

IN THE SUPREME COURT OF NEW ZEALAND

**SC 38/2009
[2009] NZSC 58**

SHANE CHARLES WENZEL

v

THE QUEEN

Court: Blanchard, Tipping and McGrath JJ
Counsel: J Bioletti for Applicant
B J Horsley and C J Curran for Crown
Judgment: 9 June 2009

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal under s 379AB of the Crimes Act 1961 against the dismissal by the Court of Appeal¹ of an appeal against an order made in a District Court under s 361D of the Act that the applicant's trial on 36 counts charging dishonesty offences should be by Judge alone. The District Court Judge's order involved an exercise of discretion which the Court of Appeal has reviewed and confirmed.

[2] Section 361D empowers an order to be made for trial before a Judge without a jury in long and complex cases. But the Judge must be satisfied under

¹ *R v Wenzel* [2009] NZCA 130 (CA 31/09, 8 April 2009).

s 361D(3)(b) that an accused person's right to a trial by jury is outweighed by the particular circumstances, including the length and complexity of the trial, such that jurors will not be able to perform their duties effectively.

[3] The applicant boldly asserts that "Parliament in enacting s 361D of the Crimes Act has fallen into error". He now for the first time asks for a declaration that the section is incompatible with s 24(e) of the Bill of Rights. He also asserts that it is incompatible with the guaranteed right to a fair trial.

[4] Put in this way, the proposed grounds of appeal are quite hopeless. First of all, it is an impossible argument that a fair trial requires a trial by jury. On the alternative argument, that no removal at all of a jury trial by Parliament could be justified under s 5, the applicant has not put forward any cogent reasoning. It is a proposition which could never achieve anything for the applicant in the face of s 4 of the Bill of Rights and the clear terms of s 361D, and has in fact been rejected under the Canadian Charter of Rights and Freedoms in *R v Lee*² by the Supreme Court of Canada.

[5] Section 361D is part of a new set of provisions (ss 361A to E) which affirm the right to trial by jury but also prescribe, consistently with s 5 of the New Zealand Bill of Rights Act 1990, certain bases on which, as a justifiable limitation, there may be a departure from s 24(e). The applicant has not asserted in this Court any error of principle in the way in which the discretion conferred by the section was exercised. He has not, for example, pointed to anything which might arguably suggest that in the present case the discretion has been exercised in a way which could not have been intended by Parliament when it authorised the Court to order trial by Judge alone in particular circumstances, taking account of the matters listed in subs (4). That is understandable, for the case has the very characteristics for which the new Judge-alone procedure appears designed.

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² [1989] 2 SCR 1384.