.

[6] The Judge discussed matters with counsel. Both the Judge and trial counsel (not counsel on the appeal) took the view Juror 1 should be discharged. In his ruling, the Judge said this:⁶

However, the juror expressed a view that she was very reluctant to continue deliberating and had become distressed. She went further and indicated that she would not be able to continue unless she had had a significant clearing of the air with the foreperson. Both defence and Crown counsel were of the view that the concerns raised by the foreperson about this juror and the juror's response regarding only being able to continue to deliberate if she was able to have it out with the jury foreperson, rendered her incapable of performing or continuing to perform her duty as a juror in the case. Pursuant to s 22(1)(b) of the Juries Act 1981, I discharged the juror [juror 1] at the request of [juror 1], but with the agreement and informed approval of both defence and Crown counsel.

[7] The Judge told the remaining members of the jury that Juror 1 had been discharged because of “personal issues” that had arisen that morning “which mean[t] that she [was] no longer able to continue to discharge her duties as a juror”. The Judge then gave the jury the standard direction as to majority verdicts. This course of action was also discussed and agreed with counsel.

The proposed appeal

[8] The applicant wishes to argue first that the Judge erred in discharging Juror 1. The principal submission would be that discharge was not permissible where a “clearing of the air” would have resolved the issue. Second, the applicant says that directions should have been given to the jury to dispel the concern otherwise present that dissenting opinions in the jury room were not permitted.

⁵ At [28].

⁶ *R v Tupa'i* [2021] NZDC 4835 [Ruling 2].

[9] In dismissing this aspect of the appeal, the Court of Appeal noted that the ability to discharge a juror for incapacity in s 22(2)(a) of the Juries Act 1981 is not confined to illness or disability. The Court referred to cases illustrating that trial Judges “are entrusted” to make decisions about juror capability “by taking into account the juror’s circumstances and the dynamics of the trial”.⁷ The Court said a trial Judge had advantages in “seeing a juror’s demeanour and assessing the whole situation”, something an appellate court could not replicate.⁸ The Court continued:

[70] The Judge clearly considered giving further directions to the jury about how to conduct their deliberations but he and counsel assessed the situation as being beyond salvation when Juror 1 said she would only continue if she could, to quote the Judge, “have it out” with the foreperson.

[71] ... But, the concerns having been raised, we consider it was open to the Judge to speak to the jurors rather than giving some form of direction, as Ms Levy also argued. Having done so, the Judge was then confronted by a juror who did not want, or feel able, to continue to participate in the deliberations. In short, the Judge was then confronted by a juror, who in terms of s 22(2)(a), was not able to continue to perform her duties.

[10] The proposed appeal would largely reprise the arguments considered by the Court of Appeal. We are not persuaded that any material error in that Court’s analysis has been identified. As the Court observed, the trial Judge was “alive to the delicacy of the situation” where the jury were deliberating.⁹ The decision to discharge reflected a careful process and one supported by trial counsel. There was no submission at the time that further directions were required to address this particular combination of facts. No question of general or public importance accordingly arises and nor is there any appearance of a miscarriage of justice in the Court of Appeal’s assessment.¹⁰

Result

[11] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁷ CA judgment, above n 3, at [68].

⁸ At [69].

⁹ At [71].

¹⁰ Senior Courts Act 2016, s 74(2)(a) and (b).