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 93/2025
[2025] NZSC 166

BETWEEN	KUKANENTHIRAN KANDAIAH Applicant
AND	THE KING Respondent

Court: Glazebrook, Kós and Miller JJ

Counsel: N P Chisnall KC for Applicant
B J Thompson and E P C Duckett for Respondent

Judgment: 25 November 2025

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted by a jury of two charges of rape, one representative charge of indecent assault and one charge of attempting to pervert the course of justice. He was sentenced to nine years' imprisonment.[1] His appeal against conviction failed.[2]

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1 *R v Kandaiah* [2024] NZDC 8854 (Judge Bonnar KC).
2 *Kandaiah v R* [2025] NZCA 359 (Palmer, Dunningham and Grice JJ) [CA judgment].

[2] He seeks leave to appeal to this Court, contending:

(a) the prosecutor departed repeatedly from the prosecutorial duty of fairness, using excessively emotive language and exhorting the jury to analyse the case empathetically rather than as if they were "in a laboratory" (Primary Ground);[3]

(b) the Judge failed to give a behavioural change direction in response to evidence by the complainant and her husband about her attitude to intimacy following the first alleged rape (Ground 2); and

(c) rebuttal evidence as to the date Uber drivers were required to hold a passenger endorsement was wrongly admitted and used unfairly by the prosecution in closing (Ground 3).

[3] These grounds essentially replicate those advanced in the Court of Appeal.

Our assessment

[4] We do not consider the criteria for leave to appeal are made out.[4] No matter of general or public importance is raised by this application, which turns on the application of well-established principles to the facts of the case.[5] Nor do we find a substantial miscarriage of justice may occur unless the proposed appeal is heard.[6]

[5] As to the Primary Ground, we consider the Court of Appeal was correct to find the prosecutor's closing address, in some respects, departed from the prosecutorial duty of fairness summarised in *Porter v R*.[7] However, as this Court has held in *R v Stewart*, for such breach to then cause an unfair trial depends on its scale and impact, and whether the appellate court is left with no choice but to condemn the trial as unfair and quash the conviction as unsafe.[8] Reading the closing address as a whole

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3 The passages complained of are set out at [16].
4 Senior Courts Act 2016, s 74.
5 Section 74(2)(a).
6 Section 74(2)(b).
7 CA judgment, above n 2, at [29]. See *Porter v R* [2015] NZCA 448 at [11].
8 *R v Stewart* [2009] NZSC 53, [2009] 3 NZLR 425 at [32] citing with approval *Randall v The Queen* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].

and in conjunction with the defence closing and the Judge's summing up, we consider that threshold not met in this case. Nor do we consider the prosecutor's approach to have caused a possible miscarriage, and we find no error in the Court of Appeal's approach.[9]

[6] Turning now to Ground 2, this Court said in *R v R* that behavioural change evidence engages a need for caution in judicial direction and, particularly where it is "front and centre in the trial", a judge should consider whether to direct the jury not to jump from the evidence of behavioural change to the conclusion that the offending must have occurred.[10] That is not this case however: the point barely featured in the prosecutor's closing address and was not mentioned by defence counsel or by the Judge in summing up. It formed a very minor part of the evidence of the complainant and her husband and had no independent force (its significance, if any, depending on the jury's overall credibility finding as to those two witnesses). We do not consider the absence of warning in this respect causative of possible miscarriage.

[7] We may also set aside Ground 3: this evidence (introduced as an agreed fact) was only marginally relevant; its inclusion (and the very modest use made of it by the prosecution) cannot have been causative of possible miscarriage.

[8] For these reasons, it is not necessary in the interests of justice for this Court to hear this proposed appeal, and the application must therefore be dismissed.[11]

Result

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

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

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9 CA judgment, above n 2, at [29]–[40].
10 *R v R* [2019] NZSC 87, [2019] 1 NZLR 693 at [47].
11 Senior Courts Act, s 74(1).