

IN THE SUPREME COURT OF NEW ZEALAND

**SC 58/2008
[2008] NZSC 97**

CHRISTOPHER MOSLEY

v

THE QUEEN

Court: Elias CJ, Blanchard and Wilson JJ

Counsel: P T R Heaslip for Applicant
M D Downs for Crown

Judgment: 17 November 2008

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Having appealed unsuccessfully to the Court of Appeal against his conviction on serious charges of dealing in drugs,¹ the applicant seeks leave to appeal to this Court on two grounds. First, he alleges, the trial Judge (Allan J) was in error in continuing the trial with a jury of 10 pursuant to s 374(4A) of the Crimes Act 1961. Secondly, the Court of Appeal is said to have erred in holding that it was precluded by s 374(8) from reviewing the exercise by Allan J on two occasions of his discretion to discharge jurors.

¹ *R v Mosley* [2008] NZCA 319; see also the related judgment in *R v Harris* [2008] NZCA 298.

[2] Section 374(4A) provides that a trial must not proceed with fewer than 11 jurors except by consent or because of “exceptional circumstances” and “having regard to the interests of justice”. The question of what constitutes exceptional circumstances has recently been discussed by this Court in *R v Rajamani*² and *R v Wong*.³ There is no reason to re-examine these principles.

[3] The present facts are clearly distinguishable from those of both *Rajamani* and *Wong*. The second juror to be discharged in Mr Mosley’s trial was discharged in the seventh week of the trial. It ran for another 12 weeks. More than two years had elapsed between the arrest of the defendants and their trial. There would be a long delay before any retrial could take place. Unsurprisingly, only three of the 10 defendants opposed the continuation of the trial with 10 jurors. The circumstances were plainly “exceptional” for the purposes of s 374(4A), and equally plainly the interests of justice were served by the continuation of the trial.

[4] Whether or not s 374(8) applies to an attempted appeal against a decision to discharge a juror, in contrast to a decision to discharge a jury, the point cannot possibly avail the applicant on the present facts. Mr Mosley sought the discharge of both the jurors who were discharged. Having adopted that position, he cannot now argue that Allan J was wrong to release the jurors.

[5] The application for leave to appeal is therefore dismissed.

Solicitors:
P R T Heaslip, Auckland for Applicant
Crown Law, Wellington

² [2008] 1 NZLR 723.

³ [2008] 3 NZLR 1.