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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 106/2023
[2024] NZSC 8**

BETWEEN	AARON LEE WALLACE Applicant
AND	THE KING Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	W C Pyke for Applicant B C L Charmley for Respondent
Judgment:	9 February 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] In February 2022, following a retrial before Judge Greig and a jury, Mr Wallace was convicted of charges of sexual violation, kidnapping and male assaults female, all relating to the same complainant.¹

[2] His appeal against conviction was dismissed by the Court of Appeal.² Mr Wallace seeks leave to appeal against that decision.

¹ Crimes Act 1961, ss 128(1)(b), 209 and 194(b) respectively.

² *Wallace v R* [2023] NZCA 422 (French, Ellis and Churchman JJ) [CA judgment].

Grounds of proposed appeal

[3] Mr Wallace’s application for leave to appeal relates to two rulings made by the trial Judge. The first directed that unvaccinated members of the jury pool would not be allowed in the courtroom. One juror was turned away.³ The second was that the unvaccinated complainant wear a mask and give evidence behind a Perspex screen.

[4] In essence, he wishes to argue with regard to the first ruling that the trial Judge had no power to make the ruling and that the illegality of the process was fundamental. It deprived the trial Court of its jurisdiction to try the applicant, rendering the trial a nullity or unfair. On the second ruling he wishes to argue that this gave rise to a miscarriage of justice.

[5] The rulings were given in the context of the COVID-19 Protection Framework (known as the traffic light system) that had been put in place on 2 December 2021.⁴ On 23 January 2022 New Zealand’s first community cases of the Omicron variant of COVID-19 were confirmed and the country moved to the Red setting at 11.59 pm that day.⁵ Mr Wallace’s retrial ran from 8–15 February 2022.

[6] On 8 February there were 202 new community cases of Omicron, although the numbers increased exponentially over the next three weeks.⁶ Relevant too is that, in March 2020, an Epidemic Notice under s 5 of the Epidemic Preparedness Act 2006 (EPA) had been issued and this remained in force. While an epidemic notice is in force, ss 24 and 24A of the EPA permit judges and Heads of Bench to modify the rules of court.⁷

[7] We also note that, subsequent to Mr Wallace’s retrial, the COVID-19 Response (Courts Safety) Legislation Act 2022 (Courts Safety Act) was passed. The purpose was to “remove current legal barriers facing the judiciary ... when addressing health

³ At [110] per Ellis J.

⁴ At [18] per Ellis J.

⁵ At [20] per Ellis J.

⁶ At [30] per Ellis J.

⁷ At [87]–[88] per Ellis J.

and safety risks in the courts”.⁸ Modifications to jury requirements were allowed under the Courts Safety Act.⁹

Court of Appeal decision

[8] The Court of Appeal was unanimous that the requirement for the complainant to wear a mask did not cause a miscarriage of justice.¹⁰ This was on the basis that jurors are routinely warned that demeanour is no longer regarded as a good indicator of credibility and, in any event, there were a number of aspects of demeanour (such as tone of voice or body language) that would still have been discernible.¹¹ Further, Mr Wallace’s then counsel had been consulted and had expressed no objection.¹² Trial counsel was in a good position to assess any possible impact having cross-examined the complainant at the first trial.¹³

[9] With regard to the first ruling, the Court of Appeal was split on the issue of the legality of the direction. Ellis J held it was without lawful basis,¹⁴ whereas (but without expressing a final view) French and Churchman JJ pointed to s 22 of the Juries Act 1981 and the inherent power to control and manage a trial and observed it would be odd if such powers could not be used to send a juror away because of health and safety concerns.¹⁵ The Court was unanimous, however, that the trial was not a nullity and was not unfair.¹⁶

[10] The Court considered that it was not possible to conclude that the absence of the one juror on the panel would have made any difference.¹⁷ Nor was it possible to conclude there was any effect on the jury’s impartiality or the fairness of the trial.¹⁸

⁸ (10 March 2022) 757 NZPD (COVID-19 Response (Courts Safety) Legislation Bill – First Reading, David Parker) as cited in CA judgment, above n 2, at [93] per Ellis J.

⁹ See CA judgment, above n 2, at [94]–[97] per Ellis J.

¹⁰ At [55] per Ellis J and [158] per French and Churchman JJ. The Court noted that the Judge had accepted the Crown’s submissions that there were practical reasons for the complainant not being able to give evidence via video link: at [52] per Ellis J.

¹¹ At [53] per Ellis J.

¹² At [54] per Ellis J.

¹³ At [54] per Ellis J.

¹⁴ At [111]–[138] per Ellis J.

¹⁵ At [159]–[166] per French and Churchman JJ.

¹⁶ At [157] per Ellis J and [167] per French and Churchman JJ.

¹⁷ At [141] per Ellis J.

¹⁸ At [143] per Ellis J.

[11] The Court said that the ruling (even if unlawful) resulted in only one juror panellist being turned away and that person may or may not have been selected for the jury.¹⁹ The Court considered that it could not be Parliament's intention that trial by such a panel would be invalid.²⁰

Our assessment

[12] We do not consider it in the interests of justice to grant the application for leave to appeal.²¹ For essentially the same reasons as the Court of Appeal we do not consider there is a risk of a miscarriage of justice arising out of either ruling.

[13] Even assuming the first ruling was unlawful, the prospects of success of any argument that the trial was unfair or invalid do not justify a second appeal.²² Further, we do not consider it raises any issue of public or general importance in light of the fact that the COVID-19 Protection Framework at issue is no longer in force. Nor are there currently any COVID-19 related measures currently in place in the courts.

Result

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

Solicitors:

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

¹⁹ At [153] per Ellis J.

²⁰ At [153] per Ellis J.

²¹ Senior Courts Act 2016, s 74(1).

²² *LFDB v SM* [2014] NZSC 197, (2014) 22 PRNZ 262 at 21.