PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 CRIMINAL JUSTICE ACT 1985

IN THE SUPREME COURT OF NEW ZEALAND

SC 33/2009
[2009] NZSC 65

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v

THE QUEEN

Court: Elias CJ, McGrath and Wilson JJ

Counsel: S J Gill for Applicant
K A L Bicknell for Crown

Judgment: 19 June 2009

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] This application for leave to appeal is based on a submission of breach of the right to a fair trial in circumstances akin to those we addressed in *R v Condon*.[1]

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1 [2007] 1 NZLR 300.

[2] At the end of the Crown case at his trial on charges of sexual offending and assault on his daughter, the applicant agreed with his counsel that he should elect not to call evidence. The Court was advised and the trial was adjourned for final addresses. Overnight the applicant changed his mind, wanting to put in a large number of documents. These had not earlier been shown to his counsel. When his counsel reminded him of his election, the applicant withdrew his instructions and put the papers before the Judge.

[3] The trial judge read the documents and concluded they were all inadmissible and irrelevant. The Court of Appeal judgment makes clear that the judge, who did not think the trial should be aborted, was assiduous in his efforts to ensure there was a fair trial. Importantly, there was no suggestion that the change of mind involved any desire by the applicant to give evidence himself other than by producing the documents or to call any other witnesses.

[4] The judge allowed an adjournment to see if other counsel could be obtained to address the jury on behalf of the applicant. In this respect he followed a course suggested by the Court of Appeal in *R v Pue*[2] in a passage which is cited in *Condon*.[3]

[5] The applicant's submissions to us assert that the applicant was not represented and suggest there was unfairness in his trial after his counsel withdrew. But the lack of reference to any specific prejudice or interference with trial rights means that this submission lacks an air of reality. The new counsel, who was instructed to complete the trial, Mr Cato, has sworn an affidavit which makes no reference to any desire by the applicant to call other evidence. It confirms that the applicant was content for Mr Cato to present submissions to the jury and indeed happy with his address.

[6] There is nothing referred to in the applicant's submissions that gives rise to the type of concerns that the Court had in *Condon*. As the Court of Appeal decided, the circumstances do not indicate any risk that a miscarriage of justice has occurred.

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2 (Court of Appeal, CA 78/04, 19 May 2005, Anderson P, McGrath and William Young JJ).

3 At para [72].

We agree with the Court of Appeal that the trial judge behaved appropriately in the circumstances which give us no concern that the trial was unfair.

[7] We dismiss the application.

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