NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS 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 NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS AND ANY PERSONS 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 45/2022
[2022] NZSC 96

BETWEEN	PAUL ELVIS RAWIRI MCLEAN Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: J S Jefferson for Applicant
R K Thomson and F E S F Girgis for Respondent

Judgment: 12 August 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Following a jury trial in the District Court in Gisborne, the applicant Mr McLean was convicted of the following offences: two charges of indecent assault, two charges of doing an indecent act on a young person and two charges of sexual

violation by unlawful sexual connection. He was sentenced to 11 years imprisonment.[1] His conviction appeal to the Court of Appeal was dismissed.[2]

[2] The applicant now seeks leave to appeal against that dismissal.

Facts

[3] The applicant and the two complainants were at a celebration held at a marae in May 2017. The applicant was 32 and the complainants were aged 16 (AB) and 11 (CD) at the time.[3]

[4] The celebration was held in the wharekai, which was adjacent to the wharenui. At some point in the evening AB went to bed in the wharenui. The applicant (by then intoxicated) lay down next to AB and indecently assaulted her.[4]

[5] Later in the evening CD came to bed and lay on the mattress next to AB, that is, between AB and the applicant. The applicant rubbed CD's stomach and genitals (skin on skin) with his hand.[5] He then sexually violated CD anally, first digitally and then by penile penetration.[6]

[6] That night AB expressed concern to two of her aunties about the applicant's behaviour towards CD. The next day AB told CD that she too (AB) had been assaulted indecently by the applicant. CD also told AB and two family members about what the applicant had done but did not make a full disclosure. It was not until January 2018 (that is, 8 months later) that AB and CD fully disclosed what had happened at the marae. This ultimately led to CD and her mother making a complaint to the police on 11 February 2018. On 27 February 2018 both complainants were interviewed by the police.

---

1 *R v McLean* [2020] NZDC 23133 (Judge Cathcart).
2 *McLean v R* [2022] NZCA 114 (Gilbert, Katz and Edwards JJ).
3 AB and CD were the identifiers used in the Court of Appeal for the complainants. We will continue to use them.
4 The two charges of indecent assault relate to this offending.
5 The two charges of doing an indecent act on a young person relate to this offending.
6 The two charges of sexual violation by unlawful sexual connection relate to this offending.

[7] In February 2018, CD visited her GP complaining of anal bleeding. She was prescribed with a cream to alleviate the problem. It seems, though, that she was already being treated for a pre-existing chronic constipation problem. On 2 March 2018, following a referral from the police, CD underwent an anogenital examination in the child sexual assault clinic. The examination disclosed no visible injury or haematoma around the anus.

Court of Appeal judgment

[8] In the Court of Appeal the thrust of the applicant's argument was that the agreed statement of facts admitted at trial by consent was unfairly prejudicial.[7] The agreed statement related to:

(a) medical evidence about the significance of CD's anal bleeding; and

(b) counter-intuitive evidence explaining that sexual offending can occur in close proximity to others without their knowledge and that complaints can be delayed in child sex offending cases.

Medical evidence

[9] The essential point made in the agreed medical evidence was that CD's anal bleeding could be consistent either with chronic constipation or sexual violation. It was not possible by examination to establish which might have been the cause. The applicant's complaint really related to the fact that the evidence, by its very nature, suggested to the jury that sexual violation was a possible cause. This, it was argued, unfairly focused the jury on the very chain of reasoning the evidence and the Judge warned them against. It was, he submitted, better not to have mentioned it at all.

[10] The Court of Appeal rejected this argument, pointing out that in the absence of the agreed statement the only evidence would be that of CD, who said anal bleeding commenced the day after the alleged offending. The jury would not, on this argument, be appraised of the exculpatory option provided in the agreed statement or of the fact that, without more, choosing which was the real cause would be speculation.

---

7 The agreed statement was admitted pursuant to the Evidence Act 2006, s 9.

Counter-intuitive evidence

[11] The applicant argued that the part of the agreed statement dealing with delay was too generalised and, in any event, irrelevant because there had been no delayed complaint in this case. Secondly, the applicant argued that the proximity aspect of the statement was unbalanced in favour of complainants.

[12] The Court of Appeal dismissed these arguments. First, delay was in fact a live issue at trial because the early disclosures were only partial. Second, it was important that counter-intuitive evidence should be generalised in order to avoid unfair prejudice to the defendant. Third, it was necessary to address false assumptions about the likelihood of sexual offending occurring in close proximity to others, and the statement achieved that in a balanced fashion.

Submissions

[13] The applicant reprises the arguments made in the Court of Appeal. He also argues that the complainants' accounts were inconsistent, and that the inconsistencies would have been fatal had the medical and counter-intuitive evidence not been adduced. In fact, the applicant made this argument in the Court of Appeal, but that Court did not address it.

Analysis

[14] We are not satisfied that it is in the interests of justice to grant leave in this case.[8] No issue of principle arises. Rather, the arguments advanced are case specific and factual in nature. Nor do we see any risk of miscarriage if leave is not granted.[9] On the contrary, as the Court of Appeal set out and the Crown submitted, the trial Judge's directions addressed any risks of prejudice arising from CD's evidence of anal bleeding. In addition, the counter-intuitive evidence was appropriately balanced and generalised in order to avoid unfair prejudice to the defendant. Finally, it is true that there were inconsistencies between aspects of the evidence of AB and CD, but they were peripheral. They did not relate to the core events of the offending. Crucially,

---

8 Senior Courts Act 2016, s 74(1).
9 Section 74(2)(b).

evidence from another witness (an aunty) that AB asked her to move the applicant from the mattresses to another side of the wharenui, went unchallenged.

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

Solicitors:
Crown Law Office, Wellington for Respondent