IN THE SUPREME COURT OF NEW ZEALAND

SC 74/2007
[2007] NZSC 99

W

v

THE QUEEN

Court: Elias CJ, Blanchard and Anderson JJ

Counsel: G King for Applicant
M F Laracy and M E Ball for Crown

Judgment: 5 December 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] This is an application for leave to appeal against convictions for indecent assault and sexual violation of the applicant's daughter, L, and two of her daughters. Various grounds of appeal were rejected by the Court of Appeal, including the single ground relied on in this application. That ground relates to the admission of evidence that the daughter had complained to another woman, D, about the applicant's conduct.

[2] Counsel for the applicant submitted to the Court of Appeal, and to this Court, that the evidence of D was admitted by the trial Judge under the aegis of rebuttal of a defence assertion of recent fabrication. However, counsel submits, the defence had not asserted recent fabrication but rather repetitive complaining by L "in order to extract financial benefit from her father when it suited her".

[3] The assertion of a financial motive on the part of L was linked by the defence to an attack on L's credit. In counsel's submission:

> The defence case was that the allegations were false and that if they were true [she] would have reported them to the police years before rather than just raising them when it suited her financial needs.

[4] What D's evidence showed was that L had complained on a particular occasion when there was no identifiable financial or strategic reasons for her to do so. The applicant complains that this evidence was inadmissible, and as it fatally undermined the defence case, led to a miscarriage of justice.

[5] The Court of Appeal considered that the evidence was hearsay and inadmissible except for rebutting an assertion of recent fabrication. In that Court's view it could not properly be characterised as such rebuttal evidence and should not therefore have been admitted. But having regard to other features of the case, the Court of Appeal held that the improper admission had not occasioned a miscarriage of justice.

[6] The Court of Appeal appears to have been in error when it held that the impugned evidence was not admissible. The defence had put in issue the context in which L made her complaints and linked that to an attack on her credit. The alleged context was financial opportunism. The Crown was plainly entitled to contest that allegation by adducing evidence of the fact of a relevant complaint in a non-financial, non-strategic context. The fact that the evidence was limited to rebuttal of a financial motive, and could not be relied on as evidence of the truth of the complaint, was adequately dealt with by the trial Judge in his directions to the jury.

[7] In any event we are satisfied that there has been no miscarriage of justice. None of the criteria in s 13 of the Supreme Court Act 2003 have been met and the application is dismissed.

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