NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 49/2019
[2019] NZSC 83

BETWEEN	PETER HUGH MCGREGOR ELLIS Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Williams JJ

Counsel: R A Harrison for Applicant
M J Lillico for Respondent

Judgment: 31 July 2019

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is granted.

C The approved ground of appeal is whether a miscarriage of justice occurred in this case.

REASONS

Introduction

[1] Mr Ellis was convicted, after a trial in the High Court in Christchurch in 1993, of 16 counts of sexual offending against seven child complainants.[1] The complainants attended the Christchurch Civic Childcare Centre where Mr Ellis was employed. He was sentenced to 10 years' imprisonment on 22 June 1993.[2]

[2] Mr Ellis applies to this Court for leave to appeal against the decision of Court of Appeal[3] dismissing his appeal against conviction.[4] He also applies for an extension of time to make this application.

The trial

[3] At Mr Ellis' trial the evidence-in-chief of the child complainants was given through pre-recorded evidential interviews. We understand that the complainants were aged between two and five years at the time of the alleged sexual offending, between five and a half and nine years during the evidential interviews and between six and a half and 10 years during the High Court trial.

[4] There was also evidence given at trial of alleged behaviours exhibited by the complainants, including toileting and sleep-related difficulties, fear and dislike of Mr Ellis and other adult males, clothing, eating and bathing problems, fear of animals, and masturbation. Expert evidence was called at trial under s 23G of the Evidence Act 1908.[5] The Crown called Dr Karen Zelas who testified that all of the behavioural

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1 Mr Ellis was acquitted on a further nine charges. He was also discharged on three charges during the trial under s 347 of the Crimes Act 1961.

2 *R v Ellis* HC Christchurch T9/93, 22 June 1993 (Williamson J).

3 *R v Ellis* [2000] 1 NZLR 513 (CA) (Richardson P, Gault, Henry, Thomas and Tipping JJ) [Second appeal judgment]. As discussed below at [5], this was Mr Ellis' second appeal. His first had also largely been dismissed: *R v Ellis* (1994) 12 CRNZ 172 (CA) (Cooke P, Casey and Gault JJ) [First appeal judgment].

4 As the Court of Appeal dismissed Mr Ellis' (second) appeal before 1 January 2004, a further appeal would ordinarily lie to the Privy Council: Supreme Court Act 2003, s 50(1); and Senior Courts Act 2016, sch 5, pt 1, cl 3(1). However, counsel for Mr Ellis and for the Crown have agreed in writing that Mr Ellis may seek the leave of this Court to appeal against his convictions: Supreme Court Act, s 50(2)(b); and Senior Courts Act, sch 5, pt 1, cl 3(2)(b).

5 Among other things this section allowed expert witnesses to testify whether any evidence given during the proceedings relating to the complainant's behaviour was consistent with the behaviour of sexually abused children in the same age group.

symptoms identified were consistent with childhood sexual abuse. Dr Keith Le Page, called on behalf of Mr Ellis, testified that most of the behavioural symptoms displayed by the complainants were inconsistent with sexual abuse. In his view the behaviour was associated with other stressors.

Appeals and inquiries

[5] On appeal to the Court of Appeal in 1994 the convictions on three of the counts were quashed, but Mr Ellis' appeal was otherwise dismissed.[6] Applications were made to the Governor-General who, acting pursuant to s 406(a) of the Crimes Act 1961, referred the remaining 13 convictions back to the Court of Appeal. The second appeal was, however, also dismissed.[7]

[6] After the second Court of Appeal decision, there was a Ministerial Inquiry in 2001 by Sir Thomas Eichelbaum, after a further s 406 application, which concluded there was no risk of a miscarriage of justice.[8] There have been unsuccessful petitions to Parliament for a Royal Commission in 2003, 2008 and 2014.

