

**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: COURT OF APPEAL ORDER EXTENDING THE HIGH COURT INTERIM ORDER SUPPRESSING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE APPLICANT UNTIL 30 MARCH 2023 ([2023] NZCA 56).**

**IN THE SUPREME COURT OF NEW ZEALAND**

**I TE KŌTI MANA NUI O AOTEAROA**

**SC 19/2023  
[2023] NZSC 24**

BETWEEN JAMES HAY WALLACE  
Applicant

AND THE KING  
Respondent

Court: Glazebrook, Williams and Kós JJ

Counsel: D P H Jones KC for Applicant  
M J Lillico for Respondent

Judgment: 21 March 2023

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**JUDGMENT OF THE COURT**

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**A The application for leave to appeal is dismissed.**

**B The application for bail is dismissed.**

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**REASONS**

[1] The applicant, Sir James Wallace, was sentenced to two years four months imprisonment, having been found guilty by a jury of two charges of attempting to dissuade the complainant, H, from pursuing his complaint, and three charges of

indecent assault.<sup>1</sup> The assaults were against three different complainants of whom H was the most recent.

[2] The applicant seeks leave to appeal against conviction and sentence. He also seeks bail pending this Court's consideration of his appeal, should leave be granted.

### **Conviction appeal**

[3] The proposed conviction appeal advances several possible grounds, but the only one of real substance relates to the effect of a s 9 Evidence Act 2006 admission of facts relevant to the indecent assault of H.

### **Background**

[4] H was staying in the staff quarters at the applicant's home on the night in question. H had contracted food poisoning, was nauseous and went to bed. It is common ground that in the small hours, the applicant went into the complainant's room wearing only his underwear and left around 16 minutes later. The applicant says he went there out of concern for the complainant. The complainant says the applicant got into bed with him and indecently assaulted him. The issue is timing. H's evidence was that while the applicant was assaulting him in bed, he (H) surreptitiously phoned the house manager (S) to get help. According to S's verified phone data, that call was made at 2.29 am.

[5] Video footage retrieved from the house surveillance system showed the applicant entering the staff quarters where H's room was located. The relevant footage was time stamped 1.31 am. It showed he left around 1.47 am. The parties agreed a joint statement of agreed facts under s 9(2) and (3) of the Evidence Act. This accepted that the time stamp should be adjusted to take account of daylight saving. It provided: "The time stamp recorded on the CCTV footage is incorrect. The correct time is one hour later than the time shown on the footage."

[6] This adjustment suggested the applicant entered the staff quarters area at 2.31 am and left at 2.47 am. Assuming the time stamp as adjusted was accurate, and

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<sup>1</sup> *R v Wallace* [2021] NZHC 1213 (Venning J).

the jury accepted it as such, this meant the complainant's evidence about the applicant being in bed with him when he made the call could not be correct, the call having been made at 2.29 am.

[7] Immediately before the High Court Judge summed up to the jury, the applicant brought a s 147 Criminal Procedure Act 2011 application relying on this timing mismatch. The application was dismissed. The Judge's starting point was that the timing of the phone call was not an element of the offence that the Crown had to prove. He then reasoned:<sup>2</sup>

There are at least two possible explanations for the disconnect between the times recorded on [S's] phone and the time stamp on the CCTV still. While it is an agreed fact that the correct time on the CCTV footage is one-hour later, as was confirmed in the evidence to the jury, that was to take account of the daylight saving adjustment. There remains the possibility that the time stamp is inaccurate; there is no direct evidence about that. It is also possible that given his distressed state, [H] was wrong about when he tried to call [S].

### **Court of Appeal**

[8] In the appeal to the Court of Appeal, the Crown said it had made a mistake in the s 9 statement.<sup>3</sup> It sought to adduce an affidavit by the member of the applicant's staff who had extracted the footage from the surveillance system. The staff member deposed that in fact the time stamp was 50 minutes slow, not one hour. This would have had the applicant entering the staff quarters at 2.21 am, eight minutes before H's phone call. In cross examination however, the staff member further adjusted the timing to 43 minutes slow. 2.21 am would have fitted perfectly with the complainant's narrative, but 2.14 am would have seen H phoning S just as the footage showed the applicant leaving the staff quarters.

[9] The Court of Appeal refused to admit the affidavit because it was not definitive as to timing and so could not meet the cogency test. Like the trial Judge, the Court held that since the timing of the phone call was not an element of the offence, the jury could have concluded that H was mistaken or lying when he said he called S while the applicant was in bed with him. In any event, there were other indicators of guilt:

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<sup>2</sup> *R v W* [2021] NZHC 646 at [14].

<sup>3</sup> *Wallace v R* [2023] NZCA 6 (Collins, Ellis and Dunningham JJ).

opportunity (the applicant admitted he was in the room), propensity (the other two indecent assaults against different complainants), and the fact that the complainant immediately complained to S and then soon after to doctors and the police.

### **Applicant's submission**

[10] The essence of the applicant's case in relation to timing is that the alternative route to conviction proposed by the Court of Appeal had an air of artificiality. He says that the Crown's closing at trial relied heavily on the coincidence between the distressed phone call and the applicant's presence in the room as confirming the complainant's story.<sup>4</sup> It is, the applicant submits, quite unrealistic, in light of the way the Crown pitched its case, to suggest the jury could have unravelled evidence of the phone call from the assault itself; and disbelieved the former while believing the latter.

### **Analysis**

[11] We accept that Crown counsel did focus in closing on the timing of the phone call as confirming H's account. But defence counsel pointed out the timing difficulties that created and, having dismissed the s 147 application, the trial Judge drew the jury's attention to the inconsistency between the CCTV time stamp and the time of the phone call. He directed that this was something the jury would "need to consider carefully" in the context of the wider body of circumstantial evidence. The jury may have rejected the timestamp evidence as unreliable because it was so inconsistent with other evidence they accepted, or they may simply have concluded that H was lying or mistaken about when he made the call. Either way, we do not think it is genuinely arguable that the adjusted time stamp neutralises all other contextual factors identified by the Court of Appeal, including H's testimony about the assault and the circumstantial evidence tending to support it. The circumstantial evidence included the propensity evidence, the fact that the applicant admitted being in H's room in his underwear and the complaint H made to S shortly thereafter.

[12] We are satisfied that this ground is essentially a factual challenge that does not give rise to a question of general or public importance, and we see no risk that justice

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<sup>4</sup> Defence counsel made much of this in closing, so it was squarely before the jury.

may have miscarried.<sup>5</sup> As to the other conviction grounds, we are not satisfied that they have sufficient prospects of success to warrant the grant of leave.

### **Sentence appeal**

[13] The sentence appeal challenges the magnitude of the uplift for the three indecent assault charges, the effect of which was to take away the possibility of home detention.

[14] The starting point for all charges was set at five years' imprisonment, made up of three years six months' for the two attempts to dissuade and 18 months' for the indecent assaults. The Judge then considered the totality and adjusted the starting point to four years, three months. That was reduced by approximately 45 per cent to take account of the applicant's age, contribution to society and health needs; leaving an end sentence of two years, four months.

[15] We do not see that sentence or the component relating to the indecent assaults as other than orthodox. There is no appearance of miscarriage.<sup>6</sup>

### **Conclusions**

[16] The application for leave to appeal against conviction and sentence is dismissed. As a consequence, the application for bail is also dismissed.

### **Suppression**

[17] The Court of Appeal's interim suppression orders will lapse on 30 March 2023. After that date this judgment can be published in full unless, before that date, Sir James or McLean's Mansion Charitable Trust, the connected party that made a separate

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<sup>5</sup> Senior Courts Act 2016, s 74.

<sup>6</sup> Senior Courts Act, s 74.

application to the Court of Appeal, file an application for leave to appeal to this Court against the Court of Appeal's judgment on name suppression.<sup>7</sup>

Solicitors:

Doug Cowan, Auckland for Applicant

Crown Law Office, Wellington for Respondent

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<sup>7</sup> *Wallace v R* [2023] NZCA 56.