IN THE SUPREME COURT OF NEW ZEALAND

SC 66/2016
[2016] NZSC 97

BETWEEN	MICHAEL BRIAN OGDEN Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Arnold JJ

Counsel: C J Nicholls for Applicant
J C Pike QC for Respondent

Judgment: 3 August 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Mr Ogden, was convicted at a judge-alone trial before Judge Tompkins of three counts of assaulting his ex-partner[1] and was later sentenced to 18 months imprisonment.[2] His appeal to the Court of Appeal against conviction and sentence was unsuccessful.[3] He now seeks leave to appeal against conviction to this Court, on the ground that he did not have a fair trial. He says he did not have a fair trial because in his reasons for verdict, Judge Tompkins relied on a written brief of evidence from a person who was not in fact called as a witness.

[2] At trial, the Crown alleged that Mr Ogden was a controlling, dominating person who had assaulted the complainant on three occasions over the course of three or four weeks following arguments or disagreements between them. For his

---

1 *R v Ogden* DC Wellington CRI-2014-096-3978, 2 September 2015.
2 *R v Ogden* [2015] NZDC 19875.
3 *Ogden v R* [2016] NZCA 214 (French, Asher and Williams JJ).

part, Mr Ogden denied that he had assaulted the complainant and claimed that she was not a credible witness and was unreliable.

[3] The Judge delivered judgment immediately following closing addresses from counsel. He found the complainant to be a "careful and considered witness", whereas he considered Mr Ogden to be an "unacceptable witness", who sought to disguise his psychological and physical abuse of the complainant. The Judge said that he considered the complainant's evidence to be largely consistent with that of other Crown witnesses. The Judge identified three – a friend of the complainant, who had become concerned about the complainant after she formed a relationship with Mr Ogden and described what she saw of their relationship; the complainant's ex-partner, who described how he had became concerned about the behaviour of the complainant and their daughter as a result of the relationship; and the kindergarten teacher of the complainant's daughter, who described the complainant as withdrawing and refusing to make eye contact at the relevant time.

[4] Immediately after judgment was delivered, counsel advised the Judge that the evidence of the kindergarten teacher had not been led, even though a brief had been prepared for her. The Judge immediately gave the following addendum to his judgment:

> Following the delivery of the reasons for verdict, [prosecuting counsel] properly drew to my attention that the formal written statement, as on the Court file, was not relied upon by the Crown at trial. I do not consider, given the relatively peripheral nature of that evidence, albeit corroborative … of the complainant's account, that its presence or absence has affected the substance of my decision in any way.

[5] Mr Ogden submitted that the right to a fair trial is absolute and that his trial was unfair as a result of the fundamental error that evidence not presented at trial was relied upon by the fact-finder. He relied on the decision of this Court in *Guy v R*.[4]

---

4 *Guy v R* [2014] NZSC 165, [2015] 1 NZLR 315.

[6] There was a majority in *Guy* for the proposition that the issue in a case such as this is whether the impugned material was capable of affecting the result of the trial.[5] If so, the conviction must be quashed; if not, the appeal must be dismissed.

[7] In the present case, it is clear that what the kindergarten teacher said in her brief was, at most, peripheral and not capable of affecting the outcome of the trial. In context, the evidence can fairly be described as "immaterial". In those circumstances, an appeal on the basis that it was wrongly before the trial Judge could not succeed.

[8] We are not satisfied that it is necessary in the interests of justice that we hear and determine this appeal. Given this Court's decision in *Guy*, the appeal raises no question of general or public importance. In addition, we do not see any risk of a substantial miscarriage of justice. The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

---

5 At [68] per William Young J (for McGrath J and himself) and at [85] per O'Regan J. Although Elias CJ, delivering the judgment of herself and Glazebrook J, took a narrower approach than the majority, she did acknowledge that there may be cases where the provision of extraneous material to a fact-finder is "immaterial": at [42] and [46].