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

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT AND ANY PERSON 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 159/2021
[2022] NZSC 38

BETWEEN		JOHN NORRIE SEYMOUR Applicant
AND		NEW ZEALAND POLICE Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: T Epati for Applicant
M J Lillico for Respondent

Judgment: 4 April 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] After a judge-alone trial, the applicant was found guilty of doing an indecent act on a child contrary to s 132(3) of the Crimes Act 1961.[1] The offending involved

[1] *R v Seymour* [2020] NZDC 21006 (Judge Cathcart).

the applicant, then 66 years of age, taking two photographs of a 10-year-old girl, K, while she was asleep in his care. The applicant's appeal against conviction to the High Court was unsuccessful.[2] The Court of Appeal granted leave to appeal but dismissed the appeal.[3]

[2] The applicant now seeks leave to appeal to this Court on two grounds. The first ground is that the Court of Appeal erred when it found that, under s 132, the act of taking a photograph is capable of being an indecent act. The second ground is that the Court of Appeal was wrong to find that this Court's decision in *Rowe v R* allowed for consideration of surrounding circumstances in determining whether an act, capable of being indecent, is in fact indecent.[4]

Background

[3] K and her sibling, B, were staying with the applicant overnight in mid-July 2019. A little after 3am B, who was pretending to be asleep, saw the applicant adjusting K's t-shirt, folding it to just below her nipple line. The applicant took two photographs. The first of these was from the top of her jeans up to her chin, including her exposed abdomen. The other photograph was a close up of K's clothed crotch area, starting from the lower part of her abdomen.

[4] The police became involved after B told his father what he had seen. A search was conducted on the applicant's property and he told the arresting officer he had not wanted the two children to stay with him because he "just knew something would go wrong". He added to this saying "I'd start abusing them … I never abused … the boy, but I did the girl. I only touched her puku." He said that he and K "would joke about her puku being like Māori bread".

[5] The District Court Judge took the view the photographs were objectively indecent based on the circumstances, and would be considered as such by community standards. Relevant factors were the staging of K, the subject matter of the

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2 *Seymour v R* [2021] NZHC 2322 (Mallon J) [HC judgment].
3 *Seymour v New Zealand Police* [2021] NZCA 637 (Collins, Duffy and Dunningham JJ) [CA judgment].
4 *Rowe v R* [2018] NZSC 55, [2018] 1 NZLR 875.

photographs and the control the applicant had over K. The Judge did not consider the decision in *Rowe* was governing because it dealt with ss 125 and 126 of the Crimes Act.

[6] In the High Court, Mallon J concluded *Rowe* was applicable but the decision did not preclude consideration of surrounding circumstances where the act, depending on the context, was capable of being indecent. Relying on the circumstances of the applicant, being an older man, taking the photographs, while K was asleep, and lifting K's shirt, the Judge concluded the taking of the photographs "would be regarded as an indecent act by right-thinking members of the community".[5]

[7] The Court of Appeal agreed with the High Court that the reasoning in *Rowe* was applicable, but did not consider it assisted the applicant for the following reasons. First, while the focus was on the act itself, the act of taking a photograph was capable of being indecent. Whether it was would "mainly hinge on the subject matter of the photograph".[6] Second, the Court interpreted *Rowe* as authority for the proposition that "if an act is incapable of being indecent, it cannot be made indecent solely by the surrounding circumstances".[7] If the act is capable of being indecent, "the surrounding circumstances could reinforce that conclusion".[8]

[8] The Court found that, contrary to the position in *Rowe*, the taking of the photographs here was capable of being an indecent act given the focus on K's crotch and exposed stomach, and where the photographs "involved the sexualisation of K and would be considered both disturbing and indecent by most members of society".[9] The Court then identified the surrounding circumstances which reinforced that conclusion, including the staging of the photographs, the time at which they were taken, and K's age.

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5 HC judgment, above n 2, at [78].
6 CA judgment, above n 3, at [52].
7 At [53].
8 At [53].
9 At [55].

The proposed appeal

[9] In support of the first proposed ground of appeal, the applicant says that clarification is necessary as to what will constitute an "act" for the purposes of s 132 so as to avoid the risk of over-criminalisation. It is also submitted that the statutory scheme suggests liability for the taking of such photographs is not addressed under s 132. Under the proposed second ground, it is submitted that the Court of Appeal was wrong in its interpretation of *Rowe*.

[10] In supporting the judgment of the Court of Appeal, the respondent submits that *LM v R*[10] and *Y v R*[11] rebut any suggestion that the taking of photographs of a child cannot amount to an indecent act on a child under s 132. Whether the act is indecent will depend on factors such as the subject matter of the photographs and any associated posing. In determining that question, the Court of Appeal was correct to conclude that the reasoning in *Rowe* did not assist the applicant.

[11] As is apparent from the discussion above, the proposed appeal would reprise the arguments made about the effect of this Court's earlier decisions in *Rowe*, *LM v R*, and *Y v R*, in the Court of Appeal. We see those arguments as having insufficient prospects of success. This case is accordingly not an appropriate vehicle to consider broader questions of general or public importance that may arise for consideration at some point about the inter-relationship between the various provisions which criminalise aspects of visual recording by photographs or other medium.[12] It follows that we do not see any matters raised by the applicant as giving rise to the appearance of a miscarriage of justice.[13]

Result

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

Solicitors:
Rishworth Wall & Mathieson, Gisborne for Applicant
Crown Law Office, Wellington for Respondent

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10 *LM v R* [2014] NZSC 110, [2015] 1 NZLR 23.
11 *Y v R* [2014] NZSC 34, [2014] 1 NZLR 724.
12 Senior Courts Act 2016, s 74(2)(a).
13 Section 74(2)(b).