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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 177/2025
[2026] NZSC 131**

BETWEEN	AMIR HOSHANG MOHEBBI Applicant
AND	THE KING Respondent

Court:	Ellen France, Williams and Kós JJ
Counsel:	D J Dufty for Applicant P D Marshall and E P C Duckett for Respondent
Judgment:	14 September 2026

JUDGMENT OF THE COURT

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| A | The application for an extension of time to file the notice of application for leave to appeal is granted. |
| B | The application for leave to appeal is dismissed. |
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REASONS

Introduction

[1] The applicant was found guilty following a jury trial of charges of threatening to kill, indecent assault and three charges of sexual violation, including by rape. All of the charges related to the complainant, Z. The applicant appealed unsuccessfully

against conviction to the Court of Appeal.¹ He now seeks leave to appeal to this Court. The proposed appeal would focus on whether the Court of Appeal was right to conclude that the exclusion of improperly obtained DNA evidence would have been disproportionate in terms of s 30 of the Evidence Act 2006.

Background

[2] The relevant facts and the procedural background are set out in detail in the Court of Appeal judgment.² The key points are as follows.

[3] The incidents giving rise to the charges took place on 27 June 2021. The complainant became very intoxicated after attending a series of social gatherings. After leaving the last of those alone, the complainant ended up in the bedroom in Mr Mohebbi's apartment. Mr Mohebbi was not known to her. The complainant's first recollection was of Mr Mohebbi standing over her, with another male that she did not know standing at the door. When she regained consciousness a second time, she said she was naked with the applicant performing a range of intrusive sexual acts on her before finally raping her.

[4] The Crown case was dependent on linking semen from Z's vagina to a DNA sample taken from Mr Mohebbi and held on the DNA profile databank. Mr Mohebbi applied pre-trial to exclude the DNA evidence on the basis that the sample had been illegally obtained. Judge Sinclair agreed that the sample was improperly obtained but admitted it upon undertaking the exercise prescribed under s 30 of the Evidence Act.³ Mr Mohebbi appealed from that pre-trial decision but there was not sufficient time for the Court of Appeal to hear an appeal before the trial date in February 2025. After an unsuccessful application on behalf of Mr Mohebbi for an adjournment, the trial went ahead as scheduled.⁴

¹ *Mohebbi v R* [2025] NZCA 561 (Whata, Venning and Osborne JJ) [CA judgment]. Initially Mr Mohebbi also sought to appeal his sentence of eight years' imprisonment to the Court of Appeal, but that appeal against sentence was not pursued.

² At [2]–[9] citing *R v Mohebbi* [2025] NZDC 12966 (Judge Lummis) at [2]–[13].

³ *R v Mohebbi* [2024] NZDC 25727 (Judge Sinclair).

⁴ *R v Mohebbi* [2024] NZDC 26271 (Judge Jelaš).

[5] Mr Mohebbi gave evidence at trial. He provided an explanation for the presence of his DNA in Z's vagina, namely, that Z had given him oral sex consensually, culminating in ejaculation. He suggested that she must then have used her underwear to clean herself or masturbated resulting in a transfer of semen.

[6] The issue relating to the DNA evidence arose in this way. In 2003, Mr Mohebbi provided a voluntary DNA sample for the databank. This followed his arrest on a charge of common assault. Detective Lally undertook the taking of the sample after satisfying herself that Mr Mohebbi had a good understanding of English. Her intention was to take a voluntary sample rather than a suspect sample.⁵ However, Detective Lally gave Mr Mohebbi the DNA request form that is used for suspects, not the form used for those voluntarily providing samples for the databank. There are various differences between the form for suspect samples and that for a voluntary sample. The suspect sample form, relevantly, indicated that if the suspect refused to provide a sample, in some situations a court order could be obtained requiring a sample to be provided. The incorrect form was provided after Mr Mohebbi had agreed to provide the sample voluntarily, having been told that he was not obliged to do so.

The proposed appeal

[7] As we have said, the focus on the proposed appeal would be on the approach that was taken to the factors set out in s 30 of the Evidence Act to determine whether or not exclusion is a proportionate response where the relevant evidence is improperly obtained. In particular, the applicant wishes to challenge the assessment of the factors set out in s 30(3)(a) and (b), respectively, the seriousness of the intrusion on the right breached, and "the nature of the impropriety, in particular, whether it was deliberate, reckless or done in good faith".

[8] In terms of the seriousness of the intrusion, Mr Mohebbi focuses on aspects of the interactions with Detective Lally he submits were not factored into the equation. For example, he says Detective Lally could not remember whether she had told him that he could withdraw consent before a sample was taken; and there was no evidence

⁵ A suspect sample is one that can be used for investigatory purposes: Criminal Investigations (Bodily Samples) Act 1995, s 5.

he was told that he may want to consult with a lawyer before deciding whether to consent. Turning then to the nature of the impropriety, the applicant's argument is that Detective Lally was grossly careless essentially because she should, for one, have realised that the form provided was not the right form. Finally, the applicant says that this Court could helpfully provide more guidance as to the approach to be taken where there is no bad faith but rather carelessness or recklessness.

Our assessment

[9] The arguments on the proposed appeal would reprise those addressed in the Court of Appeal. In relation to the seriousness of the intrusion, for various reasons, the Court of Appeal found that none of the matters advanced by the applicant added to the finding of the District Court that the right involved was important and the intrusion into it serious. Those reasons included the fact that Detective Lally's contemporaneous notes recorded that she had advised Mr Mohebbi that it was his choice whether to provide a sample. Further, the Court noted that Detective Lally was not asked directly at the pre-trial hearing whether she had advised Mr Mohebbi that he could speak with a lawyer.⁶

[10] In addressing the nature of the impropriety, reflecting the factual findings made in the District Court, the Court of Appeal saw what had occurred as, at most, a case of "good faith inadvertence".⁷ The Court of Appeal said the fact this was an inadvertent mistake was a distinguishing feature from *R v Shaheed*, a decision relied on by Mr Mohebbi.⁸

[11] Nothing raised by the applicant calls into question the conclusion reached by the Court of Appeal in relation to these two factors. In terms of the seriousness of the breach, the matters the applicant wants to rely on do not materially alter the position. In any event, the intrusion was, correctly, treated as serious and a factor weighing "strongly" in favour of exclusion.⁹ As to the assessment of the nature of the impropriety, the Court of Appeal's approach turned on its acceptance of the credibility

⁶ Mr Mohebbi did not give evidence at that hearing.

⁷ CA judgment, above n 1, at [46].

⁸ *R v Shaheed* [2002] 2 NZLR 377 (CA).

⁹ CA judgment, above n 1, at [34].

findings made in the District Court. Those findings reflected the District Court's assessment of both Detective Lally's oral evidence that she did not know she was breaching Mr Mohebbi's rights and the officer's contemporaneous notes.

[12] Having addressed these two factors, the Court of Appeal then considered the other factors in s 30. The Court noted that the alleged offending was serious sexual offending as reflected in the sentence imposed. The evidence was real and inherently reliable and was essential to the prosecution case. Indeed, the Court found that without it, the prosecution would not have proceeded. The Court continued:¹⁰

[49] Given the above conclusions, particularly the nature and quality of the evidence and the seriousness of the offending, the Judge was right to conclude that in this case exclusion would have been disproportionate despite the serious breach of Mr Mohebbi's rights.

[13] Ultimately, this assessment turned on the particular facts. No question of general or public importance arises.¹¹ Nor, for the reasons given in relation to the factors on which the applicant relies, do we see an appearance of a miscarriage of justice.¹²

[14] An extension of time was granted by consent. There was a further delay after that which has been explained. A further extension of time is formally granted.

Result

[15] The application for an extension of time to file the notice of application for leave to appeal is granted.

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

Solicitors:

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

¹⁰ CA judgment, above n 1.

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

¹² Section 74(2)(b).