IN THE SUPREME COURT OF NEW ZEALAND

SC 23/2010
[2010] NZSC 66

JONATHAN IAN BLAKE

v

THE QUEEN

Court: Blanchard, Tipping and McGrath JJ

Counsel: S D Patel for Applicant
S B Edwards for Crown

Judgment: 16 June 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of 10 counts of sexual offending against two young complainants. The Court of Appeal found that he had been incorrectly advised that, if he gave evidence, there was some risk that a previous conviction might be adduced by the prosecution. However, by majority, the Court dismissed his appeal.[1] The sole ground of his present application is that the majority erred in its conclusion that, even if correctly advised, he would still not have given evidence. On that basis it applied the proviso to s 385(1) of the Crimes Act 1961.

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1 *R v Blake* [2010] NZCA 61.

[2] The Court of Appeal received affidavits from the applicant and trial counsel on which they were cross-examined. The majority of the Court accepted the evidence of trial counsel that the main reason for the advice that Mr Blake should not give evidence was the view trial counsel had formed that his client was not well equipped to give evidence. The possibility that Mr Blake might say something which opened him up to cross-examination on his previous convictions was a less important factor or, as trial counsel put it in giving evidence before the Court of Appeal, "really ancillary".

[3] In his evidence before the Court of Appeal trial counsel described his client as being "shifty", lacking in guile or even the wit to give confident evidence and with a predeliction to get involved in side issues. "He couldn't see the greater picture so far as his defence was concerned". Counsel said that he had no confidence in the applicant's being able to stand up to cross-examination at all. Trial counsel said he was confirmed in his view by an opinion expressed at the time by Mr Blake's mother.

[4] No question of general principle is involved in the proposed appeal. It would merely be a matter of whether, on the particular facts, the proviso could properly be applied in terms of *R v Matenga*.[2] We are satisfied that it could. The case against the applicant was strong. His defence had an appearance of implausibility. The Court of Appeal had the advantage of seeing Mr Blake and his trial counsel give evidence. This Court will not share that advantage and would not be in any position to differ from the assessment of Mr Blake and trial counsel made by the majority. Even the minority Judge said that, although it was not in his view inevitable, it was "highly improbable" that the applicant would have entered the witness box if correctly advised.

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2 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145 (SC).