IN THE SUPREME COURT OF NEW ZEALAND

SC 32/2008
[2008] NZSC 56

DEBORAH GORDON-SMITH

v

THE QUEEN

SC 18/2008

SHAUN ANTONY KING

v

THE QUEEN

Hearing: 10 July 2008

Court: Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ

Counsel: K H Cook for Applicants
C L Mander for Crown

Judgment: 25 July 2008

JUDGMENT OF THE COURT

A The application for leave to appeal by Ms Gordon-Smith is granted.

B The approved grounds of appeal are:

(i) Can the police supply so-called "vetted jury lists" to the Crown to assist the Crown in deciding whether or not to challenge a prospective juror? If yes:

(ii) Should a vetted jury list that is supplied to the Crown also be made available to the accused?

(iii) Can the Crown peremptorily challenge a prospective juror on the basis of information obtained from a vetted jury list?

C The application for leave to appeal by Mr King is dismissed.

REASONS

(Given by McGrath J)

[1] This is an application by Ms Gordon-Smith and Mr King for leave to appeal against a judgment of the Court of Appeal which upheld as lawful the administrative practice of jury vetting by the police. The purpose of jury vetting is to enable prosecutors of criminal trials to have information concerning criminal histories which may be used to challenge potential jurors.

[2] The applicants, together with eight others, were tried in the High Court on charges under the Misuse of Drugs Act 1975. Prior to the trial, counsel for one of the accused applied to the trial Judge for an order prohibiting the Crown, when deciding whether to challenge a juror, from using information concerning whether a person on the jury list had a criminal conviction. In the alternative, counsel sought an order requiring that the accused be given access to the information concerned that was available to the Crown. After hearing argument, Fogarty J granted the application on the former basis, holding that jury vetting by the Crown, involving the exercise of peremptory challenges by reference to non-disqualifying criminal histories of potential jurors, was inconsistent with the Juries Act 1981.

[3] At the subsequent trial, five of the accused, one being Ms Gordon-Smith, were found guilty of charges including conspiracy to supply a class A controlled drug. Two accused were found not guilty by the jury. Three others, including Mr King, were discharged by the Judge during the trial under s 347 of the Crimes Act 1961 on the basis that they had no case to answer.

[4] The Crown proceeded with an appeal against the pre-trial ruling. As requested by the Crown, Fogarty J stated questions of law for the opinion of the Court of Appeal on the jury vetting issue under s 380 of the Crimes Act. The Court of Appeal understood the Crown to be seeking to obtain rulings in the nature of advisory opinions because it was highly unlikely that any respondent would face a re-trial as a result of the Court of Appeal judgment. The Court nevertheless decided to hear the appeal because of the importance of the High Court Judge's ruling on jury vetting to the administration of criminal justice nationally.

[5] The Court of Appeal allowed the Crown's appeal. It held, unanimously, that the police could lawfully access the national criminal records database in order to provide the Crown Solicitor with any criminal history of those on the jury list. The Crown Solicitor could then use that information to decide whether or not to challenge any person who was a potential juror. By a majority the Court of Appeal also held that the Crown was neither required, nor permitted, to disclose to the defence non-disqualifying criminal history information about potential jurors. It could only do so where there was a likelihood, in a particular case, that jurors with a criminal history might have an adverse predisposition towards the defence.

[6] The applicant Mr King applied for leave to appeal to this Court. He was one of the respondents in the Court of Appeal, where he was represented by Mr McCoy and Mr Cook. The Crown has been sympathetic to the application, seeing it as desirable that this Court rule on the lawfulness of jury vetting practices. It was, however, apparent to the parties that there were jurisdictional difficulties which we shall shortly address. It was to counter these difficulties that Ms Gordon-Smith later brought her application for leave to appeal.

[7] At the oral hearing of the application for leave to appeal to this Court, Mr Cook, for both applicants, and Mr Mander for the Crown were agreed that the issues concerning jury vetting that arise in the proposed appeal meet the statutory requirements for the grant of leave. The Court accepts that the issue is plainly a matter of general and public importance and that it is desirable that it should be addressed without delay. It is necessary, however, to address the jurisdictional impediments to which we now turn.

