

IN THE SUPREME COURT OF NEW ZEALAND

SC 32/2007
[2007] NZSC 98

KEM RAJU SAMY

v

THE QUEEN

Court: Elias CJ, McGrath and Anderson JJ

Judgment: 5 December 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

[1] Mr Samy applies for leave to appeal against the dismissal by the Court of Appeal of an appeal against his conviction in 1994 on a charge of rape.

[2] The appeal, which was heard and determined on 16 April 2007, was a rehearing of Mr Samy's appeal against conviction in terms of *R v Smith*.¹ The sole ground of appeal remaining for consideration at the hearing was that a miscarriage of justice had occurred because of trial counsel's failure to call medical evidence to explain Mr Samy's medical condition at the relevant time.

¹ [2003] 3 NZLR 617.

[3] On completion of his sentence of imprisonment, in relation to the conviction that is the subject of appeal, Mr Samy was required to leave New Zealand and has lived in Fiji. He was not present at the Court of Appeal hearing but was represented by counsel. Mr Samy had sworn an affidavit in relation to the ground of appeal, and prior to the hearing it was anticipated that he would swear a further affidavit outlining fuller details of his medical condition at the time.

[4] Arrangements had been made for Mr Samy to be cross-examined at the Court of Appeal hearing through a video conference link. He did not, however, attend at the place arranged in Fiji. His counsel sought an adjournment on the day for that reason and because a sworn copy of the second affidavit, which was required in support of the basis of the appeal, was not available. The Court refused the adjournment application. It took the view that Mr Samy had chosen to make himself unavailable for cross-examination on the day in accordance with the arrangements made. The Court considered the material on the record and reached the view that the appeal, in any event, had no chance of succeeding. Accordingly it dismissed the appeal. On 23 April 2007, it gave reasons.

[5] Mr Samy applied on 29 May 2007 for leave to appeal to this Court on the ground that he had been refused permission to enter New Zealand to conduct his appeal and the appeal had been dismissed without according him a proper hearing.

[6] On 18 June counsel who had appeared in the Court of Appeal wrote to the Registrar of this Court advising that he had to withdraw because, he had been informed, his own competence in the Court of Appeal was to be a ground of appeal to this Court.

[7] Since then, efforts have been made to obtain new counsel for Mr Samy. It seems that two barristers have considered the file but in neither case has this resulted in instructions being accepted, or submissions in support of the application being filed. The time stipulated by the Supreme Court Rules for filing written submissions has long expired.

[8] On 3 October a Judge of this Court directed that Mr Samy make submissions in writing within a month as to why his application for leave to appeal should not be dismissed for want of prosecution and, as well, why the application for leave should be granted in any event. This followed the expiry of an earlier extension of time deadline.

[9] The 3 October direction has resulted in various papers being sent to the Court by a lay person who is supporting Mr Samy. We have read what has been provided but there is nothing in it to indicate that there is a tenable ground of appeal against the Court of Appeal judgment that would meet the statutory requirements for the granting of leave to appeal to this Court.

[10] In those circumstances, there is no basis for us to prolong the prospect of an appeal to this Court against the Court of Appeal judgment and the application for leave to appeal is dismissed.

[11] It may be that, in terms of the judgment of the Court of Appeal in *R v Smith* at para [35], Mr Samy is able, at some point, to show that there are exceptional circumstances that warrant reopening by the Court of Appeal of its judgment. That possibility may, of course, already have been considered by counsel. We emphasise that, in any event, it would not be prudent for this course to be attempted until such time as Mr Samy is able to obtain legal representation and mount a proper basis, if he can, for such an application.

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