IN THE SUPREME COURT OF NEW ZEALAND

SC 25/05
[2005] NZSC 58

PETER JOSEPH THOMPSON

v

THE QUEEN

Hearing: 16 August 2005

Court: Elias CJ and Gault J

Counsel: J N Bioletti for Applicant
A Markham for Crown

Judgment: 23 August 2005

JUDGMENT OF THE COURT

A The application for leave to appeal against conviction is dismissed.

B The case is remitted to the Court of Appeal to deal with the appeal against sentence.

REASONS

[1] The applicant was tried and convicted on three counts charging the offence provided for in s 229 Crimes Act 1961 of with intent to defraud, using a document capable of being used to obtain a pecuniary advantage. He appealed to the Court of Appeal against both conviction and sentence.

[2] The Court of Appeal was persuaded that the convictions for the offence charged could not stand because the evidence did not prove that the applicant used the documents himself or by an agent. The Court was satisfied, however, that the evidence did establish commission of the different offence provided for in s 246 of the Crimes Act (now repealed). It provides for the offence of with intent to defraud by means of a false pretence, inducing a person to execute a valuable security for the purpose of obtaining a pecuniary advantage. The Court ordered amendment of the indictment substituting verdicts of guilty of offences under s 246 and purported to do so invoking the discretion conferred by s 386(2) of the Crimes Act. The Court adjourned the sentence appeal pending receipt of a reparation report.

[3] The applicant applied for leave to appeal to this Court on the ground that it was not open to the Court of Appeal to substitute under s 386(2) verdicts of guilty of offences not charged in the indictment.

[4] The Crown opposes the grant of leave to appeal. It was common ground that the verdicts could not be substituted under s 386(2), but the Crown submitted that the same result could have been reached by invoking the power in s 335 of the Crimes Act. Under that section the Court of Appeal may amend an indictment so as to make it conformable with the proof, so long as the accused has not been misled or prejudiced. The Crown submits that the verdicts returned on the charges presented at the trial are consistent only with acceptance by the jury of all elements of the substituted offences. That submission must be accepted in the circumstances of this case.

[5] Mr Bioletti argued that the jurisdiction of the Court of Appeal under s 335 is limited to situations in which amendment has been sought first in the trial court, but we do not accept that. The section is clear and there is no reason to read it down.

[6] Counsel also outlined points he would argue if leave were given with reference to the different elements in the substituted offences. But the issue is as to conformity of proof. In this case the appropriate enquiry is whether, from the verdicts of the jury on the case presented to them, it is clear that they must have accepted as proved all the elements of the substituted offences. That is essentially a

factual assessment that is specific to the circumstances of this case. It does not raise any issue of general or public importance.

[7] Further, having reviewed the trial Judge's summing up to the jury we are satisfied that there is no arguable error in principle in the assessment made by the Court of Appeal by reference to the decision in *R v Simon* CA 230/04, 14 October 2004. Invoking the wrong statutory authority for a decision that would clearly have been the same had the correct authority been identified does not give rise to a miscarriage of justice. The criteria for leave to appeal in s 13 of the Supreme Court Act 2003 are not met.

[8] Refusal of leave by this Court means the case must be remitted to the Court of Appeal to deal with the appeal against the sentence which stands in respect of the substituted offences. If the sentence appeal proceeds on the basis that that Court should have invoked s 335 in substituting different offences, there may arise for consideration the impact of subs (6) of that section. In relation to that we note the differing views expressed in *R v Bell* CA 369/89, 11 June 1990 and *R v Morland* CA 148/99, 218/99, 6 September 1999, but as presently advised we do not, and Ms Markham for the Crown does not, regard that subsection (which pre-dates appeals against sentence) as inhibiting consideration of a separate appeal against sentence.

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