

IN THE SUPREME COURT OF NEW ZEALAND

**SC 20/2005
[2005] NZSC 25**

KRISHAN JAICHANDRE KANHAI

v

THE QUEEN

Court: Gault J and Blanchard J
Counsel: D C S Reid for Applicant
J C Pike for Crown
Judgment: 11 May 2005

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted on 14 March 2003 after trial before a jury in the District Court at Auckland of doing an indecent act in a public place.

[2] After hearing the evidence of a florist that the applicant, with whom she had had previous encounters, had exposed himself to her in her shop premises, the jury returned a verdict of guilty. In doing so they clearly rejected evidence of his denial and alibi evidence from his sister and brother.

[3] The applicant appealed to the Court of Appeal on the ground that the verdict was unreasonable or could not be supported on the evidence. The appeal was dismissed and the applicant does not seek to challenge the reasons given.

[4] The applicant now seeks to raise by way of appeal an entirely new ground; that of incompetence of trial counsel in failing to discuss with his client and to call evidence of the accused's good character. He wishes to do this by way of direct (leapfrog) appeal from the trial court and is applying for leave on the ground of exceptional circumstances under s 14 of the Supreme Court Act 2003.

[5] We are not persuaded that it is open to this Court to entertain an application for leave to bring the direct appeal after an unsuccessful appeal to the Court of Appeal. In this respect, as explained in *Clark v R* [2005] SC 23, appeals from trial courts after conviction may be either to the Court of Appeal or (subject to leave) to the Supreme Court. Where there is an appeal to the Court of Appeal there may be a further appeal, with leave, to the Supreme Court.

[6] There may be special cases in which new grounds, not advanced on appeal to the Court of Appeal, may be entertained on a further appeal in the Supreme Court where that is necessary in the interests of justice. We have therefore considered the present application as one seeking leave to appeal in that way. However, we are not satisfied that even on that basis an oral hearing is necessary and leave must be refused.

[7] The case the applicant wishes to advance is that if evidence of his good character had been led before the jury a direction in the Judge's summing up as required by *R v Falealili* [1996] 3 NZLR 664 would have been given and it could not be said that the jury necessarily would have reached the same verdict.

[8] It is difficult to see in this argument an issue of principle of general or public importance. To reach that criterion it would be necessary to contend that in all criminal trials, where there would be no risk to the accused, it constitutes appealable error giving rise to a miscarriage of justice for counsel not to adduce evidence of

good character. That clearly is unacceptably broad. The circumstances of particular cases must be considered.

[9] In this case, the two witnesses from whom it is said evidence of good character should have been led were the sister and brother of the applicant on whose evidence the alibi was constructed. As the Court of Appeal judgment demonstrates, the alibi was “demolished” by contradictory evidence especially that disclosing Telecom telephone records. Rejection by the jury of their alibi evidence reflects upon the credibility of those witnesses. Plainly the probative value of their evidence of the applicant’s good character would have been minimal. It would not have made a difference in the face of strong Crown evidence. The case for raising this new ground for the first time on a second appeal lacks merit.

[10] Accordingly there having been shown no risk of a substantial miscarriage of justice and no issue of general public importance, leave is refused.

Solicitors:
Crown Law Office, Wellington