[8] As indicated, Mr King had been discharged under s 347 during the trial. The Judge's pre-trial direction as to jury selection therefore had no practical relevance to his case because it never went to the jury. The position in New Zealand has long been that the case stated appeal procedure under s 380, for appeals on reserved questions of law, is confined to trials which have run their course to a verdict. Mr Cook submitted that this Court should grant leave to appeal in order to reconsider the correctness of the leading authorities on the point, *R v Grime*[1] and *R v Fogden*[2], in light of the dissenting judgments in both decisions. Counsel submitted that the Crown has a right to ask the High Court Judge to reserve a point of law for the Court of Appeal under s 380, when an accused is discharged under s 347, as s 347(4) deems a discharge under that section to be an acquittal. He pointed out that s 380 applies following an acquittal.

[9] We are not prepared to grant leave to appeal on this basis. The majority judgments in both cases mentioned are settled law. The Crimes Act has very recently been amended to confer a right of appeal on the Crown where an accused is discharged under s 347.[3] This legislative amendment does not apply retrospectively. Nor could it assist Mr King in any event because, as Mr Mander pointed out, the new right of appeal is limited to appeals on points of law relating to the reasons for discharge. The amendment does not allow the Crown to raise other points of law relating to other aspects of the proceeding in an appeal. We are accordingly not persuaded that the Court should review the existing case law to decide whether the Crown enjoys a wider right of appeal by way of case stated following a discharge, as contended for by Mr Cook. In consequence we refuse Mr King's application.

[10] In an effort to help overcome the jurisdictional problem, the Crown raised the possibility that the two defendants at the trial who were acquitted by the jury and who, in theory, would have been at risk of a new trial in the Court of Appeal, might now apply for leave. But, as there is no suggestion that they have ever given counsel instructions to this effect (indeed it has not been possible for Mr Cook to locate either of the persons concerned) we need not consider this suggestion further.

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1 [1985] 2 NZLR 265 (CA).
2 [1945] NZLR 380 (CA).
3 See s 381A Crimes Act inserted as from 26 June 2008 by s 9 Crimes Amendment Act (No 2) 2008.

[11] Ms Gordon-Smith was one of the accused who was convicted at trial by the jury. It is common ground, and we are satisfied, that Ms Gordon-Smith was a respondent to the case stated appeal brought by the Crown (although, through oversight, her name and that of her then counsel present at the hearing are not included in the intitulement of the Court of Appeal's judgment). The Court of Appeal gave a judgment which, of course, was adverse to her in that it reversed the favourable pre-trial ruling. Ms Gordon-Smith is accordingly a person who is given a right to seek leave to appeal to this Court by the Crimes Act.[4] So, exceptionally in criminal cases, is the Crown.[5] On that basis, subject to the problem of absence of a live controversy, she is able to apply for leave to appeal to this Court. In doing so she presumably would seek an order confirming the ruling of the High Court which was reversed by the Court of Appeal.

[12] It is of some significance in the present case that the Crown has a right of appeal, with leave, against the Court of Appeal's determination on a question referred to it in a case stated appeal. The Crown indicated in written submissions that, if an applicant obtains leave to appeal, the Crown wishes to challenge the finding of the majority of the Court of Appeal that, if a vetted jury list may be provided by the police to the Crown, information about vetting may not in general be passed on to the accused. In other words the Crown would effectively cross-appeal against the majority's finding on that point.

[13] This brings us to the question of principle potentially standing in the way of giving Ms Gordon-Smith leave to appeal. Because the trial Judge's ruling was favourable to her, and jury selection proceeded in accordance with his ruling, the appeal against the Court of Appeal's adverse judgment cannot be of any practical significance to Ms Gordon-Smith. A successful outcome of her appeal could not affect her conviction and sentence. Likewise, there is no live issue in relation to this applicant left for the Crown. Both parties, however, have made plain through their

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4 Under s 406A(2) of the Crimes Act, with the leave of the Supreme Court, any party to proceedings in which the Court of Appeal heard and determined a question referred to it under s 380 may appeal to the Supreme Court against the Court of Appeal's determination of the question.

5 In general, it is only a convicted person who may seek leave to appeal to the Supreme Court against a decision of the Court of Appeal on a criminal appeal: section 383A Crimes Act 1961.

counsel that they would like the proposed appeal against the Court of Appeal judgment to proceed.

[14] The traditional position taken in New Zealand has been that the courts will not hear an appeal "where the substratum of the … litigation between the parties has gone and there is no matter remaining in actual controversy and requiring decision".[6] This approach was followed in accordance with a principle referred to in *Sun Life Assurance Co of Canada v Jervis*,[7] where Lord Simon LC said:[8]

> [I]t is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue.

