

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANT/PERSON 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>

NOTE: ORDER MADE IN THE DISTRICT COURT PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF APPLICANT AND HIS WIFE REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 88/2018
[2019] NZSC 1**

BETWEEN	P (SC 88/2018) Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: N P Chisnall for Applicant
J E L Carruthers for Respondent

Judgment: 15 February 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr P faced trial on a number of charges alleging assault of his wife and children and of breaches of a protection order. Two of the charges arose out of a single incident and gave rise to a charge of assault of his wife, K, and a charge of assault of his daughter, L. At trial, Mr P was found guilty of assault of L, but the jury could not

agree on the charge of assault of K. At a retrial on that charge (and others on which the jury could not reach agreement) he was acquitted.

[2] Mr P appealed unsuccessfully to the Court of Appeal against conviction¹ and now seeks leave to appeal to this Court. There are two proposed grounds of appeal. The first proposed ground is that the conviction for assaulting L was inconsistent with the not guilty verdict on the retrial. Mr P says this issue gives rise to a question of general or public importance. The second proposed ground is that the conviction for assaulting L was inconsistent with the jury's inability to agree at the first trial on the assault charge in relation to K. It is submitted that leave to appeal should be granted on the basis there is a risk a miscarriage of justice has occurred. The argument is that this is one of those cases where the evidence on the two charges could not logically be separated.²

[3] Both of these proposed grounds were considered by the Court of Appeal.

[4] On the question of inconsistency on the basis of the outcomes reached at separate trials, the Court said it was unaware of a case in which it had been seen as "tenable" to assert inconsistency on that basis.³ The Court also noted the doubt expressed about this concept.⁴ But, in any event, the Court concluded that the present case was not one "in which the concept justifies serious consideration because of the important differences between the two trials".⁵ The Court highlighted the fact that the appellant gave evidence at the first trial but not at the second and that the part of L's evidential video interview relating to the assault charge on L was not played at the retrial.⁶ In these circumstances, the outcome rested on the particular factual circumstances. No question of general or public importance accordingly arises.

[5] In addressing the question of the asserted inconsistency as between the outcomes at the first trial, the Court of Appeal noted that K, L and D (L's sibling) all

¹ *P (CA354/2017) v R* [2018] NZCA 361 (Gilbert, Courtney and Moore JJ) [CA judgment].

² With reference to *B (SC 12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261 at [68](e) citing *R v Pittman* 2006 SCC 9, [2006] 1 SCR 381 at [8].

³ At [6].

⁴ At [6], citing *Smith v R* [2014] NZCA 460 at [59].

⁵ CA judgment, above n 1, at [6].

⁶ An admission of fact under s 9 of the Evidence Act 2006 addressed this aspect.

gave evidence about the incident giving rise to the two relevant charges. K described an incident in the course of which Mr P tried to punch her and was hitting her. She said he wrestled her to the ground causing a big bump on her head. K stated that L then intervened to stop the attack. In the course of Mr P's response to this, K said Mr P put L's arm up her back, twisted her hand and flicked her fingers back. L's account of the assault on her was broadly consistent with K's evidence as was D's evidence.

[6] Mr P's evidence was that there was an argument but no assault on K and that L got hurt when she tried to stop K from slapping him. The defence also called a forensic pathologist who expressed doubt that the bruises seen in the photograph of K were consistent with K's description of events. He also considered the defence account of how L's finger got hurt was plausible.

[7] In reaching the view that there was a logical and reasonable basis for the different outcomes, the Court considered the evidence before the jury was "sufficiently different to explain the different verdicts".⁷ In particular, the Court relied on the consistency of the accounts in relation to the incident involving L, the absence of any dispute about the nature of L's injury, and the absence of any suggestion those accounts were not a plausible description of the way in which the injury occurred. By contrast, the Court said there were inconsistencies in the accounts given about the assault on K. L, for example, said Mr P had strangled K although she had not said that in her evidential video interview. The Court considered the defence pathologist's evidence also gave a basis for doubting K's account.

[8] We see no appearance of a miscarriage of justice in this assessment of the facts.

[9] The criteria for leave to appeal are not met. The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁷ CA judgment, above n 1, at [16].