

**ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES,
OCCUPATIONS OR IDENTIFYING PARTICULARS OF
WITNESSES/VICTIMS/CONNECTED PERSONS PURSUANT TO S 202
CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE
<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html>**

**NOTE: INTERIM ORDER PROHIBITING PUBLICATION OF NAME,
ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF
APPELLANT REMAINS IN FORCE UNTIL FINAL DETERMINATION OF
THE NAME SUPPRESSION APPLICATION IN CRI-2016-009-687.**

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 14/2021
[2022] NZSC 66**

BETWEEN	W (SC 14/2021) Applicant
AND	THE QUEEN Respondent

Court: Glazebrook and Ellen France JJ

Counsel: Applicant in person
M R L Davie for Respondent

Judgment: 25 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.**
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REASONS

Introduction

[1] Mr W was convicted at trial of meeting a young person after grooming,¹ two charges of supplying cannabis to a person aged under 18 years,² and doing an indecent act on a young person.³ Mr W appealed unsuccessfully against conviction to the Court of Appeal.⁴ He now seeks leave to appeal to this Court.

Background

[2] As the Court of Appeal noted, in describing the incidents relating to the charges, the teenage complainants said Mr W approached them at a shopping mall, befriended them and gave them food, clothes, a place to stay and ultimately cannabis. One of the complainants also alleged that while he was sleeping at Mr W's house, Mr W indecently assaulted him.

[3] It is useful to say a little about the procedural history up to the present application.

[4] The trial took place in November 2016. The appeal to the Court of Appeal was filed the following year, in May 2017. Mr W instructed counsel to act for him on the appeal. There were various delays. Assessors' reports as to Mr W's fitness to stand trial, prepared for the District Court under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003, were filed in support of the appeal. The appeal was set down for hearing in April 2019. There were further delays when an affidavit from Mr W was not filed on time. The appeal was set down again to be heard on 1 August 2019. Ultimately, the Court of Appeal declined to adjourn that fixture and the appeal proceeded on 1 August. The judgment of the Court of Appeal was delivered on 20 August 2019.

¹ Crimes Act 1961, s 131B(1).

² Misuse of Drugs Act 1975, s 6(1)(d) and (2)(c); and Crimes Act, s 66(1)(b).

³ Crimes Act, s 134(3).

⁴ *W (CA252/2017) v R* [2019] NZCA 367 (French, Mallon and Moore JJ) [CA judgment].

[5] Mr W's notice of appeal in this Court was filed nearly 18 months later, on 12 February 2021. Mr W made various other applications to the Court.⁵ Then, on 9 March 2022, following an application from the respondent, the Court gave Mr W 10 working days' notice under s 338(2) of the Criminal Procedure Act 2011 that if his submissions were not filed within that timeframe, the Court would dismiss the application for leave for want of prosecution. Mr W filed submissions within the time set. We also gave Mr W further time, as he requested, so that he could file submissions in reply to the respondent's submissions and we have considered these further submissions.

The proposed appeal

[6] Mr W says he was not fit to stand trial due to the difficulties he faces following head injuries sustained in 1997. In addition, he says that he did not receive appropriate support measures with the result that his trial was unfair. He also wishes to argue that he did not receive an effective first appeal in the Court of Appeal at least in part because of the lack of support. Finally, he raises issues related to trial publicity and disclosure.

[7] In terms of fitness to stand trial, the Court of Appeal considered the assessors' reports on this topic. The Court said the reports confirmed Mr W's difficulties, namely, "difficulties regulating his body temperature and issues with emotion regulation, information processing, attention span and concentration".⁶ The Court also noted that the reports recommended various support measures such as maintaining the ambient temperature at a set range and providing Mr W with frequent breaks to discuss and process new information with his lawyer.

[8] The Court said that Mr W's lawyer on the appeal acknowledged that neither the trial Judge nor trial counsel had raised any issues about Mr W's ability to participate in the trial at the time. Counsel's submission to the Court of Appeal was

⁵ The applications for the appointment of a litigation guardian and a communication assistant were declined. Mr W made a further application for assistance including the appointment of counsel assisting which we formally dismiss.

⁶ CA judgment, above n 4, at [22]. The Court accepted the difficulties were capable of qualifying as a "mental impairment" within the meaning of s 4 of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

that Mr W's needs were "so complex that laypeople would be likely to miss them and attribute any unusual behaviour to a bad personality".⁷ It was argued that the medical reports supported the proposition that without the recommended accommodations Mr W could not have received a fair trial.

[9] The Court of Appeal rejected these submissions. The point was made that Mr W's trial counsel was an experienced criminal lawyer. The Court said that trial counsel's evidence:⁸

... was that W engaged fully in the preparation for trial and also in the hearing itself. Prior to the trial, [trial counsel] had lengthy consultations with W discussing the prosecution evidence and formulating the defence response and trial strategy. W gave him clear and detailed instructions. Further, W participated during the trial in a way that demonstrated understanding of what was being said. Far from being unable to follow the evidence as it unfolded, W even passed him notes during the cross-examination with suggested questions. At no time did [trial counsel] detect any deterioration in W's functioning. And at no time did W ever complain to him about the temperature in the courtroom or that he was having difficulty following the process.

[10] The Court also noted that the Crown case Mr W faced at trial was straightforward. The sole question was whether what the teenagers alleged had happened did in fact happen. Against this background, the Court did not consider there had been any miscarriage of justice or a risk of a miscarriage of justice.

[11] The proposed appeal would largely involve this Court going over the ground that has been dealt with by the Court of Appeal. The issues about fitness to stand trial and the need for support which Mr W wishes to raise are factual ones.⁹ No question of general or public importance arises.¹⁰ While there may have been a question about the support that should be provided to a person in Mr W's position, the Court of Appeal made an assessment of trial fairness having heard evidence from trial counsel. Nothing raised by Mr W about that assessment gives rise to an appearance of a

⁷ At [26].

⁸ At [27].

⁹ The resolution of Mr W's proposed further ground of appeal relying on ss 19 and 28 of the New Zealand Bill of Rights Act 1990 similarly would turn on the facts.

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

miscarriage of justice.¹¹ It is also apparent that Mr W engaged with his counsel in the Court of Appeal over the appeal.¹²

[12] Finally, in terms of the other two proposed grounds referred to above, the first point to note is that Mr W does not particularise the problems said to arise in terms of disclosure.¹³ Second, on the proposed issue relating to trial publicity, as the respondent notes, there is no evidence that material about Mr W was viewed by jurors and there are, in any event, no specifics about this material. The absence of consideration of these issues by the Court of Appeal also points against a grant of leave.¹⁴

[13] While the delay in filing the present application for leave is lengthy, there is some explanation for that delay in attempts to instruct counsel along with Mr W's difficulties.

Result

[14] The application for an extension of time to apply for leave to appeal is granted. The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

¹¹ Senior Courts Act, s 74(2)(b).

¹² The respondent refers to a more recent finding that Mr W was fit to stand trial in unrelated proceedings: *Police v [E]* [2021] NZDC 12188.

¹³ At [6], above.

¹⁴ *Robertson v R* [2021] NZSC 40 at [7]; and *Devoy v R* [2017] NZSC 164 at [5].