IN THE SUPREME COURT OF NEW ZEALAND

SC 61/2010
[2010] NZSC 128

DYLAN ROBERT TUHURA

v

THE QUEEN

Court: Elias CJ, Blanchard and McGrath JJ

Counsel: W C Pyke for applicant
N P Chisnall for Crown

Judgment: 2 November 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against a judgment of the Court of Appeal dismissing his appeal against conviction on two charges of sexual violation involving rape and unlawful sexual connection.[1] The Court of Appeal had decided that medical evidence that vaginal and anal injuries to the complainant were inconsistent with consensual sex was not admissible, and had led to a miscarriage of justice in terms of s 385(1) of the Crimes Act 1961. The Court also decided that no substantial miscarriage of justice had actually occurred in terms of the proviso to

1 *Tuhara v R* [2010] NZCA 246.

s 385(1). The case was accordingly one in which the Court should apply the proviso and it dismissed the appeal.

[2] The applicant submits that, in a case where there were two plausible accounts given at the trial involving a clash of credibility between the applicant and the complainant, the Court of Appeal did not correctly apply the test for the proviso laid down by this Court in *R v Matenga*.[2]

[3] There are, as counsel contended, similarities between the circumstances and trial irregularities in this case, and those in *Matenga*. In this case the Court of Appeal accepted that material evidence adduced at the trial, connecting genital injuries to the issue of consent, was not supported by current clinical studies. The Court also accepted that this evidence may have bolstered the complainant's testimony that she was by reason of her intoxication not a consenting party, and told against the contrary evidence of the applicant. In similar circumstances in *Matenga*, this Court said that in a case turning on assessment of credibility, the Court of Appeal "will often be unable to feel sure of the appellant's guilt and will therefore be unable to apply the proviso".[3]

[4] In his evidence the applicant, who was living next door to the complainant, said that at about 11.30 pm he went outside to talk to two friends who were passing. He knew their first names only. He said that the complainant then called out to him to come over to her house and they had a conversation, during which she asked him to return later that night, thereby expressing her willingness to have sex with him. The applicant then went out with his partner and two hours later, following their return, he went over to the complainant's place where she let him in and they had consensual sex.

[5] The account of an earlier conversation was inconsistent with what friends of the complainant had said in their evidence was her drunken state at the time. The friends of the applicant who were driving by were not called to give evidence. The applicant's version was also inconsistent with the testimony of the applicant's

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2 *R v Matenga* [2009] NZSC 18, [2009] 3 NZLR 145.
3 *Matenga* at [32].

partner. The Court of Appeal decided that the applicant's account of the encounter and conversation was wholly lacking in reality, particularly given that he and the complainant had not met before. This made the applicant's account of later events when he went to her house highly implausible.

[6] The Court's reasons for judgment fully recognise the narrowness of the opportunity properly to apply the proviso in circumstances where the key issue at trial concerned the credibility of principal witnesses. We accept, however, that in this case the applicant's account was so bizarre that the Court of Appeal was entitled to reject it. The difficulties with the applicant's testimony went well beyond the conflict between his evidence and that of the complainant. We are satisfied that the Court of Appeal was entitled to apply the proviso.

[7] The application for leave to appeal is accordingly dismissed.

Solicitors:
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