

IN THE SUPREME COURT OF NEW ZEALAND

**SC 35/2007
[2007] NZSC 63**

PHILIP DAVID STURM

v

THE QUEEN

Court: Tipping, McGrath and Anderson JJ

Counsel: P J Davison QC for Applicant
M D Downs for Crown

Judgment: 2 August 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Sturm seeks leave to appeal from the Court of Appeal's dismissal of his appeal against convictions for sexual offending. They included an offence of stupefying the complainant with intent to facilitate the commission of sexual violation. The application as it relates to the other convictions depends on whether leave is given in respect of the stupefying conviction.

[2] In the Court of Appeal the applicant argued that the trial Judge had failed to direct the jury properly on the stupefying count. He argued that the charge involved a dual intent and the Judge had not made this clear. First there had to be an intent to stupefy, and second there had to be an intent to facilitate the crime of sexual violation. The Judge had not expressly referred to the intent to stupefy. The Court of Appeal held that he should have done so but that no miscarriage of justice arose because the Judge's directions conveyed the substance of what the Crown had to prove. The applicant seeks to challenge this conclusion on the premise that although the Court of Appeal's conclusion was in his favour on the point of law, the Court was wrong in its ultimate conclusion of no miscarriage. The applicant also seeks to put in issue the proper application of the proviso to s 385 of the Crimes Act 1961.

[3] We do not consider the issues which the applicant seeks to raise satisfy the requirements of s 13 of the Supreme Court Act 2003. The point of law was decided in the applicant's favour in the Court of Appeal. Whether the Judge's directions in their overall impact sufficiently complied with the correct legal analysis is a point specific to this case. We do not regard the case as justifying any examination of the proviso. In coming to this conclusion we should not be regarded as endorsing the Court of Appeal's dual intent analysis. There is a case for saying that proof of an intent to facilitate a crime by stupefying the victim necessarily involves the presence of an intent to stupefy. But we leave that point open.

[4] We consider the Court of Appeal was correct in this case to decide that, even if analytically two discrete intents must be proved, the Judge's directions and the practical realities of the case meant that no miscarriage arose from the failure of the Judge to direct in precisely those terms. That being so, none of the issues which the applicant seeks to raise stands any realistic chance of leading to a different outcome in this Court from that reached in the Court of Appeal. We therefore find that the applicant has not established that it is necessary in the interests of justice for leave to be granted. Specifically, we are satisfied that no appearance of any substantial miscarriage of justice has been shown.

[5] For these reasons the application for leave is dismissed.

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