[15] In 1999, in *R v Secretary of State for the Home Department ex Salem*,[9] the House of Lords departed from the view that it would invariably be an improper exercise of appellate authority to hear appeals in relation to questions that have become moot. Speaking for all members, Lord Slynn said:[10]

> [I]n a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se …
>
> The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so ...

[16] As the passage cited from Lord Slynn's judgment in *Salem* demonstrates, mootness is not a matter that deprives a court of jurisdiction to hear an appeal. Here, as already indicated, Ms Gordon-Smith, like the Crown, was a party to the Court of Appeal's determination of the case stated appeal and has a right to apply for leave to bring an appeal to this Court. That disposes of any issue concerning jurisdiction. The question of whether this Court should hear an appeal which otherwise qualifies under statutory criteria for a grant of leave but is moot, is rather one of judicial

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6 *Finnigan v New Zealand Rugby Football Union Inc (No 3)* [1985] 2 NZLR 190 at p 199 per Richardson J (CA).
7 [1944] AC 111.
8 At p 114.
9 [1999] 1 AC 450.
10 At pp 456 – 457.

policy. In general, appellate courts do not decide appeals where the decision will have no practical effect on the rights of parties before the Court, in relation to what has been at issue between them in lower courts. This is so even where the issue has become abstract only after leave to appeal has been given. But in circumstances warranting an exception to that policy, provided the Court has jurisdiction, it may exercise its discretion and hear an appeal on a moot question.[11]

[17] The approach in *Salem* was said to be applicable where there is an issue involving a public authority as to a question of public law. It has been applied in New Zealand by the Court of Appeal, however, in a manner that has not been confined to public law. That Court agreed in *Attorney-General v David*[12] to hear an appeal on a question of employment law of general and public importance, which warranted an early determination from the Court, although there were no longer live issues between the immediate parties.

[18] The main reasons for the general policy of restraint by appellate courts in addressing moot questions are helpfully identified by the Supreme Court of Canada in *Borowski v Attorney-General*.[13] They are, first, the importance of the adversarial nature of the appellate process in the determination of appeals, secondly, the need for economy in the use of limited resources of the appellate courts and, thirdly, the responsibility of the courts to show proper sensitivity to their role in our system of government. In general advisory opinions are not appropriate.

[19] It is convenient to assess the circumstances of Ms Gordon-Smith's application for leave to appeal against these policy considerations.

[20] The value of courts determining appeals in an adversarial context lies in the fact that having a stake in the outcome fosters full argument on the questions before the court. The need for legal principles to be applied to particular facts is also a valuable discipline for the courts in determining those principles. In this respect the issue for a court, in deciding whether to allow a moot appeal to proceed, was aptly

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11 *Borowski v Attorney-General of Canada* [1989] 1 SCR 342 at p 353.

12 [2002] 1 NZLR 501.

13 [1989] 1 SCR 342 at pp 358 – 363. See also the subsequent discussion in *Smith v The Queen and Attorney-General of Ontario* [2004] 1 SCR 385.

expressed by the Court of Appeal in *David*, as being "whether a general question posed in relation to future conduct permits of a categorical answer or whether the limits and conditions can only be defined adequately and safely by reference to particular facts".[14]

[21] In *David* the Court of Appeal granted leave to the Attorney-General, as an intervener, to appeal against a decision of the Employment Court concerning the rights of parties appearing before the Employment Relations Authority to cross-examine witnesses. Given the wider implications of the decision, the application was rightly seen as raising an issue analogous to one involving a public authority as to public law. It was also one of general and public importance. The extension of the principle in *Salem* in that case was clearly correct. Importantly, however, the Court of Appeal also said:[15]

> Clearly a cautious approach should be taken to leave applications where there are no live issues as between the immediate parties, in order to ensure that the answer to proposed abstract questions of law are not too fact dependent to provide any useful guidance.

[22] This need for caution has been reiterated in subsequent cases.[16] We agree with the approach taken by the Court of Appeal in *David* and the cautious manner in which it was applied.

[23] The present case is not fact dependent. It involves a question concerning the lawfulness of prosecution administrative procedures prior to and during the empanelling of a jury. There is unlikely to be any new matter raised in another appeal that will not be raised in this. The parties are clearly of one mind concerning the desirability of this Court hearing an appeal. That does not, however, suggest that if leave to appeal is given the hearing will be other than appropriately adversarial in the hands of experienced counsel. If the Crown does not wish to advance argument in support of the majority finding in the Court of Appeal prohibiting defence access to information concerning jurors, the Court will appoint counsel to advance that argument.

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14 At p 503.
15 At p 504.
16 For example *North Holdings Ltd v Rodney District Council* (2004) 17 PRNZ 384 (CA).

[24] The Court's primary responsibility is to determine live controversies between citizens and to develop the law of New Zealand in that context. The same consideration applies to the Court of Appeal. That concern is met, however, if the question arising in a moot case is one of significant public importance which is highly likely to come before the court again at some point. Every application for leave to appeal to this Court must meet the statutory threshold for grant of leave. The lawfulness of jury vetting is a question that clearly meets this standard because of its general and public importance. It is also likely if leave is refused that this issue will soon come before the Court in another case. If the Court takes up the issue now, that may well avoid the possible disruption of another trial through adjournment while the issue is resolved. Together these special circumstances answer any concerns about proper use of judicial resources in this case.

[25] The third factor favouring restraint in hearing moot appeals is a general policy of considerable constitutional importance. It requires that the appellate court consider whether it should leave an issue of law that is no longer the subject of a live controversy for legislative attention rather than proceed to decide it in circumstances where that is not required by the particular case. Courts develop the law in the exercise of their constitutional functioning by deciding cases put before them by parties to resolve their disputes. They should be careful not to appear to be doing so gratuitously by giving what amount to advisory opinions.

[26] The Law Commission has recognised the problem that arises in our legal system when, although it is in the public interest for an appellate court to clarify and determine the law, there is no longer a live interest for any person able to appeal. As long ago as 1989, in *The Structure of the Courts*, the Law Commission said:[17]

> [T]he parties to the original proceedings might no longer have any real interest in the matter when it gets to its final examination in the courts, as with the famous case of *M'Naghten* (1843) 10 Cl and Fin 200; and its modern version in the United Kingdom, the Attorney-General's right of reference following acquittal in a criminal case, Criminal Justice Act 1972, s 36, or as in such a case as *Wybrow v Chief Electoral Officer* [1980] 1 NZLR 147 CA. As that last case shows, issues can sometimes be brought to court independently of the actual dispute about particular facts. But such a procedure is not always available, especially in criminal matters. We recommend that the introduction of a power on the model of the United

[17] NZLC R7 at para [234].

> Kingdom one be given favourable consideration in the course of the present review of the criminal law.

[27] Since the enactment of the United Kingdom legislation in 1972, the Attorney-General reference procedure in England and Wales has been availed of by the authorities many times to have the courts clarify aspects of the criminal law. The Law Commission's recommendation that there be a jurisdiction based on the model of the Attorney-General's reference has not, however, been given legislative attention in New Zealand.

[28] There may possibly have been a policy reason for the failure to take up the Law Commission recommendation. The United Kingdom legislation was originally controversial. There was a concern by members of both Houses of Parliament at the potential for appellate judicial criticism of the acquittal of a defendant in circumstances where there would be no retrial.[18] This policy consideration justifies caution in this Court, and for that matter the Court of Appeal, before proceeding with appeals in any criminal cases that are moot. This is not, however, a concern in the present case where the merits of Ms Gordon-Smith's conviction and the circumstances which led to it are not in issue. The only question the applicant seeks to raise in this Court is a general legal one concerning the lawfulness of jury vetting and whether the use by prosecutors of information obtained as a result is permissible. Policy considerations that may possibly have deferred legislative attention being given to the Law Commission's proposal have no bearing on the present case. Nor will the Court be seen as intruding in an area more appropriately left to legislation by granting leave to appeal in this case.

[29] In summary, the Court has jurisdiction to hear the appeal but must exercise its discretion on whether to do so because the issue is moot. The issue raised by Ms Gordon-Smith's application is one of public importance which meets the statutory criteria for a grant of leave. The nature of the issue is closely analogous to, if not actually, one in public law, so that *Salem* applies. The question can be decided in the present appeal in a context which will avoid the disruption to a trial that would otherwise arise. Given that the issue potentially concerns every criminal jury trial, it

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[18] There does not, however, appear in practice to have been any instance validating the concern expressed.

is highly desirable that the correctness of the Court of Appeal judgment on the point be reviewed promptly.

[30] In these circumstances leave to appeal should be given to Ms Gordon-Smith and the Court should hear the appeal despite the fact that the issues will have no bearing on her position as a convicted person.

[31] The approved grounds of appeal are as set out in the orders at the commencement of this judgment.

[32] For the reasons given, the application for leave by Mr King is dismissed.

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