IN THE SUPREME COURT OF NEW ZEALAND

SC 88/2008
[2009] NZSC 26

CAROLINE RANGIATA AROH

v

THE QUEEN

Court: Elias CJ, McGrath and Wilson JJ

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

Judgment: 30 March 2009

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted on a single count of exporting a class A drug to Australia in March 2004. She was charged jointly with her husband. She applies for leave to appeal on two grounds. The first concerns a direction by the trial Judge that the jury could use statements in telephone conversations, to which the applicant was not a party, in considering the charge against her to the extent that they bore on her involvement in the events giving rise to the charge. In one such telephone conversation, which took place nearly six months after the actions which resulted in her being charged, a third party had asked the applicant's husband whether his wife

would do an errand "like before". According to the Crown "like before" referred to her earlier role in the export of drugs to Australia.

[2] The Court of Appeal rejected a submission that the evidence of the conversation should not have been admitted as evidence against the applicant as a co-conspirator's statement, because it had taken place six months after the export of the drugs had occurred. In his written submissions in support of the appeal, counsel for the applicant cites a ruling of Williamson J in *R v Owen (No 11)*,[1] holding that because co-conspirators' statements are admissible only if in furtherance of the conspiracy alleged, a statement made after arrest would not qualify unless the common object of the conspiracy was continuing.

[3] We accept that, as the conversation in question took place nearly six months after the export of drugs had taken place, there is a strong argument that it had no bearing on the furtherance of that common object and that it should not have been admitted at the trial under the common law rule.[2]

[4] The Crown response, however, is that any error in admitting the evidence had no operating effect on the trial. The Crown did not rely on the particular conversation as part of its case against Mrs Aroh. In her summing up, the Judge discussed the evidence relied on by the Crown to establish participation by the applicant, making no reference to the telephone conversation in question in summarising the Crown's case against her. We accept that what the Judge said as to co-conspirators' statements would have had no effective impact on the jury. More importantly, the Court of Appeal described the evidence against the applicant as "overwhelming". We agree and are satisfied that, despite any inadequacy in the direction on this point, no miscarriage of justice has resulted. Any finding of error would inevitably lead to the application of the proviso to s 385(1) of the Crimes Act 1961. The ground does not meet the test in s 13 of the Supreme Court Act to be a basis for a second appeal.

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1 High Court, Christchurch, T 28/93, 27 September 1993.

2 The rule is preserved by s 12A of the Evidence Act 2006.

[5] If the issue concerning admissibility arises in the future, the High Court's ruling in *Owen* will no doubt be considered, along with that of the Court of Appeal judgment in this case.[3]

[6] A second proposed ground of appeal concerned the length of deliberation and the late delivery of the verdict at 1.27 am. The jury had wanted to continue, reporting that it was making good progress. It was having breaks during the evening. As the authorities make clear, there is no set period of deliberation. We are satisfied that it is not arguable on this ground that there was a miscarriage of justice. Nor does any other factor make it in the interests of justice to hear a further appeal on this ground.

[7] Accordingly, we dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington

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3 *R v Aroh* [2008] NZCA 457 at paras [77] – [81].