

**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 O AOTEAROA**

**SC 69/2023  
[2023] NZSC 166**

BETWEEN H (SC 69/2023)  
Applicant

AND THE KING  
Respondent

Court: Glazebrook and Kós JJ

Counsel: W C Pyke for Applicant  
Z R Hamill for Respondent

Judgment: 20 December 2023

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**JUDGMENT OF THE COURT**

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- 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**

[1] The applicant was convicted following a jury trial of three charges of indecent assault on the complainant, a young person under 16 years, three charges of sexual

violation by unlawful sexual connection, and two charges of rape. He was sentenced to 13 years' imprisonment.<sup>1</sup> His appeal to the Court of Appeal failed.<sup>2</sup>

[2] He now seeks leave to appeal to this Court. The sole issue raised is whether the trial Judge should have given the jury a reliability warning pursuant to s 122(2)(c) of the Evidence Act 2006.

[3] The Judge had given a standard direction to the jury on credibility and reliability of witnesses generally. He did not give a particular direction under s 122(2)(c) as to caution being necessary before accepting the complainant's evidence because she may have had a motive to give false evidence against the applicant. The Judge had however outlined the challenges made by the defence to her evidence (the central defence being that the claims of offending were themselves fabricated). No issue is taken with the adequacy of the summing up, apart from the omission of a s 122(2)(c) caution.

### **Extension of time to apply for leave to appeal**

[4] The applicant's application was out of time by six weeks due to difficulties with prison correspondence processes and the absence of counsel. The respondent did not oppose an extension being granted. Extension of time to apply for leave to appeal is therefore granted.

### **Analysis**

[5] The trial turned on the credibility of the complainant. The jury was required to consider direct challenges to her evidence of the alleged offending (there being little corroborative evidence), her two written "retractions" (one of which she said was made under duress, with the other a fabrication) and communications to members of the applicant's family in which she was said to have retracted her allegations and apologised for making the complaints (communications which she said were fabrications). Each of these points of challenge were material to the complainant's

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<sup>1</sup> *R v [H]* [2022] NZDC 651 (Judge Earwaker). The applicant's name was anonymised in the Court of Appeal, despite suppression not being ordered, to protect the identity of the complainant. We continue that approach here.

<sup>2</sup> *H (CA225/2022) v R* [2023] NZCA 83 (Gilbert, Ellis and Davison JJ) [CA judgment].

credibility in relation to the offending alleged. As counsel for the applicant acknowledged, this evidence, in addition to that relating directly to the offending, put the complainant's reliability and credibility in plain issue. In convicting the applicant, the jury must have accepted the complainant's evidence of the offending, and most or all of her evidence on what occurred thereafter. Likewise, they must have disbelieved the contrary evidence given by the applicant and most or all of that given by other members of the applicant's family as to what occurred thereafter.

[6] Given the complainant's credibility was the dominant issue at trial, we do not see the omission of a s 122(2)(c) caution as prejudicial, such that a miscarriage of justice may have arisen.<sup>3</sup> The jury, properly directed as to the onus and burden of proof lying on the Crown, could have been in no doubt they needed to be sure the complainant's evidence as to the offending was truthful. This was not a case in which the complainant's motivations to give untruthful evidence were obscure, such that a warning to be cautious in becoming sure as to the truth of her evidence of offending was necessary. And, as the Court of Appeal observed, the giving of a s 122(2)(c) caution in relation to the complainant's evidence would likely have confused the jury, suggesting a judicial view on her credibility.<sup>4</sup> This Court recently reconsidered the related position regarding warnings under s 122(2)(e) in *R (SC 78/2018) v R*.<sup>5</sup> The unusual factual circumstances of this case do not however make it an appropriate vehicle to consider wider issues of principle as to when a s 122(2)(c) caution should be given.<sup>6</sup>

## **Result**

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

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

Solicitors:

Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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<sup>3</sup> Senior Courts Act 2016, s 74(2)(b).

<sup>4</sup> CA judgment, above n 2, at [49].

<sup>5</sup> *R (SC 78/2018) v R* [2023] NZSC 132.

<sup>6</sup> Senior Courts Act, s 74(2)(a).