Grounds of leave application

[7] Mr Ellis submits that his application for leave to appeal should be granted because the Court of Appeal in its second decision erred in concluding there was no miscarriage of justice. In summary, he says that:

(a) the evidential interviews fell far short of best practice (even at the time) and there was a strong possibility of contamination of the evidence;

(b) the jury was not appropriately assisted at trial by the expert witnesses; and

(c) unreliable expert evidence was led under s 23G of the Evidence Act.

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6 First appeal judgment, above n 3, at 195.
7 Second appeal judgment, above n 3, at [95].
8 Thomas Eichelbaum *The Peter Ellis Case: Report of the Ministerial Inquiry for the Hon. Phil Goff* (Ministry of Justice, Wellington, 2001).

[8] In support of his application for leave, Mr Ellis has filed two affidavits, one from Professor Harlene Hayne (dealing with the evidential interviews) and one from Dr Thelma Patterson (dealing with the issue at [7](c) above).

Extension of time application

[9] As noted above, Mr Ellis applies for an extension of time to apply for leave to appeal. He submits that there are compelling reasons to grant this application: he has recently changed legal counsel and has only recently received new expert evidence that he submits presents a compelling case for a miscarriage of justice having occurred.

[10] In particular, Mr Ellis points to Professor Hayne's evidence and her use of empirical methodology to assess the extent to which the interviews fell short of best practice and the opportunities for contamination that had arisen. He also says that, unlike in 1999, there is now consensus among the scientific community as to what factors can compromise the accuracy of a child's report.

Evidence in support of extension of time application

[11] Mr Ellis has filed an affidavit saying that he has had counsel assisting him in an unpaid capacity since the Ministerial Inquiry by Sir Thomas Eichelbaum. In particular, they had been working on applications for a further prerogative of mercy application or a possible Royal Commission. He had a change of counsel in 2014 and was aware that further work was being done on the transcripts of the evidential interviews of the complainants at the University of Otago. He deposes that he has since 2000 relied on his counsel "to advance matters, including in which forum". But that he has "always maintained [his] innocence in this matter and [has] always asked for the matter to be brought through to either the Privy Council or the Supreme Court".

[12] In a supplementary affidavit of 23 July 2019, Professor Hayne says that her involvement with Mr Ellis' case began in 2004 but it was not until 2017 that a more focused analysis of Mr Ellis' case began. Her research team spent in excess of 1,000 hours on this analysis. She says that the draft brief of evidence attached to her first affidavit is significantly different to the original work completed up until 2017. The brief was only completed and signed on 27 May 2019. She also notes that the first

comprehensive study of present day interview standards in New Zealand was only published by Wolfman and others in 2016. This provided a good basis for comparing the complainant interviews admitted in Mr Ellis' trial and the current benchmark of interview practice in New Zealand.

The Crown's position

[13] The Crown opposes the granting of an extension of time to appeal and also opposes any grant of leave to appeal. It says that the 20 year delay is inordinate and unexplained. Mr Ellis has had legal advice available to him throughout this period and at times a grant of legal aid. Mr Ellis told the High Court in 2005 that he would pursue an appeal to the Privy Council.[9] Further, Professor Hayne has been concerned about the manner in which the child complainants were interviewed since at least 2009. The Crown submits that there has been no attempt to explain why, given these factors, an application for leave to appeal was not filed earlier. That more focus has been brought to bear by Professor Hayne since 2017 does not justify the delay.

[14] In addition, the Crown submits that any retrial would cause major difficulties given the passage of time. The interests of the complainants and the principle of finality should take precedence. The substance of the current complaints were aired in front of the jury at Mr Ellis' trial and, in the Crown's submission, there have been only "marginal increases in scientific knowledge over time". The Crown also points to difficulties in conducting any appeal hearing as it would be required to call expert evidence to challenge the affidavits filed on behalf of Mr Ellis. The Crown notes this Court has expressed the view that it is not the appropriate forum for resolving evidential conflicts, such as would be inevitable in the present case.[10]

Our decision

[15] We give brief reasons for granting Mr Ellis' application for an extension of time to apply for leave to appeal.[11] The touchstone will always be the interests of justice.[12] Relevant factors to be taken into account include whether the delay is

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9 *Radio New Zealand Ltd v Ellis* [2006] NZAR 1 (HC) (Randerson and Miller JJ) at [32].
10 The Crown cites *A v R* [2011] NZSC 84; *Currie v R* [2012] NZSC 19; and *A v R* [2012] NZSC 14.
11 These reasons may be expanded on in our judgment on the appeal.
12 *R v Knight* [1998] 1 NZLR 583 (CA) at 587; and *R v Lee* [2006] 3 NZLR 42 (CA) at [95]–[99].

adequately explained and whether there are compelling reasons to extend time.[13] In considering whether to grant the application, the Court may have regard to the seriousness of the charges,[14] the strength of the proposed appeal, the impact on others and prejudice to the Crown.[15] Also relevant is whether fresh evidence has come to light.[16]

[16] On the basis of the supplementary affidavit of Professor Hayne, we are satisfied that the research underpinning her evidence was only very recently completed and that the type of empirical analysis of the evidential interviews that she has conducted is a new approach and significantly different from the expert evidence available to the Court of Appeal in 1999. We are also satisfied that her analysis could not have been completed earlier than it was, both because of the magnitude of the task and the availability of comparative data.

[17] In our view the affidavits of Professor Hayne and Dr Patterson raise issues of general and public importance and significant issues specific to Mr Ellis' case. The interest of justice requires that these issues be ventilated on appeal, despite the length of time since the second Court of Appeal decision.[17]

[18] For these reasons, we consider an extension of time for leave to appeal should be granted. We are also satisfied that the criteria for the granting of leave to appeal are met.[18]

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13 *Palmer v R* [2011] NZSC 25, (2011) 25 NZTC ¶20-031 at [2]; *McGeachin v R* [2017] NZSC 16 at [4]–[5]; and *F (SC 129/2016) v R* [2017] NZSC 34 at [15]. Rule 11(4) of the Supreme Court Rules 2004 permits this Court to grant an extension of time.

14 *R v Ferguson* [2009] NZCA 157 at [11]; and *R v Dawson* [2012] NZCA 225 at [46].

15 *Knight*, above n 12, at 588–589. The applicant also cites *Hamilton v R* [2012] UKPC 31, [2012] 1 WLR 2875 at [17], which is to similar effect.

16 *Beckham v R* [2014] NZCA 476 at [38]; and *S (SC 39/2017) v R* [2017] NZSC 169 at [7]–[9].

17 When the appeal is heard, the Crown will of course be entitled to adduce evidence countering that provided by Professor Hayne and Dr Patterson and they will be available for cross-examination.

18 It is not the Court's practice to give reasons for granting applications for leave to appeal, given that leave is decided at a preliminary stage and full arguments will be made and dealt with on appeal: *Greymouth Gas Kaimiro Ltd v GXL Royalties Ltd* [2010] NZSC 30 at [1]. The Court is required to give reasons when declining leave to appeal: Senior Courts Act 2016, s 77.

Result

[19] The application for an extension of time to apply for leave to appeal is granted.

[20] The application for leave to appeal is granted.

[21] The approved ground of appeal is whether a miscarriage of justice occurred in this case.

[22] The Registrar is instructed to arrange a telephone conference between Glazebrook J and counsel to canvass arrangements for the hearing of the appeal including:

(a) whether Mr Ellis will apply for leave to adduce further evidence (apart from the affidavits already filed);

(b) whether the Crown objects to the admission at the appeal hearing of the affidavits filed in support of the application for leave to appeal;

(c) the approximate timeframe for the Crown to file its evidence in reply;

(d) a timetable for filing submissions; and

(e) the likely duration and timing of the appeal hearing.

Solicitors:
Crown Law Office, Wellington for Respondent