IN THE SUPREME COURT OF NEW ZEALAND

SC 104/2010
[2010] NZSC 156

PETER MULLER

v

THE QUEEN

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: C J Tennet for Applicant
N P Chisnall for Crown

Judgment: 16 December 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The Court of Appeal has dismissed Mr Muller's appeal against his conviction on charges of aggravated burglary, wounding with intent to cause grievous bodily harm and kidnapping relating to an attack on the complainant in his home.[1]

[2] The application for leave to appeal was filed well out of time. Even if that is excusable, we are satisfied that leave to appeal should not be given as the criteria in s 13 of the Supreme Court Act 2003 are not met, and by a wide margin.

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1 *Muller v R* [2010] NZCA 380 per O'Regan P, Panckhurst and MacKenzie JJ.

[3] The first proposed ground was related to the Court of Appeal's refusal to admit some further evidence said to be of assistance in establishing an alibi for the applicant in relation to the attack on the complainant. The argument made is that trial counsel was in error in not calling this evidence. The Court of Appeal considered, however, that none of the witnesses was able to be sure that the event they said they attended with the applicant had occurred on the night on which the assault took place. The Court of Appeal concluded that the evidence would not have assisted the defence case at trial because it did not actually establish an alibi and that trial counsel, who took the same view, had exercised sound judgment in that respect. Mr Tennet renews in this Court the argument he advanced in the Court of Appeal that the jury should have heard the evidence because it was "a good story". No counsel can expect a Judge at any level, and certainly not in this Court, to consider the admissibility of evidence on such a basis.

[4] The next proposed point is that an item of identification evidence relating to a co-accused should not have been led at trial. The Court of Appeal agreed, but said that the prejudice was slight and of no moment in the context of the trial. That assessment is plainly correct.

[5] The third proposed ground, that a stay should have been granted, is equally unmeritorious. The Court of Appeal rightly concluded that it is an untenable proposition in view of what this Court has said in *R v Williams*.[2].

Solicitors:
Crown Law Office, Wellington

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2 *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750.