IN THE SUPREME COURT OF NEW ZEALAND

SC 71/2010
[2010] NZSC 114

BETWEEN	PHILIP JOHN SMITH Applicant
AND	THE ATTORNEY-GENERAL Respondent

Court: Blanchard, Tipping and McGrath JJ

Counsel: T Ellis for Applicant
C J Curran for Respondent

Judgment: 8 September 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed with no order for costs.

REASONS

[1] The applicant, who was convicted of offences that included murder, sexual violation and kidnapping, has been serving a sentence of life imprisonment since 1996. He was classified until 2004 by the Department of Corrections, in a series of decisions, as a maximum security prisoner. Throughout this period he had sought a lower security classification in order to be eligible for transfer to another prison, closer to where his mother lived. In November 2004 his classification was reduced to "high medium", making him eligible for the transfer. In November 2005 his classification was further reduced to "low medium".

[2] Subsequently the applicant brought judicial review proceedings to challenge the lawfulness of his classification during the period prior to 2004. He was

unsuccessful in the High Court[1] and his appeal to the Court of Appeal[2] was dismissed. He now seeks leave to appeal to this Court against the Court of Appeal's judgment.

[3] Eleven proposed grounds are advanced by the applicant for an appeal to this Court. The first three are part of a submission that the Court of Appeal's hearing of the applicant's appeal was unfair. They were that objections to Judges sitting had been determined prior to the hearing, that the Court had been hostile to the applicant's counsel at the hearing and that the presiding Judge, Hammond J, was either actually or apparently biased against the applicant.

[4] A Judge of this Court ordered that a transcript be prepared of that part of the Court of Appeal hearing that is relevant to these matters. The transcript has been referred to by both counsel in their submissions. Since receiving them we have also sought and obtained the written material that was put to the Court of Appeal prior to its hearing. Neither party objected to this course. Counsel for the parties have made submissions directed to that material. Together with the transcript, the additional material has provided us with some context in addressing the application for leave to appeal.

[5] Following receipt by the Court of Appeal of the applicant's written material, the Judges on the panel met and discussed among themselves whether in the circumstances any of them should withdraw. They decided not to do so. The complaint of predetermination is that counsel wished to be heard on these matters orally at the hearing and the procedure followed precluded this. We are, however, satisfied that it was appropriate for the Judges concerned to confer over whether any of them should withdraw from the panel. That is standard practice. It was highly desirable that the Judges should decide on whether to sit prior to commencement of the hearing of the appeal in light of all information then available. Doing so did not involve predetermination of an issue in the appeal. If the applicant was unhappy with the ultimate judgment, the issue could be raised on appeal.

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1 *Smith v Attorney-General* HC Wellington CIV 2005-485-1785, 9 July 2008.
2 *Smith v Attorney-General* [2010] NZCA 258.

[6] The transcript of the hearing records exchanges between counsel and the Bench which at times were vigorous but in our view nothing said from the Bench provides a tenable basis for a ground of appeal based on hostility of the Court to the applicant or his counsel. They were not of a character that gives any suggestion of hostility. Members of the Court had previously considered the written material provided concerning the objections and the presiding Judge was entitled to curtail oral submissions covering the same ground if of the view that they added nothing new to matters already considered. There was a sufficient opportunity for counsel to address the merits of the objections taken. Furthermore, counsel was given an opportunity to put forward any further relevant information not referred to in the written material. There is nothing in the factual context or in the record to support a ground of appeal based on apparent bias. There is no basis at all for counsel's submission that the presiding Judge demonstrated actual bias.

[7] We deal briefly with the objections taken by the applicant to judges rostered to sit in the Court of Appeal. A member of the panel had held office as Solicitor-General when the applicant's appeal against conviction was heard.[3] The Solicitor-General is responsible for representing the Crown in all criminal appeals[4] and is chief executive of the Crown Law Office whose counsel usually appear for the Crown in such appeals. The transcript records the Judge's statement at the hearing that he personally had no involvement in the applicant's conviction appeal while Solicitor-General. That removed any possible ground of appeal in the Court of Appeal based on apparent bias in his case. The applicant has not sought to make this matter a ground of appeal to this Court.

[8] That leaves the systemic complaint that the Court of Appeal does not determine panels by lot. The Judicature Act 1908 does not expressly require that they do so.[5] The argument seems to be that the New Zealand Bill of Rights Act 1990 implicitly requires that process. The applicant does not, however, suggest that

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3 *R v Smith* [2003] 3 NZLR 617 (CA).

4 Crimes Act 1961, s 390.

5 Section 58C(1) of the Judicature Act 1908 provides that judges are assigned to act as members of a division (panel) of the Court of appeal in accordance with a procedure adopted from time to time by the permanent judges of that Court. It is described in the Court of Appeal's judgment at [11] and [12].

this question be a ground for the proposed appeal. We are not called on in the present matter to assess whether it is arguable. We accordingly do not consider it.

[9] The next four proposed grounds of appeal are concerned with the admissibility of the evidence in the High Court of Dr Wales, a Department of Corrections psychologist. He gave evidence on factual matters as well as an expert. It is said that in receiving his evidence, cross-examination of which was permitted on the merits, the High Court compromised its independence. The Court of Appeal held that an expert's evidence is not made inadmissible because the witness is associated with a party. Nor does it become inadmissible because the expert gave evidence on factual matters. Those rulings are entirely orthodox and the Court of Appeal held that the evidence met the statutory test for expert evidence. The weight to be given to the evidence was a matter for the Judge. We are satisfied that his determination did not, arguably, affect his independence or otherwise breach the applicant's rights to a fair hearing. We are of the view that no arguable basis for challenging the Court of Appeal's reasoning in a further appeal based on these grounds has been put forward by the applicant.

[10] The next three proposed grounds concern whether the psychological service reports on the applicant, which were used in the process of security classification of the applicant, were based on examinations undertaken with the applicant's fully informed consent. The right to refuse to undergo medical treatment under s 11 of the Bill of Rights Act is invoked, on the basis that a prisoner accepting treatment has to be fully informed of potential consequences or the right will be breached. This ground failed in the Court of Appeal because the applicant was unable to show that his legal argument was based on necessary findings of fact in the High Court. The Court of Appeal considered and upheld the High Court Judge's findings that the applicant knew that reports written following examinations undertaken with his agreement would be placed on his prison file and be available for later security classification decisions. We are not persuaded by counsel's criticisms of the findings that there is any possibility of a miscarriage of justice in this case. Nor are we persuaded that we should review the concurrent factual findings of the two Courts. It follows that the legal arguments identified by the applicant do not have a sufficient factual basis for an arguable ground of appeal.

[11] A further ground, in relation to remedy, is that references to the term "psychopath" should be expunged from the files concerning the applicant. The Court of Appeal judgment records that the Crown has said through counsel that the references in question will be confined to a therapeutic file. On that basis we can see no ground for bringing the matter before this Court.

[12] Finally there are two proposed grounds of appeal based on the lawfulness of security classification decisions over various periods. The applicant wishes, in particular, to argue that publication of the policy basis on which these decisions are made is a requirement of the rule of law. The Crown's evidence was that legal instruments and policy documents were available to prisoners and responsible staff. The extent of their wider availability was not addressed in evidence in the High Court. This evidential limitation means that, in this respect also, there is no factual basis for an appeal to this Court on the grounds advanced. It is accordingly not appropriate to consider the legal merits of the argument.

[13] For these reasons we are satisfied that it is not in accordance with the interests of justice for this Court to hear the proposed appeal. The application for leave to appeal is dismissed. There will be no order for costs.

Solicitors:
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