ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES/VICTIMS/CONNECTED PERSONS PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

NOTE: INTERIM ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE APPELLANT REMAINS IN FORCE UNTIL FINAL DETERMINATION OF THE NAME SUPPRESSION APPLICATION IN CRI 2016-009-687.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA252/2017
[2019] NZCA 367

BETWEEN	W (CA252/2017) Appellant
AND	THE QUEEN Respondent

Hearing:	1 August 2019
Court:	French, Mallon and Moore JJ
Counsel:	A J McKenzie for Appellant A J Ewing for Respondent
Judgment:	20 August 2019 at 9.30 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by French J)

Introduction

[1] W was convicted at trial of meeting a young person after grooming, two charges of supplying cannabis to a person aged under 18 years and indecent assault on a young person.

[2] The convictions were based on the evidence of a group of teenage boys. They testified that W approached them at a shopping mall, befriended them and provided them with food, clothes, free accommodation and ultimately cannabis. One of them also alleged that while he was sleeping at W's home, W indecently assaulted him.

[3] W now appeals his convictions.

[4] Before addressing the merits of the appeal, it is necessary for us to traverse the history of this proceeding and the reasons why we declined an application for an adjournment made at the commencement of the hearing.

The procedural history of this appeal

[5] The trial took place in November 2016. The notice of appeal was filed in May 2017. Although W filed the notice himself, he instructed counsel Mr McKenzie to represent him.

[6] Then followed judicial directions requiring W to particularise the grounds of appeal and file affidavit evidence in light of an indication that trial counsel error was likely to be an issue.[1] The directions were not complied with, thwarting the Court's direction that the appeal be set down for hearing on the first available date in 2018.[2] The explanation for the default was W's health problems arising out of head injuries sustained in 1997.

[7] In April 2018, Mr McKenzie advised the Court that the main grounds of appeal were that W was unfit to stand trial in 2016 and that there was new evidence not adduced at trial. Mr McKenzie also advised the Court that, in other extant proceedings

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1 *[W] v R* CA252/2017, 22 June 2017 (Minute No 1 of Harrison J) and *[W] v R* CA252/2017, 13 July 2017 (Minute No 2 of Harrison J).

2 *[W] v R* CA252/2017, 30 November 2017 (Minute No 4 of Harrison J).

in the District Court, a Judge had ordered two reports on W's fitness to stand trial under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act 2003.[3] The appeal was put on hold pending receipt of those reports.

[8] A copy of the first assessor's report dated 20 June 2018 was subsequently filed in this Court. It stated that W was fit to instruct counsel and stand trial but that, because of his "executive functioning difficulties", accommodations including the courtroom temperature being in the low 20s and the taking of frequent breaks were recommended to allow him to engage in the court process.

[9] In light of the report, Mr McKenzie advised this Court on 5 July 2018 that, for the purposes of the appeal, the contention would be that if such accommodations are necessary now, that would also have been the position at trial in 2016. He accepted that such a contention would need to be supported by expert evidence and had sought funding to enable him to commission a report from a neuropsychiatrist Dr Newburn who had treated W in the past. It was agreed that affidavits from W's trial counsel and W would also be required. The Court directed that W file his affidavit by 28 August 2018.[4]

[10] Mr McKenzie also advised the Court that fitness to stand trial was now the only ground of appeal.

[11] The appeal was set down for hearing in April 2019. However the fixture had to be abandoned because, despite the 28 August 2018 deadline for the filing of W's affidavit being extended until 18 September 2018,[5] the affidavit had still not been filed as at 21 February 2019.[6]

[12] In a minute dated 21 February 2019, this Court ordered that W's affidavit must be filed no later than 8 March 2019.[7] The minute also stated that there would be no

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3 The proceedings related to another set of charges against W involving allegations of forgery. We understand those charges were withdrawn in the District Court by the police on 1 August 2019.
4 *[W] v R* CA252/2017, 5 July 2018 (Minute No 3 of French J).
5 *[W] v R* CA252/2017, 28 August 2018 (Minute No 4 of French J).
6 *[W] v R* CA252/2017, 21 February 2018 (Minute No 5 of French J).
7 At [5].

further adjournments and that the appeal would proceed on the new date even if W had still not filed his affidavit.[8]

[13] The new date ultimately allocated for the appeal was 1 August 2019.

[14] On 16 July 2019, Mr McKenzie filed a memorandum applying for an adjournment and also seeking leave to withdraw as counsel. The justification for both applications was that fresh eyes were needed to review the file. The memorandum also enclosed a report from Dr Newburn dated 21 February 2019 in his capacity as the second assessor appointed by the District Court under s 38 of the Criminal Procedure (Mentally Impaired Persons) Act.[9] The report was to similar effect as the other assessor's report.

[15] This Court declined to grant Mr McKenzie leave to withdraw. It directed that W's submissions were to be filed no later than 4 pm 30 July 2019.

[16] On 31 July 2019, Mr McKenzie filed a further memorandum advising he did not feel able to file submissions and renewing the application for an adjournment. Mr McKenzie submitted that, rather than proceed with the appeal, the more appropriate course of action was for us to adjourn the appeal and issue a notice of non-compliance under s 338 of the Criminal Procedure Act.

