IN THE SUPREME COURT OF NEW ZEALAND

SC CRI 3/2004

POURSHAD MARCO ARVAND

v

THE QUEEN

Hearing: 7 July 2004

Coram: Elias CJ
Tipping J

Appearances: W Lawson for Applicant
J C Pike for Respondent

Judgment: 15 July 2004

JUDGMENT OF THE COURT

---

[1] Pourshad Marco Arvand seeks leave, pursuant to s13 of the Supreme Court Act 2003, to appeal from the decision of the Court of Appeal dismissing his appeal against conviction. He contends that the issues involved, or at least some of them, are matters of general or public importance (s13(2)(a)) and that a substantial miscarriage of justice would occur unless his intended appeal to this Court is heard (s13(2)(b)).

[2] Mr Arvand was convicted after a jury trial in the High Court at Rotorua on a number of counts of stupefying, sexual violation, indecent assault and fraud. The trial Judge ruled that the deposition evidence of two of the sexual complainants, K

and S, could be read at the trial, they being out of the country. The Crown's case in summary was that Mr Arvand targeted females of Asian ethnicity who were living in or visiting New Zealand and perpetrated both sexual attacks and fraud upon them. K and S were visitors to New Zealand at the relevant time. They had subsequently returned to Japan and declined to return to New Zealand to give evidence at the trial; albeit they had earlier given evidence at depositions.

[3] The Court of Appeal held that the trial Judge should not have allowed K's deposition evidence to be read to the jury, largely because of interpretation problems. The Judge's decision to admit S's deposition evidence was, however, upheld.

[4] The first point Mr Arvand wishes to pursue on further appeal is the proposition that the Court of Appeal was wrong to have made this distinction. He contends that S's deposition evidence should also have been excluded. In delivering the Court's judgment Hammond J said (at paragraph [26]):

> Instances in which persons who had been visiting New Zealand who would not wish to return to New Zealand for a trial of this character, elicit sympathy. The trauma of returning to a foreign jurisdiction is also sometimes overlaid also with cultural considerations. The difficulties standing in the way of prosecutors are then self-evident. Nevertheless, it must only be in truly exceptional cases pertaining to charges of a sexual character that the complainant should not be presented for examination before the jury. We consider, entirely on the facts, that this is such an exceptional instance. The appellant was literally "caught in the act", and with the complainant in the state she was then found to be in. Those are matters of objective fact, attested to by independent witnesses.

[5] Mr Lawson rightly accepted he could not challenge the "truly exceptional" test which the Court of Appeal adopted. His complaint was rather that the facts of this case were not truly exceptional. Hence no point of principle is involved. The Court of Appeal's view that the facts were truly exceptional was based in part on the proposition that Mr Arvand had been "caught in the act". This was a reference to the evidence of a police officer who very shortly after the offending found the complainant S in a state which was wholly consistent with her allegation that she had been stupefied.

[6] The police officer's description of the state which S was in, and her conduct, demonstrated independently of the complainant's evidence that she was substantially

under the influence of some stupefying substance. Mr Lawson argued that this evidence did not sufficiently meet and rebut the defence of consent which Mr Arvand had advanced. Implicit in this argument was the proposition that it was reasonably possible that S had given her consent earlier, when rational.

[7] We are of the view, however, that the state in which S was found was strongly corroborative of her allegation of lack of consent. We do not consider it at all likely that a genuine consent was given earlier, as Mr Lawson suggested was possible, and that such consent extended to sexual activity while she was stupefied to the degree observed by the police officer. Nor is the level of stupefaction consistent with an earlier rational consent. It hardly suggests that S had freely consented to his conduct.

[8] In any event we consider it was fully open to the Court of Appeal to take the view that the independent evidence of S's state, coupled with the fact that she had been cross-examined at depositions, made the case sufficiently exceptional to justify her deposition being read at trial pursuant to the discretion given the trial Judge by s184 of the Summary Proceedings Act 1957.

[9] This point does not qualify for leave on either of the bases advanced (point of general importance and substantial miscarriage of justice). In essence, in the case of S, the Court of Appeal upheld the exercise by the trial Judge of her discretion. No error of principle is asserted nor is it reasonably arguable that the concurrent views of the trial Judge and the Court of Appeal on the matter are so plainly wrong as to necessitate a second appeal. There can be no concerns about the fairness of Mr Arvand's trial on this aspect.

[10] Mr Arvand's second point concerns the late supply by the Crown of the brief of evidence of Professor Begg. In essence Professor Begg's evidence established that the relevant complainants had ingested substantially more diazepam than Mr Arvand admitted he had given them. The Professor had not given evidence at depositions and his brief was supplied to the defence unheralded at 5.10pm on the Tuesday before the scheduled start of the trial on the following Monday. The trial Judge was asked to exclude this evidence or, alternatively, to adjourn the trial. She

refused to do either. Her decision was upheld by the Court of Appeal on the basis that there was "at the end of the day" no actual prejudice to the defence.

[11] Mr Lawson argued that although in the short time available he had been able to confer with another suitably qualified expert in Western Australia, and had also been able to make some headway when cross-examining Professor Begg, a sufficient miscarriage of justice may nevertheless have occurred to warrant a further appeal. Although, as Mr Pike readily accepted, the evidence was tendered extremely late, we consider the Court of Appeal was entitled to find, in effect, that in the circumstances there was no sufficient risk of prejudice to justify a new trial. No basis has been identified upon which it could be suggested that with an adjournment Mr Arvand might reasonably have been able to cross-examine Professor Begg to better effect or call evidence himself, so as significantly to cast doubt on what the Professor said at the trial.

[12] In these circumstances we are not satisfied that it is necessary in the interests of justice for the Supreme Court to hear and determine the proposed appeal. We are not persuaded that a substantial miscarriage of justice may have occurred or may occur on this point unless the proposed appeal is heard.

[13] Mr Arvand's third point is that the Court of Appeal erred in not upholding a complaint he had made about another ruling of the trial Judge. This ruling declined to allow Mr Arvand to require a complainant, H, to demonstrate her English language ability in front of the jury. The defence purpose was to demonstrate that a non-Japanese speaking police officer could not have elicited a statement from H couched in the way it was in English. The complaint is that the statement was more that of the police officer than H. Mr Lawson accepted that the essence of his argument was that H had been allowed to refresh her memory before trial from a statement expressed in English which was tainted by her lack of understanding of that language. This proposed ground of appeal also concerns limits which the trial Judge put on cross-examination of the complainants in a similar context.

[14] We are not satisfied these matters qualify for a second appeal. Essentially they concern rulings by the trial Judge, upheld by the Court of Appeal, about the

degree of relevance of proposed evidence and a proposed line of cross-examination. The issues represent individual features of an unusual case and their nature can hardly be regarded as a matter of general or public importance. Nor it is necessary for the Supreme Court to consider them on miscarriage of justice grounds. The same can be said of a point raised by the Court in argument concerning the effect of the decision of the Court of Appeal that K's evidence should have been excluded on the Judge's similar fact direction that if the jury regarded K's evidence as believable, it was available to support S's case. In the event of course K's evidence should not have been before the jury but, as Mr Pike pointed out, there was so much evidence that was capable of amounting to similar fact support for the evidence of S, that no miscarriage of justice concerns can reasonably arise.

[15] For the reasons given we are not persuaded that any of the points raised, either orally or in writing, qualify for leave to appeal under s13 of the Supreme Court Act. The application for leave to appeal is therefore dismissed.

Solicitors:
Lance and Lawson, Rotorua for Applicant
Crown Law Office, Wellington for Respondent