

ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

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>

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 40/2023
[2023] NZSC 63**

BETWEEN	TAMA TOKOA NOOROA Applicant
AND	THE KING Respondent

Court: O'Regan, Ellen France and Kós JJ

Counsel: S K Green for Applicant
L J Sullivan for Respondent

Judgment: 26 May 2023

JUDGMENT OF THE COURT

- A The application for leave to appeal is dismissed.**
- B Order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of trial. Publication in law report or law digest is permitted.**
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REASONS

[1] The applicant is due to stand trial for one charge of indecent assault and one charge of sexual violation by unlawful sexual connection. The Crown case is that, after the alleged offending, the complainant told a third person, A, about what had occurred. A informed his wife, B, a relative of the applicant. A, B and the complainant confronted the applicant, with A covertly recording the conversation. During a heated exchange, the applicant made several statements against interest. The police interviewed the applicant that same day. He admitted to touching the complainant's penis over the complainant's clothes. He denied carrying out any other sexual touching.

Lower Court decisions

[2] The Crown applied to admit the recording in evidence. Following a pre-trial hearing in the District Court, Judge Forrest declined the application.¹ She found that the applicant's statements were unreliable and that the recording should be excluded under s 28 of the Evidence Act 2006. The exchange involved three people challenging the applicant (including two older relatives) who expressed anger in extreme terms and made threats against the applicant. The intimidation likely felt by the applicant from the outset meant he may have made comments to appease those confronting him or as an attempt to remove himself from the situation.² For these same reasons the Judge also said that, if it had been necessary for her to decide the point, she would have excluded the evidence under s 30 of the Evidence Act as being unfairly obtained.³

[3] The Crown appealed to the Court of Appeal. The Court allowed the appeal and found the recording to be admissible.⁴ In holding that the applicant's statements were not unreliable, the Court made five points. First, even though the exchange was emotionally charged, this would not have affected the applicant to such a degree as to undermine the reliability of his subsequent statements. Secondly, several key statements against interest occurred before anything that might amount to a threat. Thirdly, the applicant offered additional details about the alleged offending without

¹ *New Zealand Police v Nooroa* [2022] NZDC 16318 (Judge Forrest).

² At [25]–[27].

³ At [28]–[29].

⁴ *R v Nooroa* [2023] NZCA 96 (Katz, Whata and Davison JJ).

being prompted. Fourthly, there was nothing before the Court to suggest that the applicant made any of his statements because of a power imbalance or fear of actual harm. Fifthly, the threats made to the applicant were entirely hypothetical in nature and did not lead to any materially more significant admission.⁵ The Court said that this also inevitably meant that the statements were not unfairly obtained.⁶

Submissions

[4] The applicant now applies to this Court for leave to appeal. He submits that no prior decisions fit squarely with the facts of this case, namely, a covert recording of a defendant made by a layperson who is not an agent of the state. As a result, the protections of the New Zealand Bill of Rights Act 1990 and s 30(6) of the Evidence Act do not apply.⁷ He submits that it is increasingly common for laypersons to covertly record defendants on their mobile phones. How ss 28 and 30 of the Evidence Act apply in these situations is therefore a matter of public importance.⁸

[5] The applicant also argues that it is necessary for this Court to grant leave to appeal to prevent a substantial miscarriage of justice.⁹ The applicant makes a range of submissions on this point, including an argument that the Court of Appeal made factual errors. Whether the recording shows the applicant admitting to the second charge is contested. Questions are raised as to who must discharge the onus of proving that the statements are unreliable and whether the Court of Appeal was permitted to reassess the evidence without first finding fault with the District Court's assessment of the law. Given the central importance of the evidence to both sides, he argues that it is necessary for this Court to grant leave to appeal pre-trial.

Our assessment

[6] This Court must not grant leave to appeal a pre-trial evidential ruling of the Court of Appeal unless it is satisfied, in addition to the ordinary criteria for leave, that

⁵ At [32]–[38].

⁶ At [48].

⁷ Section 30(6) of the Evidence Act 2006 states that in assessing whether a statement has been unfairly obtained by the police, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

⁸ Senior Courts Act 2016, s 74(2)(a).

⁹ Section 74(2)(b).

it is necessary in the interests of justice to determine the proposed appeal before the proceeding is concluded.¹⁰ This is a high threshold, not least because the point may still be taken after conviction (if that occurs) and corrected (if that is required) in light of the whole trial record.¹¹

[7] We do not consider the threshold described in [6] is met in this case. The covert recording of the applicant's statements is by no means a novel point.¹² The balance of the applicant's proposed appeal is, in essence, a challenge to the Court of Appeal's factual assessment. The applicant may appeal, and seek leave to appeal here, if convicted. In that event, this Court would have the benefit of all of the evidence at trial. It is not appropriate to give leave to a pre-trial appeal on this basis.¹³ Nor is there a risk of a miscarriage of justice if this Court does not hear the appeal at this stage in the proceeding.

Result

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

[9] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceedings (including the result) in news media or on the internet or other publicly available database until final disposition of the trial. Publication in law report or law digest is permitted.

Solicitors:
Crown Law Office, Wellington for Respondent

¹⁰ Section 74(2) and (4); and *Hamed v R* [2011] NZSC 27, [2011] 3 NZLR 725 at [9].

¹¹ *Hamed v R*, above n 10, at [13]; *Bailey v R* [2017] NZSC 103 at [4]; and *Clark v R* [2021] NZSC 84 at [7].

¹² See, for example, *K v R* [2014] NZSC 10. The issues raised in this case are similar, albeit *K v R* involving some state agency (the complainant made the recording at the suggestion of the police).

¹³ *Morgan v R* [2015] NZSC 179 at [6].