[17] When the matter was called on 1 August 2019, Mr McKenzie made further submissions in support of the application for an adjournment. In addition to the matters he had raised previously, he advanced two further grounds. First, that W now wanted to raise new grounds of appeal which would require evidence and investigation. And secondly that last night W had provided him with what W instructed was a medical certificate certifying that he was unfit to mount an appeal. Mr McKenzie had not had sufficient time to vouch for the authenticity of the document but we said we were prepared to look at it.

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8 At [7].

9 There has never been any explanation for the delay in obtaining and filing this report.

[18] The document was not a medical certificate. It was headed "statement by Dr Gil Newburn" and contained twelve short paragraphs. They were typed, with a handwritten notation to the effect that the statement had been prepared by W himself based on his understanding of the doctor's opinion which had been shared over time and which was accurate.

[19] We were satisfied that neither this document nor the professed desire to investigate new grounds of appeal on the eve of the hearing justified an adjournment of an appeal which had been in train for over two years and which had been characterised by constant delays on the part of W. There was nothing in any of the medical reports which had been supplied to indicate that he was incapable of understanding the clear directions given by this Court and incapable of complying with them in the generous time that had been allowed.[10]

[20] The appeal therefore proceeded at our direction on the basis that the sole issue was whether W was unfit to stand trial in November 2016, resulting in a miscarriage of justice. W's trial counsel (Mr McCormick) who had provided an affidavit was cross-examined by Mr McKenzie.[11] Mr McKenzie then presented oral submissions in support of the appeal and replied to the Crown submissions. W did not attend the hearing.

[21] For completeness, we record that since the hearing, W has requested the Court to stay release of this decision and advised that he will file an affidavit once he feels able to do so. We are not prepared to countenance any further delay and there is no reason to withhold release of this decision.

Was W fit to stand trial in November 2016?

[22] The medical reports confirm that W has well established difficulties arising out of head injuries sustained in 1997. Those difficulties are difficulties regulating his body temperature and issues with emotion regulation, information processing, attention span and concentration. They are difficulties which are capable of qualifying

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10 Report of Ms Stephanie Snelson (Canterbury District Health Board) 20 June 2018; and Report of Dr Gil Newburn (Neuropsychiatric Services) 21 February 2019.

11 A waiver of privilege having been filed in December 2018.

as "mental impairment" within the meaning of s 4 of the Criminal Procedure (Mentally Impaired Persons) Act.

[23] The difficulties in W's functioning were identified in the period following the accident in 1997 and reassessed in the period between 2010 and 2013, in part for the purposes of proceedings under the Accident Compensation Act 2001. We therefore accept they are long standing and must have existed in 2016.

[24] However, the existence of mental impairment does not of itself mean a defendant is unfit to stand trial or instruct counsel. And indeed in this case the medical evidence suggests otherwise.

[25] As already mentioned, the 2018 and 2019 reports while confirming that W is fit to stand trial also recommended consideration of certain steps being taken to help minimise the effects of his executive functioning difficulties and allow him to engage in the Court process. The recommended measures were:

(a) W needs to be responsible for taking his medication.

(b) The ambient temperature should be managed and kept within the range of 16–21 degrees Celsius, ideally in the middle of this range.

(c) Frequent breaks should be taken to allow W time to discuss and process new information with his lawyer.

(d) External stimuli such as noise and number of people present should be minimised.

[26] Mr McKenzie acknowledged that neither the trial Judge nor trial counsel Mr McCormick had raised any concerns about W's ability to participate in the trial at the time. However, he submitted that W's needs were so complex that laypeople would be likely to miss them and attribute any unusual behaviour to a bad personality. Mr McKenzie said that the medical reports support the proposition that the recommended accommodations were necessary for W to receive a fair trial and that

without them W would have been disadvantaged. In short, W's difficulties can be managed but the fact is that they were not.

[27] We do not accept those submissions. Mr McCormick is an experienced criminal lawyer. His evidence was that W engaged fully in the preparation for trial and also in the hearing itself. Prior to the trial, Mr McCormick had lengthy consultations with W discussing the prosecution evidence and formulating the defence response and trial strategy. W gave him clear and detailed instructions. Further, W participated during the trial in a way that demonstrated understanding of what was being said. Far from being unable to follow the evidence as it unfolded, W even passed him notes during the cross-examination with suggested questions. At no time did Mr McCormick detect any deterioration in W's functioning. And at no time did W ever complain to him about the temperature in the courtroom or that he was having difficulty following the process.

[28] Mr McCormick's evidence confirmed what is also stated in the medical reports — that W is an intelligent and articulate man. We note too that the Crown case he faced at trial was straightforward. As Ms Ewing pointed out, there was no expert evidence and the sole question was whether what the young men alleged had happened did in fact happen.

[29] It follows from all of the above that we do not accept there has been any miscarriage of justice or a risk of a miscarriage of justice. The appeal is accordingly dismissed. We would add that, in our assessment, W has been well served by both Mr McCormick and Mr McKenzie.

Outcome

[30] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent