IN THE SUPREME COURT OF NEW ZEALAND

SC 71/2016
[2016] NZSC 118

BETWEEN	VIJENDRA KUMAR NAIKER Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: I M Brookie for Applicant
P D Marshall for Respondent

Judgment: 2 September 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The Crown alleged that the defendant had arranged for the burning down of his company's factory and had then made a false insurance claim in respect of it. There was no dispute that the fire was a result of arson. At the conclusion of his trial the applicant was found guilty of arson and the dishonest use of a statement which he had submitted in support of his insurance claim. A subsequent appeal against conviction was dismissed by the Court of Appeal.[1]

[2] The basis of the proposed appeal arises in this way. After the jury had been empanelled, the foreperson asked court staff to notify his employer that he was serving on a jury. It would appear that the employer looked into the case and, as a result, sent a text to the foreperson to the effect that the fire in question was arson

1 *Naiker v R* [2016] NZCA 250 (Harrison, Simon France and Woolford JJ).

and/or that the defendant was guilty.[2] It appears that for some days the foreperson said nothing about the text. However, towards the end of the trial, in the course of a conversation with some of the jurors he mentioned the text. Another juror who overheard the conversation raised it with the court crier who in turn told the Judge.

[3] The Judge spoke to both the foreperson and the juror who had overheard the discussion. His response was to dismiss an application from counsel for the applicant for a mistrial but to discharge the foreperson and to continue the trial with 11 jurors. The Judge recorded the reasons for the course he took.[3] In doing so he referred to the leading authorities.[4]

[4] No criticism has been made of what the Judge subsequently told the jury following the discharge of the foreperson or what he said in summing up.[5] The argument instead is that in the circumstances which had arisen, the Judge had no choice but to declare a mistrial.

[5] The argument advanced in support of the application for leave to appeal is broadly the same as that advanced to, and rejected by, the Court of Appeal.

[6] The situation which confronted the judge is by no means uncommon. His response was in accordance with usual practice. It is true that he could have made inquiry of more of the jurors but he was well-placed – indeed best-placed – to determine what the occasion required.[6] And as the Court of Appeal noted, it should not be lightly inferred that a jury which had heard a long trial would be influenced by extraneous material of the type involved here.[7]

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2 The exact words of the text message are not known.
3 *R v Naiker* [2015] NZDC 16132 (Judge Sharp).
4 At [11]–[14].
5 The Judge gave the Jury a firm direction to ignore any external material and reiterated the scope of the evidence they could consider. Further, as the respondent submits, there had been earlier such comments during the trial, most importantly a direction immediately following the discharge of the foreperson.
6 Mr Naiker's counsel opposed the Judge interviewing the other jurors.
7 At [11].

[7] There is no question of public or general importance involved in the proposed appeal and no appearance of a miscarriage of justice. Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent