IN THE SUPREME COURT OF NEW ZEALAND

SC 8/2006
[2007] NZSC 96

EMELYSIFA JESSOP

v

THE QUEEN

Court: Elias CJ, Blanchard and Anderson JJ

Counsel: T Ellis for Applicant
M D Downs for Crown

Judgment: 30 November 2007

JUDGMENT OF THE COURT

The application to set aside dismissal of leave is dismissed.

REASONS

[1] The applicant applies to set aside the leave judgment of this Court dated 27 March 2006. By it, she was declined leave to appeal against the Court of Appeal's judgment of 19 December 2005 dismissing her appeal against conviction and sentence on a charge of aggravated robbery. The leave application was dismissed by Elias CJ, Blanchard and Tipping JJ, acting for the Court in accordance with s 15 of the Supreme Court Act 2003. The basis upon which the leave judgment is challenged in the present application is the composition of the leave Court. The appellant contends that Elias CJ and Tipping J should have been disqualified because

of a reasonable apprehension of bias. It is also maintained that there was a failure of natural justice, and a breach of s 27 of the New Zealand Bill of Rights Act, because the appellant was not notified of the composition of the leave Court, "thus preventing her from objecting to Elias CJ and Tipping J sitting".

[2] The matter has a long history. The appellant was one of those whose appeals were directed by the Privy Council in *R v Taito*[1] to be considered again by the Court of Appeal, after having first been dismissed on the papers. Tipping J had been a member of the Court of Appeal panel which had first dealt with the appeal on the papers. The subsequent Court of Appeal hearing following the successful appeal to the Privy Council was heard in December 2005 by a new panel. The appeal against conviction and sentence was dismissed in a judgment delivered on 19 December 2005.[2] It is this judgment against which the applicant sought leave to appeal to this Court.

[3] Before the trial and conviction that gave rise to this appeal, the applicant had earlier been convicted in respect of the same offending after pleading guilty in the Youth Court in 1998. She had been sentenced by Potter J in the High Court at Auckland in July 1998 to a term of imprisonment of four years. The conviction and sentence were set aside by the Court of Appeal, by consent, on the basis that the entry of the conviction in the Youth Court was a nullity. Because the procedural defect was fatal, the Court of Appeal was not required to consider the merits of the case against Ms Jessop. Nor was it required to consider the sentence imposed. A new trial was ordered. The Court of Appeal panel then comprised Eichelbaum CJ and Robertson and Elias JJ.

[4] At the new trial before Potter J and a jury, Ms Jessop pleaded not guilty. She was found guilty and sentenced to a prison term of four years eight months (an increase which simply reflects the absence of a reduction for a guilty plea). It may be noted that there is no reason why Potter J, though she was the earlier sentencing Judge in respect of the conviction which was set aside, should not have presided at

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1 [2003] 2 NZLR 577.
2 *R v Jessop* (Court of Appeal, CA 13/00, 19 December 2005).

the trial. No objection to her sitting was made and, indeed, the applicant's counsel requested that Potter J should undertake the subsequent sentencing.

[5] It is these new proceedings, heard in late 1999, which give rise to the present application. The conviction and sentence imposed following the guilty verdict were the subject of the appeal eventually determined by the Court of Appeal in 2005, which Ms Jessop sought leave to appeal further to this Court.

[6] Ms Jessop contends that the Chief Justice should not have sat on the leave application, and should not sit in the present application, because she had been a member of the Court of Appeal panel which had set aside the first conviction on the basis of a procedural defect. There is no proper basis for the claim of reasonable apprehension of bias in these circumstances. The present appeal arises out of the new trial, not the earlier conviction. The 1999 case was concerned with a fatal procedural defect which made it unnecessary for the Court of Appeal to consider the merits of the underlying charge and the sentence. The decision of the Court of Appeal to set aside the conviction and sentence was by consent, effectively at the request of both the Crown and the applicant. Even if the appeal is properly characterised as a subsequent stage of the same earlier proceeding (a characterisation we think doubtful), a Judge is not normally disqualified because he or she has sat on an appeal at an earlier stage of a proceeding. It is necessary for there to be some real ground for doubting the ability of the judge to bring an objective judgment to bear.[3] Here there is no ground upon which it can properly be suggested that the Chief Justice should not have sat in determining any appeal from the conviction and sentence on retrial. The Chief Justice is accordingly part of the present panel constituted under s 27(2) of the Supreme Court Act 2003 to determine the application for reconsideration of the decision of 27 March 2006.

[7] Contrary to his usual practice, counsel for the applicant did not draw the Court's attention to Tipping J's involvement some six years previously in the appeal which gave rise to the application for leave. Tipping J has placed a memorandum on

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3 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at 480 (CA).

the file recording that he has no independent recollection of the case. On that basis his previous involvement cannot have indirectly affected his judgment, or that of other members of the later panel considering an appeal by the applicant, even if Tipping J should not have sat again on the grounds of apparent bias - a matter which is itself doubtful for the reasons discussed in *Auckland Casino Ltd v Casino Control Authority*[4] and *Locabail (UK) Ltd v Bayfield Properties Ltd.*[5] However, on the basis that it is arguable that Tipping J should not have sat on the application, Anderson J has replaced Tipping J for the purpose of reconsidering the earlier decision of this Court.

[8] Having reconsidered the grounds raised on behalf of the applicant in support of the granting of leave, we are unanimous in considering that the earlier decision declining leave was in substance correct, for the reasons given therein, and that no proper basis has been shown for departing from the decision. The decision is confirmed.

Solicitors:
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4 [1995] 1 NZLR 142, 148.
5 At 477.