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 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 O AOTEAROA

SC 10/2022
[2022] NZSC 50

BETWEEN	EDWARD POWNEY COUPER Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Williams JJ

Counsel: J E L Carruthers for Applicant
M L Wong for Respondent

Judgment: 14 April 2022

Reissued: 18 May 2022

JUDGMENT OF THE COURT

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

B The application for leave to appeal is dismissed.

REASONS

Background

[1] The applicant was tried in the District Court on one charge of sexual violation by unlawful sexual connection, two charges each of sexual conduct with a child under 12, assault with intent to injure, and assault with a weapon, and one charge of assault on a child. The jury returned verdicts of guilty on all charges. The Court of Appeal dismissed the applicant's appeal against conviction in relation to the sexual offending.[1] He now seeks leave to appeal against that decision.

Facts

[2] The Crown's case was that when the complainant was about nine years old the applicant committed the acts which are the subject of the sexual offending charges. The complainant told his aunt about the alleged offending when he was a teenager and later completed an evidential video interview. The interview formed the basis of the Crown's case at trial for the sexual offending charges.

The defence case at trial

[3] At trial the applicant adduced evidence of an incident in which the complainant, then 11, had been caught sexually assaulting his younger relative. At a subsequent family meeting called over the incident, the complainant admitted his behaviour. When asked whether he had himself been sexually abused, he said he had not. He said he got the idea from watching a video with a friend.

[4] While potentially double edged, as the question asked of the complainant at the family meeting attests, the applicant called the evidence of the incident to support the suggestion that the complainant's allegations against the applicant were false. The argument was that the complainant had only made the allegations against the applicant after learning that his mother had told his aunt about the sexual assault on his younger

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1 *Couper v R* [2021] NZCA 632 (Cooper, Venning and Palmer JJ).

relative. This timing, it was submitted, suggested that the complainant may have made the allegations to deflect trouble over that incident.[2]

[5] At trial, counsel did not emphasise the complainant's explanation that he had learned about his sexualised behaviour from a video. The only reference to it was a brief and somewhat unclear acknowledgement by the complainant's mother in cross-examination.

Court of Appeal judgment

[6] In the Court of Appeal, the applicant argued that the evidence of the incident with the young relative was too prejudicial and trial counsel's decision to adduce it was an error likely to have affected the outcome.[3] In the alternative, it was argued other evidence should also have been called by trial counsel which supported the defence theory that the complainant was merely deflecting attention from himself.

[7] The Court of Appeal, while acknowledging the risks inherent in the defence strategy, found that the trial Judge's firm directions in summing up about the relevance of the incident favoured the defence and adequately mitigated any risk of miscarriage. The Court accepted that, in hindsight, counsel could have done more to highlight the fact that in response to a direct question at the family meeting, the complainant said he had learned about his sexualised behaviour from viewing a video. But the Court was not satisfied that this could have affected the outcome. The evidence before the jury confirmed the fact that the complainant had indeed sexually assaulted his young relative and that the timing of his allegations in relation to the applicant was consistent with the defence theory. The proposed additional evidence was merely confirmatory of these propositions. The unambiguous directions from the trial Judge that the jury was not permitted to use evidence of the incident against the defendant, meant there was no real likelihood of a miscarriage.

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2 *R v Couper* [2021] NZDC 1319. In a ruling under s 44 of the Evidence Act 2006, Judge T V Clark allowed an application by trial counsel to lead evidence about the incident. The Judge reasoned that the timing and context of the allegations in relation to the incident were relevant and probative with respect to assessing the complainant's credibility.

3 Criminal Procedure Act 2011, s 232(2)(c). See also *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730 at [66].

Applicant's submissions

[8] The applicant argues that the Court of Appeal failed to grapple with the prejudicial effect of counsel's failure to call evidence of the source of the complainant's sexual knowledge. The incident involving the complainant's young relative was similar in kind to the alleged offending and likely to have stuck in the minds of jurors. Its potential prejudice could have been easily remedied by putting the matter directly to the complainant, the applicant or by calling other witnesses (already briefed by counsel) who attended the family meeting and would have confirmed that the complainant had said he learned of this behaviour from a video. Further, it is argued the Court of Appeal overestimated the curative effect of the trial Judge's directions. The Court of Appeal failed to quantify the risk of prejudice arising from counsel's failure to elicit the complainant's explanation and so had not grappled satisfactorily with the ability of the trial Judge's direction to adequately mitigate that prejudice.

[9] Finally, the applicant submits that the Court of Appeal failed to refer to the prejudicial effect of the prosecutor's cross-examination of the applicant in relation to the complainant's sexual knowledge. The applicant submits that this cross-examination reinforced the perception of a link between the incident and the alleged offending. The relevant part of the cross-examination is as follows:

> Q. But interestingly that one of the questions that gets asked apparently is, "Well has anyone ever done anything like this to you?" Right?
>
> A. Yes.
>
> Q. Because it would make sense wouldn't it for such a young boy of 11, you're very much a child, it's a very unusual thing shall I say to see an 11 year old child asking a [very young] child to do something sexual isn't it?
>
> A. Yes.
>
> Q. And so it's a natural question to ask, "How have you learnt this? Has someone done this to you?" Right?
>
> A. Yes.

Analysis

Application out of time

[10] The application was filed five days out of time. The noncompliance is minor and there is no prejudice to the respondent. Accordingly, the application for an extension of time to apply for leave to appeal is granted.

Application for leave to appeal

[11] No matter of principle is involved in the proposed appeal and we are not satisfied there is any risk of miscarriage.[4] The key error attributed to counsel in the proposed appeal is narrow in focus. Seen in the wider context of the trial and the very careful directions from the trial Judge, who was obviously alive to the very risk now complained of, we do not see that this proposed appeal has sufficient prospects of success to warrant the granting of leave.

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent

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4 Senior Courts Act 2016, s 74(2)(b).