

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 83/2025
[2026] NZSC 35**

BETWEEN MAX CHRISTOPHER GARDEN
Applicant

AND THE KING
Respondent

Court: Kós, Miller and Cooke JJ

Counsel: H T Young for Applicant
M J R Blaschke for Respondent

Judgment: 17 April 2026

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal from the decision of the Court of Appeal dismissing his appeal against his conviction on one charge of indecent assault.¹ The applicant was convicted following a trial before a jury and sentenced to 220 hours community work, 12 months' intensive supervision, a no-contact condition and judicial monitoring, and was required to pay \$750 in reparations.²

¹ *Garden v R* [2025] NZCA 306 (Mallon, Jagose and Grice JJ) [CA judgment].

² *R v Garden* [2023] NZDC 21984 (Judge Robinson). The sentence was also imposed concurrently for other offending.

Background

[2] The applicant followed a young, female student when she was leaving the Otago University gym, walking behind her in the street for a short distance before touching her bottom from behind with his whole hand as he walked past her. He seeks leave to bring a second appeal following his conviction on the basis that it is in the interests of justice for the Court to hear and determine the proposed appeal because it involves a matter of general or public importance, or because a substantial miscarriage of justice may otherwise occur.³ Two proposed grounds of appeal are advanced:

- (a) that he received inadequate advice in relation to his ability to change his election from trial by jury to trial by judge alone; and
- (b) that he received inadequate advice in relation to his election not to give evidence.

[3] The grounds are not identical to those advanced in the Court of Appeal, although the grounds there advanced involved criticism of his trial counsel, and both the applicant and his trial counsel gave evidence in that Court.

Assessment

[4] We do not accept that either proposed ground of appeal satisfies the criteria for leave to appeal to this Court.

[5] As to the proposed ground in relation to the election of a jury trial, the Court of Appeal accepted that the applicant had not received complete advice. The applicant elected a jury trial following advice that he could change his election at a later date. The District Court later declined an application to change the election because to do so would delay the disposition of the charges. The Court of Appeal found that the applicant was not aware that there was a risk his change in election would not be accepted if made at a later stage.⁴ The applicant wishes to argue that the

³ Senior Courts Act 2016, s 74(1) and (2)(a)–(b).

⁴ See CA judgment, above n 1, at [36].

incomplete advice meant that he did not have a fair trial, and seeks to rely on the reasoning of the minority in *S v R*.⁵

[6] Whilst we accept that the adequacy of advice given in relation to the election might form the basis for an argument that there was an unfair trial under the principles set out in *S v R*, we do not consider that it could in the present case. As the respondent submits, the minority view only considered that an election decision might involve a serious procedural error resulting in an unfair trial when a defendant had not received advice on their election at all, and when the advice would have led to a different decision.⁶ That is not the situation here. The applicant did receive advice on the election, but in circumstances where he did not fully appreciate that any application to change his election might not be accepted by the District Court.

[7] As to the second proposed ground of appeal, the applicant did not give evidence at trial after receiving advice from trial counsel. He contends that the advice was inadequate and that it was necessary for him to give evidence in light of his defence—namely, that his contact with the victim had been accidental. The Court of Appeal held that the advice from trial counsel was sound and that this was illustrated by the applicant’s presentation when giving evidence on appeal.⁷ We do not accept that any potential miscarriage arises in these circumstances and the circumstances of the case more generally.

[8] We have also considered the two proposed grounds of appeal in combination in light of the applicant’s argument that he would have more readily given evidence at a judge-alone trial, but we are not satisfied that a potential miscarriage arises on that basis. Neither do we accept that the proposed appeal raises a matter of general or public importance. For these reasons, we are not satisfied that it is necessary in the interests of justice for the Court to hear and determine the appeal.⁸

⁵ *S v R* [2018] NZSC 124, [2019] 1 NZLR 408.

⁶ At [95]–[96] per Glazebrook and Arnold JJ.

⁷ CA judgment, above n 1, at [42].

⁸ Senior Courts Act, s 74(1)–(2).

Result

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

Solicitors:

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