



conviction was dismissed by the Court of Appeal on 2 December 2016.<sup>1</sup> He now applies for leave to appeal to this Court.

## **Background**

[2] The complainant visited Mr S's shop on 8 December 2012. It was her first visit. She and Mr S discovered common interests and struck up a conversation. The complainant left to buy coffee for them both. When the complainant returned with the coffee, Mr S locked the shop and they went into the back room where the complainant alleges the sexual offending occurred.

[3] Mr S's position at trial was that the sexual encounter that occurred there was consensual. There were a number of aspects of the evidence pointed to by his counsel at trial to support that contention. The complainant said she did not consent. By its verdict the jury must have accepted her evidence on this point.

[4] After trial Mr S obtained a statement of claim filed in the Federal Court of Australia by the complainant alleging disability discrimination against her employer. The statement of claim said that she suffered from a disability and listed a number of symptoms.<sup>2</sup> Mr S tried to obtain further details of the claim in Australia, as well as seeking access to the complainant's medical records in New Zealand. No relevant medical records were uncovered in New Zealand<sup>3</sup> and the Federal Court of Australia twice declined applications by Mr S for access to the complainant's complaint filed with the Australian Human Rights Commission.

[5] Mr S then applied to the Court of Appeal to serve a subpoena on the complainant requiring her to produce her Australian medical reports. The Court of Appeal treated the application as one for a non-party disclosure hearing under s 24 of

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<sup>1</sup> *S (CA539/2014) v R* [2016] NZCA 575 (Wild, French and Simon France JJ) [CA Decision].

<sup>2</sup> The symptoms were lack of sleep, shingles, digestive problems, increased alcohol consumption, exhaustion and inability to maintain a regular exercise regime. There was a reference to the complainant becoming ill in August and October 2012. She also alleged a failure by her employer to support her "after she was hospitalised in August 2012, December 2012 and March 2013: see CA Decision, above n 1, at [10]–[11]. See also at [25] where the Court recorded that the doctor who examined the complainant on the day of the rape made no record that she was under the influence of alcohol.

<sup>3</sup> The Court of Appeal refused a non-party disclosure order in relation to New Zealand medical records on the basis that no relevant material was contained in them: *S (CA539/2014) v R* [2016] NZCA 260.

the Criminal Disclosure Act 2008, directed at the medical practitioners. It declined the application on the basis that the medical records could have no relevance to the critical issue at the trial, which was consent.<sup>4</sup>

[6] At the hearing of his appeal against conviction Mr S submitted that fresh evidence (the complainant's pleaded disability) undermined her evidence at trial rendering the verdicts unsafe. The Court of Appeal dismissed the appeal, finding that it was effectively an appeal against the decision declining the application for a non-party disclosure hearing. The Court of Appeal reiterated that records of medical treatment the complainant received around the time of the sexual offending are not relevant to the critical issue of consent at the trial.<sup>5</sup>

### **Grounds of application**

[7] Mr S applies for leave to appeal on the basis that:

- (a) The medical records relating to the complainant's mental health would have been relevant to the jury's assessment of her credibility and reliability.
- (b) There are a number of matters arising out of the evidence that "must give reason for concern over the validity of the verdict, and militate in favour of production of mental health records."
- (c) The Court of Appeal had no jurisdiction to differ from an earlier decision of a differently constituted court which had held that the medical records were relevant.
- (d) This is a matter of public and general importance as there are "important but competing public policy issues at play (privacy and confidentiality of mental health records, as against fair trial rights)".

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<sup>4</sup> *S (CA 539/2014) v R* [2016] NZCA 518 at [6].

<sup>5</sup> CA Decision, above n 1, at [23]–[24].

## **Our assessment**

[8] The issue in the trial was consent. Nothing raised by Mr S suggests that the Court of Appeal was in error on the issue of relevance. The matters raised by Mr S as throwing doubt on the jury's verdict were all before the jury at trial. None of those matters bears on the issue of relevance of the medical records.

[9] We do not accept Mr S's submission that a differently constituted court was unable to come to a different decision on relevance. The statements about relevance Mr S relies on were made at an earlier stage of the proceedings and we accept the Crown's submission that they must be seen as preliminary views only.

[10] We accept that there may be competing public policy issues relating to the production of medical records. As the medical records are not relevant, no issue of public and general importance arises in this case.

## **Result**

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

[12] We note that publication of name, address or occupation of the complainant is prohibited by s 203 of the Criminal Procedure Act 2011.

[13] An order prohibiting publication of name, address, occupation or identifying particulars of the applicant remains in force pending final disposition of charges he faces in a different criminal proceeding.

Solicitors:  
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