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 96/2021
[2022] NZSC 32

BETWEEN	ISAAC KEREHOMA STEVENS Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: E A Hall for Applicant
J E Mildenhall for Respondent

Judgment: 30 March 2022

JUDGMENT OF THE COURT

The application for leave to appeal direct to this Court is declined.

REASONS

[1] Following a judge-alone trial, the applicant was found guilty by Judge Edwards of 13 charges involving violence and sexual offending against his then partner.[1] His appeal against conviction and sentence was dismissed in the High Court by Cooke J.[2] The Court of Appeal dismissed his later application for leave to bring a second appeal against conviction and sentence.[3] He now seeks leave to appeal to this

1 *R v Stevens* [2019] NZDC 20484 [DC judgment].
2 *Stevens v R* [2020] NZHC 3290 [HC judgment].
3 *Stevens v Police* [2021] NZCA 340 (Goddard, Venning and Peters JJ) [CA judgment].

Court, which we take to be by way of an appeal against the High Court judgment upholding his conviction.

[2] If leave is granted, the basis of the appeal would be contentions (to some extent overlapping) that:

(a) the reasons given by Judge Edwards were not adequate; and

(b) in a series of specific respects, the trial was unfair.

[3] Second appeals against conviction are generally provided for by s 237 of the Criminal Procedure Act 2011. Section 75 of the Senior Courts Act 2016 applies to a proposed direct appeal to this Court from the decision of the first appeal court (the High Court). This means that in addition to satisfying the usual leave criteria,[4] the applicant must also satisfy this Court that there are exceptional circumstances warranting this Court taking the appeal directly.[5] This Court has been slow to allow leave to appeal to it direct where an application for leave to appeal has already been considered and dismissed by the Court of Appeal.[6]

[4] The most notable feature of these proceedings is that the reasons given by the trial Judge for finding the applicant guilty do not provide, on a standalone basis, an analysis of the case which would enable a reader to understand in any detail the allegations against the applicant. There is no general narrative of events and no charge by charge breakdown of the competing positions of the complainant and applicant. Instead, the reasons proceeded generally on the basis that if the narrative of the complainant were accepted and that of the applicant rejected in relation to the critical elements in the case, convictions would be appropriate,[7] save in relation to three charges, alleging sexual violation, threatening to kill and injuring with intent to cause grievous bodily harm.[8] The trial Judge:

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4 Senior Courts Act 2016, ss 74 and 75(a).
5 Section 75(b).
6 See *Clarke v R* [2005] NZSC 60 at [3].
7 DC judgment, above n 1, at [7] and [39].
8 At [35]–[38].

(a) Broadly accepted the evidence of the complainant and rejected that of the applicant for reasons which she gave at reasonable length.[9]

(b) Was satisfied, in relation to the sexual violation charge, that the events happened in the way in which the complainant alleged; consent was not in issue as the applicant denied the incident and there was no evidential foundation which put consent in issue.[10]

(c) Held, on the charge of threatening to kill, that it was not fatal to the charge that the applicant said that she did not take the threat seriously (that is, as indicating an actual intention to kill). This is because the issue was whether the applicant had intended that the threat be taken seriously. As the applicant was strangling the complainant at the time it was made, the Judge could infer that it was intended to be taken seriously.[11] And;

(d) Rejected, in relation to the grievous bodily harm charge, the evidence of the complainant that she was kicked only four times in favour of the evidence of a third party who said that it was at least 10 times.[12]

[5] In the High Court, Cooke J applied the approach of this Court in *Sena v New Zealand Police*[13] along with the earlier Court of Appeal judgments in *R v Connell*[14] and *R v Eide*[15] and concluded that the reasons given met the requirements of s 232 of the Criminal Procedure Act.[16] This aspect of the case does not give rise to a question of general or public importance;[17] this given the recent judgment of this Court in 2019 in *Sena*. There is no also appearance of a miscarriage of justice.[18]

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9 At [13]–[34].
10 At [35].
11 At [21] and [36].
12 At [37].
13 *Sena v New Zealand Police* [2019] NZSC 55, [2019] 1 NZLR 575.
14 *R v Connell* [1985] 2 NZLR 233 (CA).
15 *R v Eide* [2005] 2 NZLR 504 (CA).
16 HC judgment, above n 2, at [9]–[10] and [16].
17 Senior Courts Act, s 74(2)(a).
18 Section 74(2)(b).

[6] Of the more specific complaints, there are two which warrant comment.

[7] The first of these relates to charge 3. This arose out of an incident on 26 February 2017 at the applicant's brother's address. Present at the address had been the complainant, the applicant, the applicant's brother and two other people (Mr Miller and Ms Kingi). The complainant had only recently been discharged from a hospital to which she had been admitted following an assault on her by the applicant. She was in the process of having a miscarriage and wished to return to hospital. The applicant, however, wished to continue drinking with his friends. On her narrative he assaulted her. She then went outside to a car to drive herself to hospital and was followed to the car by the applicant and his brother. On the Crown case, the applicant tried to get into the car to get some $2 coins (so that he could buy more alcohol) and assaulted her by holding her by the neck, punching her in the head, grabbing her hair and slamming her head against the interior of the car.

