

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 ANY PERSON UNDER THE AGE OF 18 YEARS WHO IS A COMPLAINANT OR WHO APPEARED AS A WITNESS 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 50/2026
[2026] NZSC 137**

BETWEEN	KENT MORTLOCK FAWCETT-KAY Applicant
AND	THE KING Respondent

Court:	Williams, Kós and Cooke JJ
Counsel:	T D A Harré for Applicant K B Bell for Respondent
Judgment:	30 September 2026

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Fawcett-Kay was convicted following a jury trial in the District Court of 18 charges of sexual offending, including five age-related indecency charges and 11 sexual violation charges, all committed against the complainant when she was between

about five and 14 years old.¹ The Court of Appeal dismissed his appeal against conviction.² Mr Fawcett-Kay now applies for leave to appeal to this Court.

[2] The proposed appeal turns on three aspects of the Judge's summing up: whether the complainant had a motive to lie, how the jury should use the question trail and the relevance of the complainant's consent in relation to the age-related indecency charges. Mr Fawcett-Kay does not contest the Court of Appeal's finding that, to the extent these comments caused prejudice, that prejudice accrued to the Crown. He instead says the Court was wrong to use this finding to conclude that his trial was not unfair.³

[3] As to motive to lie, the defence case at trial was that the offending had not occurred, and the complainant had lied in her allegations against the defendant. In closing to the jury, the Crown submitted that the complainant had no reason to lie. The defence submitted in response that it was not required to identify a motive for the complainant to lie. When summing up, the trial Judge acknowledged the Crown's position on motive to lie, confirmed that there was no obligation on the defence to establish a motive, and then offered the following:

Equally though, it is possible, I only put it as high as that, that potentially it could be a case where, under the influence of alcohol at a party, wanting to get the attention of her partner, her new boyfriend, she makes an unspecified, no details, suggestion but that quickly builds through further telling to a strong sister who wants to encourage her to go to the police and she does not but the sister goes to the police and all of a sudden [the complainant] sits in front of you either choosing to remain the truthful person that she was to her partner ... or does she say to you: "Well, actually, I made it all up. It's got too serious now"?

[4] This scenario tracked the sequence of the complainant's initial disclosure of the offending. But there had been no suggestion at trial that this created a motive for the complainant to lie.

¹ See *R v Fawcett-Kay* [2025] NZDC 3205 (Judge Hix).

² *X (CA795/2024) v R* [2026] NZCA 152 (Collins, Fitzgerald and Robinson JJ) [CA judgment]. The Court of Appeal allowed Mr Fawcett-Kay's appeal against sentence, removing the minimum period of imprisonment.

³ See Criminal Procedure Act 2011, s 232(2)(c) and (4)(b).

[5] As to the use of the question trail, the trial Judge directed the jury that it was a tool with no legal status, which the jury could elect to use or not to use. The Judge nevertheless encouraged the jury to use the question trail as a guide and summed up on the individual charges by reference to it. He also later clarified that the jury needed to be satisfied each of the elements in the question trail were satisfied before reaching a guilty verdict.

[6] As to the claimed error about consent, the Judge directed the jury that the complainant's consent was not relevant for the five age-related indecency charges. He added: "She may well have consented. But because of the age issue the law says she cannot consent, consent is off the table."

[7] At the conclusion of the summing up and in the absence of the jury, the prosecutor raised concerns with the Judge about each of these directions. The suggestion of a particular motive to lie in circumstances where none was put to the complainant and the suggestion that the complainant may well have consented were said to be improper because they conveyed the Judge's view on significant factual issues in the trial. Consent was relevant to the sexual violation offending, and the prosecutor was concerned the jury might apply the Judge's direction to those charges. Finally, in relation to the use of the question trail, counsel was concerned that the Judge's direction could have confused the jury, causing them to set the useful discipline of the question trail to one side in deliberations.

