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 NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF 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 108/2021
[2023] NZSC 12

BETWEEN	T (SC 108/2021) Applicant
AND	THE KING Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: P J Davey for Applicant
E J Hoskin for Respondent

Judgment: 1 March 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr T seeks leave to appeal against a Court of Appeal decision dismissing his appeal against conviction for sexual offending against a young relative.[1]

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1 *T (CA572/2020) v R* [2021] NZCA 374 (Brown, Brewer and Davison JJ) [CA judgment].

Procedural background

[2] Mr T was initially convicted in 2016 but a retrial was ordered by the Court of Appeal.[2] Mr Arman was Mr T's counsel for that appeal and he remained counsel for the retrial, which took place in February 2018.

[3] In his first trial, Mr T elected to call and give evidence.[3] At the retrial, Mr Arman advised Mr T against giving evidence at trial and he accepted that advice.

[4] Mr T was found guilty at the retrial and sentenced to a total of 16 years and 10 months' imprisonment with a 50 per cent minimum period of imprisonment.[4]

[5] Mr T lodged an appeal against conviction in the Court of Appeal. By this time, Mr Arman had been struck off as a barrister and solicitor and could no longer be located.[5] The Court of Appeal ultimately found Mr Arman's input was not necessary for the purposes of the appeal and that none of the alleged errors of counsel would have affected the outcome of the trial and thus did not lead to a miscarriage of justice.[6]

Grounds of application for leave

[6] Mr T alleges failings by Mr Arman and by the trial judge. These are essentially the same grounds he raised in the Court of Appeal. Mr T submits that the Court of Appeal erred by not finding they resulted in a miscarriage of justice.

[7] With regard to the decision not to give evidence, Mr T said in an affidavit filed in the Court of Appeal that he did "not remember *much* of [former counsel's] advice to him" (emphasis added). In another affidavit, Mr T said that Mr Arman:

> …referred to when I gave evidence at the first trial and said it didn't really go well and that talking was not my strength. He advised me against giving evidence. I trusted him and that's why I didn't give evidence.

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2 The conviction was quashed in relation to a failure to give a majority verdict direction to the jury: see *T v R* [2017] NZCA 469 (Gilbert, Venning and Wylie JJ).
3 Mr Arman had not been Mr T's counsel in the first trial.
4 CA judgment, above n 1, at [13].
5 At [8].
6 At [53].

Court of Appeal judgment

[8] The Court of Appeal noted that there were two issues raised with regard to trial counsel:

(a) alleged inadequate advice about giving evidence at trial; and

(b) failure to call medical evidence and family witnesses.

[9] The Court of Appeal considered that the outcome of the trial was unaffected because the advice of counsel was reasonable in the circumstances.[7] The Court noted the following factors in support of this conclusion:

(a) Mr Arman had significant knowledge of Mr T's case, having successfully conducted his appeal. This would have included a well-informed view on the wisdom of Mr T giving evidence. Mr T's credibility had been strongly criticised by the prosecutor in the first trial, with Mr T being described as an "extraordinarily uncompelling witness" with an account that "defied belief". [8]

(b) Mr T had been through the trial process before and had already had the advantages and benefits explained and would have been aware of them. He confirmed he was aware the decision was his alone to make.[9]

(c) There was nothing to be added by giving evidence at the retrial, given his position was that the offending never happened. In that first trial, the jury rejected Mr T's account, so it can be surmised Mr Arman's advice and Mr T's acceptance of this advice was informed by this.[10]

[10] In relation to the failure to call expert medical evidence, the Court was also satisfied that this did not give rise to a real risk that the outcome of the trial was

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7 At [42].
8 At [39].
9 At [40]. We also note the evidence referred to at [7] above where Mr T admitted at least remembering some of what previous counsel had advised him.
10 At [41]. See Mr T's confirming comment set out at [7] of this judgment.

affected because the proposed evidence neither "improved or advanced" the defence case.[11]

[11] As to the issue of calling family witnesses, it appears Mr T had not instructed Mr Arman to do so, but in any event it would have made no difference to the outcome as the evidence, even if accepted, did not remove the opportunity to offend.[12]

[12] The Court of Appeal also rejected the submission about judicial error. Mr T submitted that some of the evidence given by the complainant's mother at trial created the impression that she thought her daughter was telling the truth and therefore that the trial judge should have given a direction to the jury specifically addressing that evidence. The Court of Appeal noted that, as a prosecution witness, the jury were likely to infer that she believed her daughter and that this was supported by her actions in taking her daughter to the police to make a complaint. In any event, clear directions were given by the judge that it was for the jury alone to determine if the complainant was telling the truth.[13]

Our assessment

[13] The grounds Mr T seeks to argue relate to the circumstances of his particular case and therefore raise no matters of general or public importance.[14] Further, nothing raised indicates that the Court of Appeal's analysis was incorrect. This means that there is no risk of a miscarriage of justice.[15]

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent

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11 At [45]. Indeed, the Court of Appeal noted there was a greater risk to Mr T because the proposed medical expert was of the view the scarring could not have been caused by congenital conditions, therefore leaving only two possible causes: the scarring resulting from injury (giving weight to a sexual assault having occurred) or from a skin condition.

12 At [48].

13 At [61]–[62].

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

15 Section 74(2)(b).