

IN THE SUPREME COURT OF NEW ZEALAND

**SC 98/2006
[2007] NZSC 15**

WAYNE PETER HITCHINGS

v

THE QUEEN

Court: Blanchard, McGrath and Anderson JJ

Counsel: J B Samuel for Applicant
K B F Hastie for Crown

Judgment: 9 March 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] This is an application for leave for a further appeal against conviction on the ground that the prosecution wrongly failed to disclose evidence to the defence and that a miscarriage of justice resulted. It is said that it will be argued that there has been a failure by the Police to meet the requirements of disclosure of material information to the defence prior to trial. That argument is plainly misconceived. It is necessary to refer briefly to the facts to explain why this is so.

[2] The charge related to the burglary on 8 January 2005 of a West Auckland property in the general area where the applicant lived with his mother. His defence was alibi and on 1 August 2005 he gave written notice to the prosecution that he intended to call his mother to give evidence that on the night question he was at home with her. The notice also mentioned the possibility of calling evidence from a Ms Webb.

[3] The appellant's mother, interviewed on 14 October, stated she had watched Antiques Roadshow on television between 7.30 and 8.30 p.m. on the night in question and that the appellant had been at home with her, in and out of the room. When interviewed by the Police on 18 October 2005, eight days before trial, Ms Webb stated she had telephoned the appellant on his landline between 8.00 and 8.30 p.m.

[4] Police inquiries established that Antiques Roadshow had not in fact gone to air as scheduled, having been displaced by extended coverage of a sports fixture. The Police also learned that there had been no calls recorded to the appellant's landline between 7.00 p.m. and 9.00 p.m, but that there had been an outgoing call to the telephone of a Ms Bishop. That call began at 8.19 p.m. and lasted about 20 minutes. The Crown told defence counsel it had evidence to rebut the alibi but gave no details. Inquiries were not made of Ms Bishop at that stage.

[5] During the examination of the applicant's mother the prosecutor caused inquiries to be made of Ms Bishop. She stated she had been telephoned by the applicant to whom she had spoken for some time before then speaking to his mother. This information was immediately made available to the defence.

[6] By agreement the applicant was recalled by his counsel and asked about the call to Ms Bishop. He said he could not remember making such a call.

[7] The prosecution is not under a duty to disclose to the defence information tending to discredit alibi witnesses.¹ But the argument for the applicant is that the

¹ See *R v Brown* [1997] 3 All ER 769 (HL) at 777-778; *R v Shaqlane* CA 341/00, 5 March 2001.

prosecutor should have disclosed to the defence, when the information came to hand, that there had been an outgoing call from the applicant's home at a relevant time. It is submitted this was information which was material to the defence.

[8] It was not incumbent upon the Police to disclose the evidence of the telephone call record to the applicant. Either he himself made the call, in which case it could be assumed he was aware of it, or it was made by someone else and was presumably irrelevant. There was no failure of proper disclosure and the Police were not obliged to make an inquiry about the call.

[9] The applicant has not satisfied us that there is or may have been a miscarriage of justice, nor has he satisfied us of any other basis for appeal under s 13 of the Supreme Court Act 2003. The application is dismissed.

Solicitors:
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