[8] The complainant's evidence was supported in varying degrees by that of neighbours who witnessed some of what had happened. One of them telephoned the Police as he "genuinely feared for whoever was in the vehicle". Also supporting her evidence was her state when she arrived at hospital (where bruising to her eye and chest was seen). The eye injury was also seen by an attending police officer. The applicant in his evidence denied any use of violence on the occasion, maintaining that the eye injury was the result of an assault by him on her a week or two earlier. He also said that his brother had assisted him in getting the money and suggested that his brother might have been responsible for the bruises on the complainant's chest. The applicant conceded in cross-examination that when he arrived at the car he may have said "I'm going to fucking smash the window" to encourage her to open the car door. The incident was referred to in cross-examination in this way:

> Q So the picture you're painting—
>
> A What do you mean?
>
> Q —for this Court, Mr Stevens, is two grown men inside a car, holding down a screaming woman who wants to go to hospital because she's just had a miscarriage. That's your story?
>
> A Yeah but she'd been screaming all morning, like moaning and, like, I don't know, I think my brother had enough, yeah.

Q And this is a woman who you were—

THE COURT:

Q Sorry, what was that?

A Like because she'd been—

Q She'd been screaming all morning and what was the next bit?

A Like, moaning and throwing things around and was, like, upsetting my brother and everyone else there.

Q Because she wanted to go to hospital?

A Well, all of a sudden because I'd been drinking and wanted to buy another box, that's when she wanted to go to hospital.

[9] On the last day of the trial (the fifth), counsel for Mr Stevens sought an adjournment until the following day. In doing so, he advised the Judge that he had attempted to contact Mr Miller and Ms Kingi in the past but had only just succeeded in locating Mr Miller (to whom he had spoken by telephone and who was unable to attend court that day). He had not been able to speak to Ms Kingi. In declining the application, the Judge noted that there had "been ample time for steps to be taken to contact and summons witnesses".[19]

[10] She went on:

> [5] I am not satisfied it is in the interests of justice to adjourn this trial to enable those potential witnesses to be called. There has been considerable delay in reaching this trial for various reasons already. I am not satisfied the evidence these witnesses could give, especially as it only it relates to one charge, is of such potential significance that an adjournment is warranted for them to be located and summonsed. Indeed, on the evidence I have heard, there is no real indication the evidence they could give would be of significance in relation to the events of 26 February.

[11] For the purposes of the appeal, statements made by Mr Miller (in October 2020, a year after the trial) and Ms Kingi (in December 2020) were made available to Cooke J. Both provided some support (more in the case of Ms Kingi than Mr Miller) for the applicant's denial of violence.

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19 *R v Stevens* [2019] NZDC 19927 [DC ruling three] at [3].

[12] In his judgment, Cooke J reviewed the contents of the two statements.[20] He accepted that the statement of Ms Kingi suggested that there had been no violence towards the complainant on this occasion.[21] He then went on:

> [56] … Had it [Ms Kingi's statement] been available at the time it could have been significant. There is no information before me to explain why this information is only available now more than a year after the trial. Neither do I have information that this evidence would have been available had the overnight adjournment been granted.
>
> [57] In any event given the application made at the time, and the basis for it, I do not agree there has been a miscarriage of justice for a failure to adjourn the trial. It was not clear what evidence the witnesses would give, and it would not have been certain that they would even show up given that Mr Miller had not been able to be located until the day the application was made. It did not have the appearance of reliable and significant evidence.
>
> [58] This would have been a difficult issue for the Judge, but given what she was presented with I accept the decision not to adjourn was reasonably open to her. With hindsight it may have been better to adjourn to the following morning. But given the application made to her I accept the decision she made was open to her, and I also accept that no miscarriage of justice resulted as a consequence.

[13] In agreement with Cooke J, we think it may have been better for the trial Judge to have adjourned the proceedings. But likewise, given the context, it would be difficult to conclude that the decision was not open to her on the situation as it was at the time she made it. Further, as Cooke J noted, there is no indication that either witness would have given evidence had the adjournment been granted.

[14] We have also considered whether, treating the evidence as new, there was a miscarriage of justice. It is hard to see how evidence from Mr Miller in accordance with his interview would have assisted the applicant in the context of the trial. A claim by him that the complainant "didn't have no black eyes and no fat lip" sits awkwardly with the injuries which the complainant was seen to be suffering from shortly after the incident and, indeed, the applicant's explanation for them. Ms Kingi's statement likewise provides no explanation for those injuries. As well, their accounts of the event at the car and what led up to it are distinctly more anodyne than the narrative accepted by the applicant in his evidence at trial.

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20 HC judgment, above n 2, at [54]–[56].
21 At [56].

[15] This aspect of the case does not justify us taking the exceptional course of granting leave to appeal direct from a High Court judgment.

[16] The other complaint about the trial which we think it right to discuss relates to the sexual violation charge and the Judge's conclusion that there was no evidential foundation for a defence of consent. As to this, Cooke J noted:

> [27] In my view it was not necessary for the Judge to go further than make the findings she did. Unlike a jury, the Judge was aware [of the] necessary elements of the offending—indeed she specifically referred to the consent element. What the Judge's finding involved is a conclusion that there was no evidential basis that could put consent in issue as a matter of fact. This was apparent from the nature of the complainant's evidence. … Based on her evidence there could be no question of consent. Mr Stevens' evidence was "that did not happen at all". There was no suggestion from him that it did happen, but was a consensual act, or that he believed that she was consenting. The ultimate question was whether the prosecution had proved that it did happen as she described to the required standard. For these reasons the Judge's findings seem to me to be justified. I do not accept that there is any deficiency in the reasoning. I agree it would have been better for the elements of the offending to be set out, and addressed more methodically. But the reasoning nevertheless addresses what was necessary to properly address, and then explain the findings made by the Court.

[17] We see no plausible basis upon which that reasoning can be challenged.

[18] As will be apparent, we do not regard the other issues raised on behalf of the applicant as providing an appropriate basis for allowing a leapfrog appeal. The application for leave to appeal direct to this Court is declined.

Solicitors:
Crown Law Office, Wellington for Respondent