IN THE SUPREME COURT OF NEW ZEALAND

SC 47/2006
[2006] NZSC 84

WALI JAVAD ALLAHYAI

v

THE QUEEN

Court: Blanchard, Tipping and McGrath JJ

Counsel: B J Hart for Applicant
E M Thomas for Crown

Judgment: 5 October 2006

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted by a jury in the High Court on eleven counts involving violence towards his wife, and one count of unlawful possession of a firearm. The jury acquitted him of a charge of attempted murder. The most serious count on which he was convicted was of wounding the complainant with intent to cause grievous bodily harm. He was sentenced to 10 years' imprisonment and ordered to serve a minimum term of six years.

[2] The applicant appealed to the Court of Appeal against his conviction on the wounding with intent charge. The sole ground of appeal was the availability of fresh evidence which might reasonably have resulted in a different verdict. He also appealed against his sentence. His appeal was dismissed in both respects. He now applies for leave to appeal to this Court against the dismissal of his appeal against conviction.

[3] The applicant relies on a large number of grounds, described as "an overwhelming number of irregularities", relating to the conduct of his trial and the Court of Appeal hearing. A common feature is his criticism of the conduct of the defence at his trial, and of the subsequent appeal, by the counsel who represented him on those occasions. His present counsel was engaged following delivery of the Court of Appeal's judgment.

[4] In relation to his trial the applicant wishes to argue that inadmissible evidence was heard by the jury which may have resulted in a substantial miscarriage of justice. The evidence said to be inadmissible related first to residue following discharge of a firearm, secondly to certain hearsay evidence, and thirdly to certain evidence bearing on the applicant's character. Two passages of evidence were said to be "inferentially hearsay". One concerned what was said to be an inference arising from evidence from a witness that, as a result of a phone call, the witness met an unknown person who disposed of a rifle that had been left in the car of the witness. The other concerned inferences arising from the victim's evidence that she was scared of the applicant. The complaint that evidence of the applicant's bad character was wrongly admitted concerned disclosures that the applicant was in prison in New Zealand prior to the shooting and evidence given in response to the Judge's questions in which the applicant indicated he had a history in Canada which led to his deportation.

[5] The applicant next wishes to argue that his trial was unfair because charges in relation to the more serious counts of violence, concerning events of 12 August 2003 when the victim was shot while at home, should have been heard separately from other charges. No application for severance was made and the complaint is that the Court should have severed the charges on its own initiative.

[6] Another ground of appeal concerns the alleged incompetence of the applicant's former counsel at his trial. This ground repeats various grounds of appeal attributing responsibility to former counsel in failing to take action of various kinds at the trial. There are also incidental complaints concerning such matters as the alleged failure to engage a forensic expert, to cross-examine on gunshot residue, wound height, and phone calls possibly made by the victim, as well as prior inconsistent statements by a witness and failure to call evidence including that which the Court of Appeal refused to admit.

[7] The next ground concerns the refusal of the Court of Appeal to admit additional evidence on the appeal to that Court because the new evidence was not credible or cogent. Associated with the complaint that this decision was wrong is an allegation of incompetence of counsel who did not call that evidence at trial.

[8] These grounds are said to give rise in combination to a situation where a miscarriage of justice may occur if the applicant is not allowed a second appeal. It is also argued that the applicant's rights of appeal have not been met by the process. The grounds are supported by an affidavit from the applicant who has waived privilege in respect of his former counsel.

[9] It is apparent that the applicant is now of the view that his trial defence and appeal should have been presented on a different basis. We must, however, approach the application for leave to appeal to this Court, under ss 12 and 13 of the Supreme Court Act 2003, by examining whether the proposed appeal involves any matter of general or public importance or whether the points raised indicate that a substantial miscarriage of justice may have occurred.

[10] To the extent that the Court of Appeal's refusal to admit new evidence is challenged, we are satisfied that its conclusion that the evidence lacked cogency was reached applying settled legal principles and that no possible miscarriage of justice, nor any issue of general or public importance, arises from the judgment on that point. The counsel incompetence ground related to this question also falls away once it is plain that the evidence lacked cogency. The written submissions of the applicant concerning that finding did not persuade us to a different conclusion.

[11] Subject to one qualification, all other grounds advanced in support of the application for leave to appeal are also without substance. It is not necessary to elaborate on this conclusion by discussing every one of the large number of points raised. In relation to the firearm discharge residue evidence, experienced counsel clearly decided not to object to the manner in which it was led, through New Zealand ESR witnesses. We see no proper basis for allowing that decision to be made the basis of a second appeal. Similarly, there is no basis on which the particular complaints over inferential hearsay raise an issue that should be heard by this Court. The only indication that the trial Judge gave concerning offending in Canada relates to what the trial Judge said when sentencing the applicant. A reading of the transcript indicates this aspect of the applicant's situation was dealt with very carefully by counsel and the Judge during the trial. Trial counsel obviously decided not to seek severance of the attempted murder or wounding counts. There is, however, nothing to indicate this was done other than for appropriate tactical reasons.

[12] There is an issue of potential importance raised by the present appeal which concerns whether the leading of bad character evidence gives rise to a serious question of trial counsel incompetence, which it could not be expected would be put before the Court of Appeal in a situation in which trial counsel for the defence was also counsel on appeal. With that in mind, we have read the extensive references to the transcript of evidence to which counsel drew our attention in written submissions in support of the application. Having done that we are not of the view that what was admitted went beyond what would normally be permitted by a trial court. Much of it was the sort of evidence which experienced defence counsel might wish to have on the record as a basis on which to suggest to the jury that a witness might have had malice towards the accused or sympathy for the complainant.

[13] We are satisfied that in these circumstances it is not necessary for us to invite former counsel for the applicant to respond to the various allegations made against him. Nor would we be assisted by an oral hearing of the application for leave to appeal. Nothing said on the applicant's behalf in written submissions persuades us that there is any issue that is seriously arguable in this Court that the Court of Appeal was wrong to dismiss the appeal against his conviction. We are also satisfied that

calling further forensic evidence would not have assisted him surmount the very strong Crown case against him at trial. What he may have instructed his former counsel in that regard takes the matter no further. Nor has the applicant persuaded us that there is an arguable issue on any other basis concerning his former counsel's competence in conducting the trial that might cause concern that there has been a miscarriage of justice in this case. The applicant had a fair trial and a fair hearing of his appeal on the grounds that his experienced counsel thought raised the best prospect of securing a retrial. In fairness to trial counsel, who has not of course had a chance to respond to criticism, we add that in his sentencing remarks the trial Judge referred very favourably to his conduct of the trial.

[14] The application for leave to appeal is accordingly dismissed.

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