

IN THE SUPREME COURT OF NEW ZEALAND

**SC 85/2009
SC 86/2009
SC 87/2009
SC 88/2009
[2009] NZSC 107**

**MICHAEL WAUCHOP PORTER
MILES GAISFORD ELLIOTT
DHARMINDER SINGH
SURJIT SINGH**

v

THE QUEEN

Court: Tipping, McGrath and Wilson JJ

Counsel: R B Squire QC for Applicants
N P Chisnall for Crown

Judgment: 20 October 2009

JUDGMENT OF THE COURT

The applications for leave to appeal are all dismissed.

REASONS

[1] These four applicants seek leave to appeal from a decision of the Court of Appeal upholding an order made in the District Court that all four be tried by Judge alone. They are charged with conspiracy to assist illegal immigrants to stay in

New Zealand or others to work in New Zealand contrary to their work permits. The District Court Judge exercised his discretion under s 361D of the Crimes Act 1961 to order trial by Judge alone, being satisfied that the criteria for such an order were satisfied. The Court of Appeal, after considering a number of grounds upon which the District Court order was attacked, expressed itself as satisfied that the Judge did have jurisdiction to make the order and was justified in exercising his discretion in the way he did.

[2] Section 361D came into force on 25 October 2008 and is in the following terms:

361D Judge may order trial without jury in certain cases that are likely to be long and complex

- (1) This section applies only to a person (the accused person) who is committed for trial for an offence that is not—
 - (a) an offence for which the maximum penalty is imprisonment for life or imprisonment for 14 years or more; or
 - (b) an offence of attempting or conspiring to commit, or of being a party to the commission of, or of being an accessory after the fact to, an offence referred to in paragraph (a).
- (2) The Judge may, on a written application for the purpose made by the prosecutor to the Judge and served on the accused person before the accused person is given in charge to the jury, order that the accused person be tried for the offence before the Judge without a jury.
- (3) However, the Judge may make an order under subsection (2) only if the prosecution and the accused person have been given an opportunity to be heard in relation to the application, and following such hearing, the Judge is satisfied—
 - (a) that all reasonable procedural orders (if any), and all other reasonable arrangements (if any), to facilitate the shortening of the trial, have been made, but the duration of the trial still seems likely to exceed 20 days; and
 - (b) that, in the circumstances of the case, the accused person's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively.
- (4) In considering, for the purposes of subsection (3)(b), the circumstances of the case, the Judge must take into account the following matters:

- (a) the number and nature of the offences with which the accused person is charged:
 - (b) the nature of the issues likely to be involved:
 - (c) the volume of evidence likely to be presented:
 - (d) the imposition on potential jurors of sitting for the likely duration of the trial:
 - (e) any other matters the Judge considers relevant.
- (5) If the accused person is one of 2 or more persons to be tried together, all of them must be tried before a Judge with a jury unless an order under subsection (2) for all of them to be tried by a Judge without a jury is applied for and made.
- (6) This section does not limit section 361B or 361C or 361E.

[3] The point which the applicants seek to raise in this Court was not raised either in the District Court or in the Court of Appeal. It concerns the relationship between s 5 of the New Zealand Bill of Rights Act 1990 and the terms of s 361D. The applicants contend that the Courts below erred in failing to bring to account the terms of s 5 in the s 361D assessment.

[4] The Court of Appeal referred to its earlier decision in *Wenzel*, from which this Court declined leave to appeal in a decision delivered on 9 June 2009.¹ That application arose in circumstances broadly similar to those which apply here. The applicants' submissions do not make reference to the decision of this Court in *Wenzel*, whereas those made on behalf of the respondent place significant reliance on it. While the point sought to be raised in the present case is not exactly the same as that which was raised in this Court in *Wenzel*, the present applicants face some of the same difficulties as were identified by this Court in *Wenzel*. Furthermore, we would not ordinarily be disposed to give leave to bring a point to this Court that had not been raised in the Court of Appeal. The essential reason is that in these circumstances this Court does not have the benefit of the views of the Court of Appeal upon the point in issue.

[5] In the present case the point raised, as already foreshadowed, is that the exercise of the discretion to order trial by Judge alone conferred by s 361D should be

¹ [2009] NZSC 58.

informed not only by the criteria expressly set out in s 361D but also by the proposition that the right to trial by jury should not be taken away from an accused person unless that course represents a justified limitation of that right.

[6] The right to trial by jury under s 24(e) of the Bill of Rights Act is subject to justifiable limitations under s 5. Section 361D of the Crimes Act represents Parliament's determination that the right may justifiably be limited in certain cases which are likely to be long and complex. The section confers a discretion to order trial by judge alone. Before making an order the judge must be satisfied, having taken into account the matters specified in s 361D(4), that in the circumstances of the case the accused person's right to trial by jury is outweighed by the likelihood that potential jurors will not be able to perform their duties effectively. Parliament has thereby provided that if the judge is properly so satisfied, the accused's right to trial by jury may justifiably be limited.

[7] In the present case the trial Judge decided that the statutory requirements were satisfied and that his discretion should be exercised in favour of making an order for trial by Judge alone. The Court of Appeal, after a careful review of the Judge's reasons, and the circumstances of the case generally, upheld his conclusion.

[8] The alleged "failure" of the Court of Appeal and the trial Judge to make specific reference to s 5 and to apply its terms expressly, as an additional requirement, before exercising the discretion in favour of trial by Judge alone is, in this statutory environment, of no moment. As we have already said, once the statutory criteria are present and the trial Judge is properly satisfied, in accordance with the section's requirements, that the discretion should be exercised in favour of trial by Judge alone, the limitation on the right to trial by jury must be regarded as a justified limitation. It must, in any event, prevail by reason of s 4 of the Bill of Rights.

[9] If the Court finds an application under s 361D to be finely balanced, it would be appropriate, in the context of a protected right, for the Court to decline to order trial by Judge alone; but that is not the situation in the present case. While the exercise of the discretion in favour of trial by Judge alone in this case might not have

been quite as clear cut as it was in *Wenzel*, the concurrent views of the trial Judge and the Court of Appeal that this was a case for an order under s 361D cannot reasonably be attacked in this Court on account of any error of principle or on any other basis representing a point of general or public importance.

[10] For these various reasons, we do not consider that the applicants have made out any ground for the grant of leave. For completeness, we should add that we do not consider it to be reasonably arguable that the substantial miscarriage of justice ground might apply to this case.

[11] The applications for leave to appeal must therefore be dismissed.

Solicitors:
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