NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS, OF COMPLAINANTS PROHIBITED BY SS 203 AND 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA664/2017
CA674/2017
[2018] NZCA 201

BETWEEN	PATRICK MAURICE O'SULLIVAN Appellant
AND	THE QUEEN Respondent

Hearing: 19 April 2018

Court: Williams, Wylie and Thomas JJ

Counsel: Appellant in person
M H Cooke for Respondent

Judgment: 18 June 2018 at 3.00 pm

JUDGMENT OF THE COURT

A The application for leave to bring a second appeal in CA664/2017 is declined.

B The appeal in CA674/2017 is dismissed.

REASONS OF THE COURT

(Given by Thomas J)

[1] The appellant, Patrick O'Sullivan, applies for leave to bring a second appeal against conviction and appeals against the lifting of interim name suppression. It is not clear on the face of the notice for leave to appeal whether or not leave was also sought to appeal against sentence. In any event, Mr O'Sullivan's written submissions indicate he abides by the sentencing decision and sentencing was not addressed in oral

submissions. We therefore treat any application for leave to appeal against sentence as abandoned.

[2] On 23 February 2017, following a judge-alone trial in the District Court, Judge Harland convicted Mr O'Sullivan on one charge of doing an indecent act on a young person under 16 years and one charge of doing an indecent act on a child under 12 years.[1] The Judge imposed a sentence of 11 months' imprisonment.[2] Mr O'Sullivan's first appeal against conviction and sentence was dismissed by Dunningham J on 26 October 2017.[3] Dunningham J also lifted the interim order suppressing Mr O'Sullivan's name.[4]

Factual background

[3] In 2006, Mr O'Sullivan befriended X's mother and her children, and sometime later befriended Y. X and Y's parents were in a relationship but not living together. X and Y, as well as other children, would visit Mr O'Sullivan at his house relatively regularly.

[4] Mr O'Sullivan's first conviction is for indecent assault of X, who was then aged about 11 or 12 years, between 12 July 2010 and 11 July 2012. X was interviewed about offending against her in 2013.

[5] X's evidence was that she was at Mr O'Sullivan's house watching a movie. He was drunk and, while sitting on the couch beside her, he put his hands down her pants, touched her bottom and masturbated. X told her mother immediately on arriving home but, when her mother said she should tell someone, X said she did not want to.

[6] X later wrote a letter purporting to retract the allegations. The letter was produced at trial and, although X confirmed she did not wish the proceedings to go

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1 *R v O'Sullivan* [2016] NZDC 25428 [*DC verdict*].
2 *R v O'Sullivan* [2017] NZDC 8184.
3 *O'Sullivan v R* [2017] NZHC 2628 [*HC decision*].
4 At [109].

ahead, she remained adamant the offending happened as she described in her interview.

[7] Mr O'Sullivan denied the allegation and gave evidence at trial. He traversed a number of matters which, if accepted, would have undermined X's evidence. He speculated X was lying, had been offended by his insistence that she obtain her mother's approval for receiving lifts into town, and had colluded with other witnesses.

[8] The second conviction relates to indecent assault of Y, then aged six years, between 27 September 2013 and 18 October 2013. Y was interviewed on the same day as X, 12 November 2013, about offending against her.

[9] Y's evidence was that she was at Mr O'Sullivan's house, playing cards with him. Mr O'Sullivan then told her to give him a massage, which she did. Mr O'Sullivan had a shower, after which he told her to massage him again. After she had done so, he asked her to lift up her top. She left, telling her father what had happened when she got home.

[10] It was Y's complaint to her father which precipitated the involvement of Child Youth and Family in respect of both allegations.

[11] Mr O'Sullivan maintained that Y had massaged his shoulder entirely of her own volition. He suggested Y had misheard his comment and speculated she was upset by his remonstrating with her for cheating at cards. Mr O'Sullivan surmised that Y's father was behind the complaint, saying he was "pathologically jealous" and resented Mr O'Sullivan's relationship with X's mother.

District Court decision

[12] The District Court Judge assessed the key issues as whether the acts occurred; if they did occur in relation to X, whether they occurred within the alleged timeframe; and if they did occur in relation to Y, if they were indecent acts committed on or with Mr O'Sullivan.[5]

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5 *DC verdict*, above n 1, at [17].