[8] The prosecutor asked the Judge to recall the jury to clarify these matters. The Judge did so and gave further directions. Still not satisfied, the prosecutor then filed a formal memorandum seeking yet further clarification in relation to the same issues. The request was declined with reasons set out in a minute issued the following day.

[9] In the Court of Appeal, the applicant advanced a number of grounds, including (but not limited to) the challenges he seeks to advance in this Court in relation to the summing up. For present purposes, it is necessary only to record that the Court of Appeal acknowledged the summing up had departed from best practice in respect of

the motive to lie and question trial directions.⁴ But the Court held that, when the summing up was read as a whole, it did not have the prejudicial effects contended for, and it therefore did not render the trial unfair.⁵ The Court also considered it significant, but not determinative, that the comments favoured Mr Fawcett-Kay.⁶

Applicant's submissions

[10] Mr Fawcett-Kay submits that the Court of Appeal erred in dismissing the conviction appeal after identifying two departures from proper practice. He argues that the Court should have assessed whether those departures resulted in an objectively unfair trial, rather than whether they prejudiced him. He submits that s 232(4)(b) of the Criminal Procedure Act 2011, which relates to unfair trials, is not concerned with which party was prejudiced by the unfairness but with the integrity of the trial process. This, he submits, is consistent with ss 6 and 25(a) of the New Zealand Bill of Rights Act 1990, which require an enquiry directed at the right itself. He notes that s 25(a) also provides a right to be tried by an independent and impartial court. These qualities are said to be assessed objectively, and so it is submitted that unfairness should be assessed that way too.

[11] Mr Fawcett-Kay calls in aid earlier decisions of this Court and the Court of Appeal to the effect that, in assessing whether a trial is unfair, it is not necessary to consider whether the outcome of the trial was affected because the focus is on the right to a fair trial itself, not the guilt (or otherwise) of the accused.⁷

[12] Mr Fawcett-Kay submits that the Court of Appeal erred by offering an outcome-focused answer to a process-focused question.

[13] It is further submitted that the accepted position is that a trial will be unfair if there is a departure “so gross, or so persistent, or so prejudicial, or so irremediable” that the integrity of the trial process is compromised.⁸ The prejudice in that

⁴ See CA judgment, above n 2, at [69] and [77].

⁵ At [93].

⁶ At [94].

⁷ Mr Fawcett-Kay cites *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1; and *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315.

⁸ See CA judgment, above n 2, at [22] citing *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 and *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237.

formulation is prejudice to the trial process itself, not outcome disadvantage suffered by a party.

[14] Mr Fawcett-Kay argues that the proposed appeal merits leave because it raises a matter of general or public importance. He notes that previous decisions, including of this Court, have not settled what types of error were intended to fall into the unfair trial category.⁹

Assessment

[15] Although the issue identified by the applicant may be a matter of general or public importance, it does not arise in this case. The Court of Appeal found that, when the Judge's summing up was considered as a whole, the alleged errors, taken individually or in combination, did not cross the unfairness threshold described in *Randall v R* beyond which the integrity of the trial itself is at risk.¹⁰ As the respondent submits, that finding was not dependent on the Court's assessment as to the direction in which prejudice flowed.

[16] We see no reason to depart from the Court of Appeal's assessment in this respect. It follows that no issue of general or public importance arises, and there is no risk of a substantial miscarriage of justice if leave is declined.¹¹ It is therefore not necessary in the interests of justice for this Court to hear and determine the proposed appeal.¹²

Result

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

[18] Mr Fawcett-Kay has until now had interim name suppression pending disposition of his appeals. He sought continued name suppression if leave to appeal

⁹ Mr Fawcett-Kay again refers to *Wiley*, above n 7, and *Guy*, above n 7.

¹⁰ See CA judgment, above n 2, at [92]–[94]. See also *Randall*, above n 8, at [28].

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

¹² Section 74(1).

was granted. As leave has been declined, suppression of Mr Fawcett-Kay's name lapses with delivery of this judgment.

Solicitors:

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