

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS 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 NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS UNDER THE AGE OF 18 YEARS 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

**SC 44/2019
[2019] NZSC 95**

BETWEEN	JEFFREY ROBERT BUNTING Applicant
AND	THE QUEEN Respondent

Hearing: 29 August 2019

Court: Winkelmann CJ, O'Regan and Ellen France JJ

Counsel: L A Andersen for Applicant
K S Grau for Respondent

Judgment: 9 September 2019

JUDGMENT OF THE COURT

- A The application for an extension of time is granted.**
- B The application for leave to appeal is dismissed with leave reserved as set out in [11] below.**
-

REASONS

Introduction

[1] Mr Bunting was convicted after trial on three charges of indecently assaulting two sisters aged between four and eight years old.¹ The offending was said to have occurred when Mr Bunting was carrying out electrical work at the home of the complainants' father. Mr Bunting appealed against conviction to the Court of Appeal on the basis a miscarriage of justice had occurred primarily because of trial counsel error.² In dismissing the appeal, the Court of Appeal concluded that “on balance” there was no miscarriage of justice.³

[2] Mr Bunting now seeks an extension of time to seek leave to appeal to this Court from the decision of the Court of Appeal.

Background

[3] The application for an extension of time to seek leave to appeal relies principally on developments subsequent to the issuing of the judgment of the Court of Appeal on 20 December 2018. In particular, Mr Bunting says he became aware that Simon Claver, who had acted for Mr Bunting at trial, had admitted to a charge of misconduct particularising “a range of failures over a two to three year period, in respect of 14 different clients”.⁴ In a decision dated 29 March 2019, the New Zealand Lawyers and Conveyancers Disciplinary Tribunal (the Tribunal) made various orders disciplining Mr Claver including suspension from practice for a period of 12 months from 1 March 2019 and an order that he not practise on his own account until further order of the Tribunal.⁵

¹ *R v Bunting* [2017] NZDC 882.

² *Bunting v R* [2018] NZCA 602 (Kós P, French and Miller JJ) [CA judgment].

³ At [30].

⁴ *Otago Standards Committee v Claver* [2019] NZLCDT 8 [Tribunal decision] at [1].

⁵ Tribunal decision, above n 4. The Tribunal appears to accept Mr Claver's acknowledgment that he “was not equipped to take on the conduct of jury trials”: at [17].

The proposed appeal

[4] The principal matter Mr Bunting wishes to argue on the proposed appeal is that the Tribunal's report provides a basis for the finding that Mr Claver was not capable of providing Mr Bunting with proper representation and that, as a result, he has been deprived of his right to a fair trial. Second, Mr Bunting wishes to revisit an argument rejected by the Court of Appeal that propensity evidence admitted at trial was inadmissible. Finally, in reliance on affidavits filed in this Court, Mr Bunting seeks to raise various matters in relation to which he says Mr Claver ignored his instructions or otherwise did not provide adequate representation.

Assessment

[5] We address the latter two proposed grounds of appeal first.

[6] The argument sought to be made in relation to the propensity evidence (an earlier conviction for indecent assault) would focus on the fact the complainant who was the subject of the propensity evidence was, at 15 years of age, an older girl than the two complainants in the present case. However, the Court of Appeal acknowledged the difference in age between the girls so the challenge would be to the weight given to that factor in the particular circumstances. No question of general importance arises. Nor does anything raised by the appellant give rise to the appearance of a miscarriage of justice in relation to the Court of Appeal's assessment of that factor. This question does not meet the criteria for leave.⁶

[7] A considerable number of the matters canvassed in the affidavits filed in this Court were not raised by Mr Bunting in his affidavit filed in the Court of Appeal. Because these matters had not been advanced at that earlier stage, neither Mr Bunting nor Mr Claver, both of whom were cross-examined in the Court of Appeal, addressed these matters in their evidence in that Court. Nor is there any explanation from Mr Bunting as to why he seeks to raise these issues for the first time in this Court. Mr Bunting also wishes to revisit a point abandoned in the Court of Appeal concerning

⁶ Senior Courts Act 2016, s 74(2).

the advice he was given about his ability to give evidence at trial. Against this background, none of these matters meet the criteria for leave.

[8] We accept that the principal proposed ground of appeal does raise a question of general importance. However, because of the way in which the matter has arisen, if this Court granted leave to appeal at this point, we would not have the benefit of the views of the Court of Appeal on the topic. Nor would we have that Court's views on any evidential issues arising from the Tribunal's report.

[9] These constraints on a prospective appeal in this Court and the alternative prospect of the applicant seeking to have the Court of Appeal revisit the matter were discussed at the hearing on the present application. Mr Andersen, who appeared for Mr Bunting, advised that his preference had been for the Court of Appeal to deal with the matter in the first instance but he had not considered that was possible. Mr Andersen favoured adjourning the leave application to enable the Court of Appeal to consider its approach. For the respondent, Ms Grau's submission was that the leave application should be dismissed. Ms Grau also noted Mr Bunting had the option to make an application for the exercise of the prerogative of mercy.⁷

[10] In these circumstances, we consider that while an extension of time to file the application for leave should be granted, the application for leave to appeal should be dismissed. But we do so on the basis that Mr Bunting can seek to pursue his preferred option which is to ask the Court of Appeal to exercise its inherent jurisdiction to revisit the matter, and to renew his application for leave in this Court should the Court of Appeal dismiss his further application.⁸

Result

[11] The application for an extension of time is granted. The application for leave to appeal is dismissed. Leave is reserved to the applicant to make a further application

⁷ Crimes Act 1961, s 406.

⁸ *R v Smith* [2003] 3 NZLR 617 (CA), discussed in *Lyon v R* [2019] NZCA 311.

for leave to appeal to this Court if the application to the Court of Appeal asking that Court to revisit the matter is unsuccessful.

Solicitors:
Guest Carter, Dunedin for Applicant
Crown Law Office, Wellington for Respondent