[13] The judgment was lengthy, the Judge thoroughly examining the issues and the law, and assessing the evidence and witnesses' credibility. The Judge refused the Crown's application to admit the evidence of each complainant as propensity evidence in relation to the alleged offending against the other.[6] She therefore analysed each allegation separately. She was unable to give significant weight to the allegations of collusion between the witnesses, found the victims' evidence compelling despite inconsistencies in peripheral detail and found Mr O'Sullivan's account less believable. The Judge found both charges proved beyond reasonable doubt.[7]

High Court decision

[14] Mr O'Sullivan appealed on these grounds:[8]

(a) In respect of X:

(i) the Judge was incorrect on the timing issue and the prosecution did not prove that the offending occurred within the time specified in the charging document;

(ii) the Judge failed to deal correctly with the significance of another child's birthday dinner agreed upon between the witnesses, which Mr O'Sullivan argued was relevant to the timing of the offending;

(iii) the Judge's findings as to credibility were open to question; and

(iv) the Judge did not deal with the issue of photographs of the defendant in the correct way.

(b) In respect of Y:

(i) the Judge erred in finding a non-indecent massage combined

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6 *DC verdict*, above n 1, at [149].
7 *DC verdict*, above n 1, at [150].
8 *HC decision*, above n 3, at [18].

with a discrete request (not in itself an "act") sufficient to constitute an indecent act; and

(ii) the Judge failed to deal adequately with the possibility of a misunderstanding between Mr O'Sullivan and Y.

[15] At the first appeal hearing, issues (ii), (iii) and (iv) relating to X and issue (ii) relating to Y evolved into a challenge to the reasonableness of the verdicts, based on the Judge's analysis of the evidence, dismissal of the suggestion of collusion between witnesses and assessments of credibility.

[16] Additional grounds alleging trial counsel error were added following Mr O'Sullivan parting ways with his lawyer, including that:[9]

(a) counsel mishandled the argument about the exchange over Y's top by not questioning Y on a "phonetic misunderstanding" between the appellant pointing out that she had "left her top" rather than asking her to "lift her top";

(b) exhibits relating to the timing of X's complaint were not produced and should have been;

(c) the issue of collusion between the complainants, and with Y's father who was hostile to Mr O'Sullivan, which would have affected X's credibility, was not properly handled by counsel; and

(d) counsel failed properly to challenge X on whether the event actually occurred at all.

[17] Dunningham J found there was no real risk of counsel error and, even if there was, it did not carry a risk of a miscarriage of justice.[10]

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9 At [21]. Mr O'Sullivan's submissions totalled 84 pages.
10 At [57].

[18] When assessing the period of offending against X, Dunningham J found the evidence, even including additional evidence referred to on appeal, did not indicate the offending must have taken place outside the offence date range.[11] Moreover, even if it did, the charge would have been amended to reflect the adjusted date and therefore could not have had a material impact on the trial so as to constitute a miscarriage of justice.[12]

[19] When assessing the legal test for an indecent act in relation to Y, Dunningham J found the trial Judge did not expressly lay out the elements of the offence but had properly considered them in her analysis.[13] Mr O'Sullivan argued that surrounding circumstances could not render a non-indecent act indecent, it required an ambiguity in the act which was itself capable of being indecent before the Court could consider surrounding circumstances such as indecent intent. Dunningham J rejected the claim that a massage by a six-year-old girl was inherently non-indecent, noting the House of Lords decision in *R v Court* distinguished between the putting on of a shoe which could never be considered indecent and a smack which might be indecent, depending on intent.[14] She applied New Zealand authority which had developed that nuanced approach and allowed for surrounding circumstances to render objectively non-indecent acts indecent, such as taking photographs.[15]

[20] Dunningham J reminded herself of the considerations to be taken into account in the assessment of whether a verdict is unreasonable, as outlined by the Supreme Court in *R v Owen*.[16] She noted the threshold for appellate intervention is high, such that an appellant must show the conclusion reached was not available on the evidence.[17] She found the trial Judge had carefully assessed the evidence and witnesses' credibility, set out reasons for preferring the victims' evidence over Mr O'Sullivan's, and had come to conclusions of fact which could not be considered

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11 At [58]–[69].
12 At [59].
13 At [79]–[88].
14 *R v Court* [1989] AC 28 (HL).
15 *R v Annas* [2008] NZCA 534; and *Rowe v R* [2017] NZCA 316, [2017] NZAR 1211.
16 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [13].
17 At [76].

unreasonable.[18] She found the trial Judge made no errors which could give rise to a miscarriage of justice.[19]

Suppression

[21] Dunningham J found no material before the Court which would suggest consequences for Mr O'Sullivan which were any more than those normally associated with the publication of a defendant's name.[20] She therefore lifted name suppression.

Analysis

Appeal against conviction

[22] In order to grant leave to bring a second appeal the Court must be satisfied that the appeal involves a matter of general or public importance, or that a miscarriage of justice may have occurred or may occur unless the appeal is heard.[21]

[23] We do not consider the appeal involves a matter of general or public importance. The law relating to indecent acts, including how surrounding circumstances can render a non-indecent act indecent, is relatively straightforward and settled, meaning the appeal is unlikely to have significance beyond any potential effects on Mr O'Sullivan.

[24] The remaining avenue open to Mr O'Sullivan is the possibility a miscarriage of justice has occurred. The Crown rightly states the threshold is a high one.[22] This is reinforced by various decisions of this Court stating courts will be slow to grant leave where success requires a reversal of concurrent findings of fact in the courts below.[23] That applies in particular to judge alone trials,[24] and where the appeal is on issues thoroughly traversed by the lower courts.[25]

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18 At [77].
19 At [78].
20 At [109].
21 Criminal Procedure Act 2011, s 237.
22 *McAllister v R* [2014] NZCA 175, [2014] 2 NZLR 764.
23 *R (CA176/2016) v Police* [2016] NZCA 403 at [26]; and *Butler v Police* [2016] NZCA 27 at [3].
24 *Warren v R* [2016] NZCA 108 at [30]; and *R (CA176/2016) v Police*, above n 23 at [26].
25 *Wells v R* [2015] NZCA 528.

[25] Mr O'Sullivan's grounds of appeal are largely fact-focused. The alleged errors were also considered in some detail by the trial Judge and analysed by Dunningham J in the first appeal. In particular, Mr O'Sullivan alleges:

(a) Possible collusion between the witnesses. This was rejected by the trial Judge as having little evidential foundation,[26] and on appeal that conclusion was found not to be unreasonable.[27] At the hearing before us, Mr O'Sullivan stressed what he maintained was evidence of collusion, in particular an alleged change in Y's evidence referring to what Mr O'Sullivan wore as a robe rather than a smock or long jersey. This, in his submission, was evidence of collusion between X and Y. This was addressed in both the District and High Courts, even if not in exactly the same context as Mr O'Sullivan now argues it. The point is that in both Courts the issue of collusion was addressed and rejected. Importantly, the trial Judge made strong findings as to the credibility and reliability of X and Y and these findings were upheld in the High Court.

(b) Both X and Y were lacking in credibility. The trial Judge made a finding that the relevant portions of X's evidence were compelling, believable and highly persuasive.[28] She noted peripheral aspects of Y's evidence were troubling but found Y's evidential interview compelling, detailed and clear.[29] The trial Judge was not so impressed with Mr O'Sullivan's evidence, finding him less believable following his evidence in Court than she had after viewing his evidential interview.[30] On appeal, Dunningham J found these aspects were dealt with appropriately.[31]

(c) Both X and Y misinterpreted their respective observations. X saw Mr O'Sullivan scratch his groin, while Y heard "lift up your top" when

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26 At [134]–[136].
27 At [77].
28 *DC verdict*, above n 1, at [66].
29 At [125]–[129] and [137].
30 At [64] and [116], [130] and [132].
31 At [77].

he said either "pick up your top" or "you left your top". Whether X and Y misinterpreted their experiences was addressed and rejected by the trial Judge and by Dunningham J on appeal.[32]

(d) The relevance of the evidence of the other child's birthday dinner. This was considered peripheral by the trial Judge.[33] On appeal, Dunningham J found it could not give rise to a miscarriage of justice.[34]

(e) The trial Judge misinterpreted and misapplied the law related to indecency when considering the offending against Y. This was discussed in both decisions in detail.[35] Dunningham J considered the trial Judge used Mr O'Sullivan's request that Y lift her top as an indication of his indecent motivation throughout the massage.[36] That interpretation was open to the trial Judge on the facts.

[26] All issues raised were addressed at the trial and at the first appeal. They are subject to concurrent findings of fact. Mr O'Sullivan raises no grounds which were not adequately dealt with both at first instance and at the first appeal.

[27] There are no matters of general or public importance and no issues raising the possibility of a miscarriage of justice. The application for leave to bring a second appeal is declined.

Appeal against lifting of name suppression

[28] Mr O'Sullivan's grounds for appeal on this point focus on risks to his fair trial rights if he were to be successful in his application for leave to appeal and faced a retrial. Given our conclusion regarding leave to appeal, such risks do not arise. The appeal against the lifting of name suppression is therefore dismissed.

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32 *DC verdict*, above n 1, at [64]–[66] and [139]; and *HC decision*, above n 3, at [49] and [56].
33 *DC verdict*, above n 1 at [73]–[75].
34 *HC decision*, above n 3, at [65]–[69].
35 *DC verdict*, above n 1 at [140]–[146]; and *HC decision*, above n 3, at [79]–[88].
36 At [88].

Result

[29] For the reasons given, the application for leave to bring a second appeal is declined.

[30] The appeal against the lifting of name suppression is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent