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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 47/2023
[2023] NZSC 137**

BETWEEN FAZALULLAH KHAN MOHAMMED
 Applicant

AND THE KING
 Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: Q Duff and I M Stewart for Applicant
 M R L Davie for Respondent

Judgment: 20 October 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of three charges of indecent assault after a District Court jury trial. His application for a discharge without conviction was refused.¹ He was sentenced to seven months home detention and required to pay \$7,000 emotional harm reparation to the complainant.²

¹ *R v Mohammed* [2022] NZDC 21577 (Judge Dawson).

² *R v Mohammed* [2022] NZDC 11364.

[2] The applicant appealed against conviction to the Court of Appeal, but the appeal was dismissed.³

[3] The applicant now seeks leave to appeal to this Court against conviction. The proposed grounds of appeal are:

- (a) that the trial Judge erred in failing to give a lies direction to the jury;
and
- (b) that the prosecutor misled the jury at the trial by overstating/misstating the evidence.

[4] Both of these grounds were advanced in the Court of Appeal but rejected.

[5] In relation to the first ground, the applicant wishes to argue that the Court of Appeal was wrong to find that the lies direction was not necessary.

[6] The applicant did not give evidence at the trial, but made a pre-trial statement to police which was recorded on video and played at the trial. The prosecutor submitted that in the course of this statement, the applicant had lied on a number of occasions, and set these out in his closing address. However, the prosecutor then reminded the jury that there was no onus on the applicant to prove anything and that, if they disbelieved what he said in his interview, they should put it to one side and come back to the Crown's evidence, because the onus rested on the Crown's evidence.

[7] Section 124(3) of the Evidence Act 2006 requires a trial Judge to give a lies direction if the defendant requests one or the Judge is of the opinion that the jury may place undue weight on the evidence of a defendant's lie. In the applicant's trial, his counsel did not request a lies direction and there is no suggestion that counsel was negligent in that regard. So the question before the Court of Appeal was whether the Judge ought to have formed the view that the jury may have placed undue weight on evidence of the applicant's lies and so should have given a lies direction.

³ *Mohammed v R* [2023] NZCA 119 (Courtney, Venning and Downs JJ) [CA judgment].

[8] The Court of Appeal rejected a submission made on behalf of the applicant that the Crown had used lies in the applicant's statement to bolster the victim's credibility or relied on the applicant's lies as evidence of guilt.⁴ The Court distinguished a case relied on by the applicant's counsel, *Ward v R*.⁵ The Court referred to another case, *R v Guo*, which it saw as similar to the present case, where the Court of Appeal had found no lies direction was necessary.⁶ The Court also noted that, in *Guo*, the Court of Appeal had confirmed that a lies direction was not required where, as here, the Crown simply maintained the exculpatory explanation given by the defendant was false.

[9] The submissions for the applicant in support of the application for leave largely repeat those advanced in the Court of Appeal. The applicant argues that the fact that no lies direction was given at the trial has led to a real and substantial risk that a miscarriage of justice has occurred.⁷

[10] In relation to the second proposed ground, the applicant submitted in the Court of Appeal that certain statements made by the Crown prosecutor at the trial misstated/overstated the evidence. The Court of Appeal accepted that there had been errors by the Crown prosecutor, but concluded that none led to a miscarriage. The applicant wishes to reprise the same arguments before this Court and challenge the conclusion reached by the Court of Appeal. The applicant says the errors made the need for a lies direction more acute.

[11] We do not consider that it is in the interests of justice for this Court to grant leave to appeal in this case.⁸ The applicant invokes the ground set out in s 74(2)(b) of the Senior Courts Act 2016, namely that "a substantial miscarriage of justice may have occurred, or may occur unless the appeal is heard". In effect, the applicant is asking this Court to provide for a second attempt at advancing the arguments made by his counsel in the Court of Appeal in circumstances where there is no appearance of any error on the part of the Court of Appeal in the way the grounds of appeal were

⁴ At [24].

⁵ At [25] referring to *Ward v R* [2016] NZCA 280.

⁶ CA judgment, above n 3, at [26]–[28] referring to *R v Guo* [2009] NZCA 612.

⁷ Senior Courts Act 2016, s 74.

⁸ Section 74(1).

addressed. We are not satisfied that there is any risk that a miscarriage of justice may occur if leave is declined.

[12] The application for leave to appeal is dismissed.

Solicitors:

Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent