IN THE SUPREME COURT OF NEW ZEALAND

SC 79/2007
[2008] NZSC 12

TERRENCE AUSTIN MCFARLAND

v

THE QUEEN

Court: Blanchard, Anderson and Wilson JJ

Counsel: W C Pyke for Applicant
M D Downs for Crown

Judgment: 5 March 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 a charge of maiming the complainant with intent to cause grievous bodily harm, the applicant now seeks leave to appeal to this Court.

[2] The proposed appeal is said to raise a matter of general or public importance, namely the appointment of an *amicus curiae* where the accused does not accept the appointment and is not represented by counsel.

[3] Alternatively, it is submitted that a substantial miscarriage of justice may have occurred by reason of the applicant being unrepresented at trial by counsel retained by him, errors of *amicus* and errors of the trial Judge.

[4] We accept that the involvement of an *amicus* contrary to the wishes of an unrepresented accused may give rise to an issue of general or public importance. But that is not what occurred here. To the contrary, although the appointment of *amicus* was made without notice to and in the absence of the applicant, the role of *amicus* developed during the trial into effectively acting as counsel for the applicant when so requested by him.

[5] As the Court of Appeal correctly recorded:

> [58] In fact [counsel's] role as amicus seems to have expanded during the course of the trial, at the request of Mr McFarland. [Counsel] conducted much of the case on Mr McFarland's behalf, including dealing with jury selection, cross-examining Crown witnesses, leading evidence from defence witnesses, and delivering the opening and closing addresses. However, he did not act for Mr McFarland in the way he would have had he been instructed by Mr McFarland. Generally speaking, he left it to Mr McFarland to consult and involve him to the extent that he wished.

[6] We note that, in submissions in support of the proposed second ground, the applicant asserts that "amicus curiae took on the role of applicant's counsel during the trial …", without any suggestion that this was contrary to the wishes of the applicant.

[7] The question of what would be the position if an *amicus* acts contrary to the wishes of an accused does therefore not arise for consideration.

[8] As to the second proposed ground, there does not appear to have been a miscarriage of justice.

[9] The Crown case was very strong. The complainant gave evidence that the applicant and a co-accused had forced him to place his right hand on a table and then to hold a knife over his hand. The co-accused then hit the top of the knife with a sledgehammer, severing the complainant's right little finger. Subsequent scientific examination revealed the presence of the complainant's blood on the sledgehammer

and the knife and on the ceiling and a wall of the room in the applicant's house where the attack had occurred.

[10] The defence of the applicant at trial was that he was not in the room at the relevant time. His co-accused, having pleaded guilty at the conclusion of the case for the prosecution, gave evidence for the applicant and said that what occurred was an accident (notwithstanding his guilty plea) and that the applicant was not in the room. Unsurprisingly, the jury rejected this implausible evidence.

[11] Against this background, the applicant's exercise of his right not to have counsel and his subsequent availing himself of the services of *amicus* cannot possibly be said to have contributed to a miscarriage; nor can the alleged failure of *amicus* to warn the applicant not to call the co-accused, when the applicant had made the decision to do so for the understandable reason that this evidence provided the only basis on which to challenge the account of the complainant.

[12] The Court of Appeal concluded, following a detailed and careful examination of alleged deficiencies in the directions of the trial Judge to the jury, that although there were several respects in which the directions "could have been better", these matters, separately or cumulatively, did not raise even the possibility of a miscarriage of justice. We agree.

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