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IN THE SUPREME COURT OF NEW ZEALAND

**SC 126/2016
[2017] NZSC 29**

BETWEEN IAN EDWARD HITCHCOCK
Applicant
AND THE QUEEN
Respondent

Court: William Young, Arnold and Ellen France JJ
Counsel: L Hitchcock for Applicant
J E L Carruthers for Respondent
Judgment: 8 March 2017

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted after trial of charges involving sexual offending, supply of cannabis, and of attempting to pervert the course of justice. The sexual offending involved two young girls, A and B, both of whom were considerably younger than the applicant.¹ Both A and B described sex after they were tied and blindfolded. The cannabis offending involved supply to the two complainants² as well as others. The charge of attempting to pervert the course of justice arose out of material on a Facebook page set up by the applicant relating to A and B.

¹ A was 13 and B 14 at the time. The applicant was in his late 20s.

² The applicant was acquitted of one count of supply to A said to have taken place on the same night as the sexual offending.

[2] The complainant A met the applicant for the first time on 10 September 2011 when the incident giving rise to charges involving A occurred. The applicant and A, who was by then intoxicated, went to the applicant's home. A said the incidents leading to the charges of rape and unlawful sexual connection, on which the applicant was convicted, took place there.

[3] B and the applicant knew each other before the alleged offending and their text message exchanges had a sexual aspect. The jury could not agree on a charge of rape in relation to B and he was convicted of an alternative charge of sexual connection with a young person under 16. The applicant was also convicted of a representative count of sexual connection with a young person in relation to B.

[4] The Court of Appeal rejected the applicant's appeal against conviction.³ The applicant (through his father, Les Hitchcock) seeks leave to appeal out of time on the two grounds raised in the Court of Appeal, that is:⁴

- (a) The trial Judge's directions on the two counts involving sexual offending against A incorrectly placed an onus on the applicant to prove consent; and
- (b) The Judge's directions on the cannabis supply counts incorrectly failed to direct the jury of the need to be satisfied he knew the substance supplied was a controlled drug, namely, cannabis.

[5] In addition, the applicant wants to argue:

- (a) The police investigation of the complaints was inadequate meaning evidence such as text messages supporting the defence of collusion was not before the jury.

³ *Hitchcock v R* [2016] NZCA 465 (Asher, Mallon and Whata JJ).

⁴ The application was filed three days out of time. The delay is explained and the Crown does not object to an extension of time.

- (b) The sexual offending could not have occurred as A described it given the occupation and layout of the applicant's house and the fact, only now apparent, that his sister was also in the house at the time.
- (c) Social media coverage prior to the applicant's trial may have adversely affected some of the jurors.
- (d) The Judge should have given a lies direction in relation to A's evidence and his directions about prejudice members of the jury may feel towards the applicant because of evidence about matters such as bondage were inadequate or incorrect.

[6] The grounds raised are not said to give rise to any issue of general or public importance. Rather, it is claimed that there is a risk of a substantial miscarriage of justice. For the reasons which follow, we do not consider that a substantial miscarriage of justice may have occurred as a result of any of the proposed grounds.

[7] The first proposed ground arises from the statement made by the trial Judge, Judge Saunders, in summing up to the jury when the Judge said:

You might think that a pretty clear consent would need to be given by a female who has been either tied up or subject to handcuffs and a blindfold and that a person, a male, would need to have pretty clear consent that that was being given freely at the time if that activity was being undertaken.

[8] The Judge had, elsewhere in the directions and in written material provided to the jury, correctly identified the onus and standard of proof on the Crown and given standard directions on consent. We agree with the Court of Appeal that overall, given the full directions and the particular facts, the Judge's instructions on consent were sufficient.

[9] On the second ground, whether or not there was a requirement to direct the jury as to the applicant's knowledge the substance was a controlled drug,⁵ the absence of such a direction was of no moment. That is because, as the Court of

⁵ As the Crown submits, *R v Strawbridge* [1970] NZLR 909 (CA) and *R v Metuariki* [1986] 1 NZLR 488 (CA) suggest that, in the absence of any evidence that the applicant was mistaken as to the nature of the substance, such knowledge will be presumed.

Appeal said,⁶ there was nothing to suggest the applicant did not believe that what he was supplying was cannabis. The defence at trial was that he had been dealing but the substance was synthetic cannabis. There was no evidence suggesting the applicant mistakenly believed he had been supplying synthetic cannabis and not cannabis.

[10] As to the other proposed grounds of appeal, as this Court has said previously, leave will rarely be given to pursue points not taken before the Court of Appeal.⁷

[11] In any event, as we have foreshadowed, there is no risk of a substantial miscarriage of justice in relation to these grounds. They raise matters, such as collusion and social media comment adverse to the applicant, which were before the jury.⁸ In addition, the applicant seeks to rely on new material, such as the layout of the house, which is not fresh. Finally, this was not a situation in which it was necessary to give a lies direction and the Judge cautioned the jury both orally and in writing on the need to put to one side feelings of prejudice or sympathy.

[12] An extension of time to file the application for leave to appeal is granted. The application for leave to appeal is declined.

[13] We add that, to the extent the applicant relies on new material which is not before this Court nor advanced in the Court of Appeal, the result of this application does not prevent the applicant from considering the option of recourse to s 406 of the Crimes Act 1961.

Solicitors:
Crown Law Office, Wellington for Respondent

⁶ *Hitchcock*, above n 3, at [21].

⁷ See, for example, *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643 at [2].

⁸ Trial counsel cross-examined Crown witnesses on the issue of collusion and evidence of social media material of the nature of which the applicant now seeks to rely was adduced as part of the defence.