

IN THE SUPREME COURT OF NEW ZEALAND

SC 43/2010
[2010] NZSC 72

BETWEEN ABDIRAZAK YUSSUF MUSSA
Applicant

AND THE QUEEN
Respondent

Court: Blanchard, Tipping and McGrath JJ

Counsel: D L Stevens QC and M J Lilloco for Applicant
N P Chisnall for Crown

Judgment: 5 July 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The proposed appeal is against a conviction at re-trial on one count of abduction and two counts of sexual violation by rape. The defence was consent. The unusual feature is that the applicant used two condoms during both of the acts of intercourse which he admits took place. The Crown case was that he did so because he was HIV positive and did not want to risk infecting the complainant; that, in light of his HIV status, the use of the condoms was not suggestive that the sex was consensual. At an earlier trial evidence of HIV status was not led. The verdict was reversed on appeal because the jury may have been misled as to the reason for two condoms. The decision to allow this evidence to go before the jury at the second trial ensured the full picture was presented.

[2] The applicant submits that the pre-trial ruling admitting evidence of his HIV status was in error; that the Court of Appeal dealt only with relevance and failed to

weigh the probative value of that evidence against the unfair prejudice which the jury might have for HIV positive persons. It is said that the Court of Appeal failed adequately to consider the level of prejudice which the applicant faced because of his HIV. On the other hand, it would have been very prejudicial to the Crown if the HIV status had not been mentioned in relation to the use of the two condoms.

[3] The Judge in fact did counsel the jury against being influenced prejudicially by the fact that the applicant was a Somalian refugee and HIV positive. The Court of Appeal concluded on the substantive appeal against conviction that the prejudicial effect of the evidence, after making allowance for the directions given by the Judge, was outweighed by its probative value, given the limited use to which it was put at the trial.

[4] Although the evidence was used by the Crown only to explain the use of the two condoms, it is said for the applicant that that was not explained to the jury by the Judge. The Court of Appeal said such an explanation was unnecessary as it would have been clear to the jury in the context of the trial.

[5] There is no basis shown for a further appeal on an essentially factual matter peculiar to the particular trial, nor is there any appearance of a miscarriage of justice. The Judge's cautions to the jury were adequate and it must have been plain to the jury that the HIV status had no relevance other than an explanation for the oddity of the use of two condoms.

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