

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 COMPLAINANT 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 6/2024
[2024] NZSC 45**

BETWEEN B (SC 6/2024)
 Applicant

AND THE KING
 Respondent

Court: Glazebrook, Ellen France and Kós JJ

Counsel: S J Gray and S C Shao for Applicant
 J M Pridgeon for Respondent

Judgment: 2 May 2024

JUDGMENT OF THE COURT

- 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.**
-

REASONS

Introduction

[1] The applicant was found guilty after trial on several charges of sexual assault

and indecency against H.¹ His conviction appeal was dismissed by the Court of Appeal.² He has filed an application for leave to appeal to this Court on the grounds that evidence about H's behavioural changes over the offending period was not admissible. As this evidence was adduced at trial, he says that a miscarriage of justice has resulted because the trial Judge did not direct the jury on the proper use of this evidence.

Background

[2] The facts are set out in the decision of the Court of Appeal.³ For present purposes it is helpful to say a little about the trial.

[3] At trial, the Crown relied on the evidence of the following witnesses: H; H's friend (to whom H first disclosed what was taking place); a relative of H; and the officer in charge of the case. The Court of Appeal observed that in her evidence-in-chief, H said the offending caused her to become "pretty depressed about life".⁴ As summarised by the Court of Appeal, in her evidence H's friend said that talking about the offending "had lifted a weight" off H's shoulders "but she continued to go off the rails a bit, hanging out with the wrong crowd, drinking and sneaking out".⁵

[4] The applicant's defence was that some of the incidents giving rise to his charges had not taken place; had not taken place in the way H had described; or had been misinterpreted by H. The applicant gave evidence to this effect. The defence also called a relative of the applicant who said they were with the applicant when the incident giving rise to the first of the charges was said to have occurred.

[5] Part of the evidence for the defence was that H's allegations were explained by the fact that H had become depressed in her teenage years, and that there was conflict between the applicant and H over her boyfriend's behaviour. This formed part of the applicant's evidence and that of another defence witness, a relative of H. The

¹ H was aged between 13 and 18 over the years of the alleged offending.

² *B (CA588/2021) v R* [2023] NZCA 655 (Miller, Brewer and Osborne JJ) [CA judgment].

³ At [4]–[12].

⁴ See CA judgment, above n 2, at [18].

⁵ At [18].

Court of Appeal noted that in cross-examination, the applicant denied he was the cause of changes in H's behaviour over the relevant period.

[6] Finally, the Court of Appeal said that while, in closing, the prosecutor made some reference to the evidence of H's behavioural changes, defence counsel made no reference to it.⁶

The proposed appeal

[7] In making the argument that the evidence of behavioural change was inadmissible, the applicant would reprise the argument made in the Court of Appeal on this topic. In concluding that the evidence was admissible as part of the context of the offending, the Court of Appeal made the following points:

- (a) First, there was “not a great deal of evidence” about behavioural changes.⁷
- (b) Second, the applicant sought to explain his actions by referring to H's behavioural issues. For example, the Court said that in his interview with the police the applicant explained some of his behaviour (such as telling H she was “sexy and beautiful”) as an attempt to boost her confidence because she was down about herself and having trouble at school.⁸

[8] Against this background, the Court of Appeal said this:

[24] The evidence of behavioural change was admissible in this case, as part of the context. It also responded to the appellant's case that the complainant had continued willingly to associate with him. But it did not assume prominence. Nor was it likely to lie beyond the jury's experience, so as to call for expert evidence. The alternative explanation — essentially, she was a teenager — was squarely before them.

[9] The Court of Appeal also addressed the argument the applicant wishes to make as to the need for a direction to the jury about the proper use to be made of this

⁶ At [20] – [21].

⁷ At [18].

⁸ At [18].

evidence. The Court said that a direction cautioning the jury that there might be other explanations for H’s behaviour was “desirable but not essential in this case”.⁹ That was because the point was obvious and there was no real risk that the omission of a direction had affected the outcome.

Our assessment

[10] The principles applicable to behavioural evidence of this nature were discussed in *R (SC 1/2019) v R* and are not challenged here.¹⁰ Rather, resolution of the proposed appeal would essentially raise questions about the Court of Appeal’s assessment of the facts. No question of general or public importance accordingly arises.¹¹ Nor does anything raised by the applicant give rise to the appearance of a miscarriage of justice in the Court of Appeal’s assessment.¹²

Result

[11] The application for leave was filed out of time but the delay was minimal. The application for an extension of time to apply for leave to appeal is granted. The application for leave to appeal is dismissed.

Solicitors:

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

⁹ At [25].

¹⁰ *R (SC 1/2019) v R* [2019] NZSC 87, [2019] 1 NZLR 693.

¹¹ Senior Courts Act 2016, s 74(2)(a).

¹² Senior Courts Act, s 74(2)(b).