IN THE SUPREME COURT OF NEW ZEALAND

SC 24/2006
[2006] NZSC 41

KEVIN JACK NGAN

v

THE QUEEN

Court: Elias CJ, Blanchard and Anderson JJ

Counsel: C W J Stevenson for Applicant
A Markham for Crown

Judgment: 12 June 2006

JUDGMENT OF THE COURT

The application for leave to appeal directly to this Court is dismissed.

REASONS

[1] The applicant seeks leave pursuant to s 14 of the Supreme Court Act 2003 to appeal directly to this Court against his conviction, in the High Court, for possessing methamphetamine for supply. This Court has considered the written submissions in support of and in opposition to the application, and has determined that it is unnecessary to have oral argument.

[2] Mr Ngan was driving a car on State Highway 1 and then crashed. He, the only occupant, was airlifted to hospital. Police officers who attended the scene took

possession of various items of personal property for safekeeping. These included a large supply of high denomination currency notes which had been strewn around the crash site. One officer also took possession of a sunglasses case. Believing it to contain more currency, he wished to open it in the presence of another police witness and did so. The case contained the methamphetamine. Mr Ngan's wallet, also picked up by the police, was examined at the police station to which the property was taken. It was found to contain a newspaper clipping reporting judicial comment on Mr Ngan's drug habit.

[3] Evidence of the finding of methamphetamine was crucial to the prosecution. Mr Ngan challenged its admissibility, unsuccessfully, in a pretrial application in the High Court under s 344A of the Crimes Act 1961, and on appeal from that decision to the Court of Appeal.

[4] In the High Court Mr Ngan's counsel argued that the search of the sunglasses case at the scene was unreasonable. Miller J accepted a concession on behalf of the Crown that the search of the case was unlawful, but concluded that it was nevertheless reasonable. The Judge went on to note that in any case the search of Mr Ngan's wallet at the police station would have led to the discovery of the newspaper clipping, which, in combination with the large amount of cash at the accident site, would have provided reasonable grounds to search the sunglasses case. Thus, the discovery of the methamphetamine was inevitable. It had been accepted on behalf of Mr Ngan that the police were entitled to examine the wallet at the station for the purposes of inventory in connection with safekeeping.[1]

[5] In dealing with the appeal against the pretrial ruling the Court of Appeal held that the police had a duty to identify and record the contents of the wallet for safekeeping purposes. The Court found it unnecessary to determine the lawfulness of the search of the sunglasses case because, in its view, the presence of the cash at the accident site and the discovery of the newspaper clipping would have supported either an application for a search warrant or a search pursuant to s 18 of the Misuse of Drugs Act 1975. Discovery of the methamphetamine was therefore inevitable.

[1] As noted in the Court of Appeal judgment at [25].

[6] On appeal against conviction, Mr Ngan would wish, by counsel, to argue that both the search of the sunglasses case and the wallet were unreasonable and that a miscarriage of justice has occurred by reason of the admission of such evidence.

[7] Counsel for Mr Ngan submits that a conviction appeal to the Court of Appeal would simply result in a replication of that Court's pretrial conclusion and for that reason this Court should entertain a direct "leapfrog" appeal from the High Court pursuant to s 14. He submits that the appeal involves a matter of general or public importance, that being the legality and reasonableness of inventory searches conducted by police. This issue has been addressed by the United States Supreme Court in *Colorado v Bertine*[2] and *Florida v Wells*[3] and by the Supreme Court of Canada in *R v Caslake*.[4] It is also submitted that if the appeal is not heard a substantial miscarriage of justice may occur.

[8] The Crown's view is that an appeal directly from the trial Court to this Court is not warranted. The Court of Appeal's approach leaves open the question of the reasonableness or otherwise of the search of the sunglasses case. Nor was it asked to consider the jurisprudence of Canada and the United States of America. The Crown submits that the matter should first be heard, refined, and determined by a permanent Court of Appeal.

[9] One reason why leave for a "leapfrog" appeal is only to be granted in exceptional circumstances is so that this Court may have the benefit of the opinion of the Court of Appeal on questions of general or public importance. Of the points counsel for Mr Ngan now seeks leave to argue, one (the reasonableness of the wallet search) was apparently conceded in the High Court and the other (the reasonableness of the search of the sunglasses case) was not addressed by the Court of Appeal. Nor did the Court of Appeal have the benefit of the overseas jurisprudence that has now been brought to this Court's attention.

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[2] 479 US 367 (1987).
[3] 495 US 1 (1990).
[4] [1998] 1 SCR 51.

[10] An appeal against conviction to the Court of Appeal would not therefore necessarily lead to a replication of the earlier judgment. The Court of Appeal may examine the reasonableness of the search of the sunglasses case and re-examine that of the wallet. Those matters are entirely for the Court of Appeal at that stage.

[11] Likewise, the issue of whether a substantial miscarriage of justice may have occurred was one that did not require the consideration of the Court of Appeal on the pretrial application, but which it may address on an appeal against conviction.

[12] For these reasons, it does not appear to us that there are exceptional circumstances warranting a direct appeal to this Court pursuant to s 14. The application is accordingly dismissed.

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