IN THE SUPREME COURT OF NEW ZEALAND

SC 106/2011
[2011] NZSC 146

G

v

THE QUEEN

Court: Elias CJ, Blanchard and William Young JJ

Counsel: M M Wilkinson-Smith for Applicant
M J Inwood for Crown

Judgment: 1 December 2011

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant wishes to raise arguments concerning the application of s 35(2) of the Evidence Act 2006. The Court of Appeal has dismissed his appeal against conviction on a representative charge of sexual violation of complainant J, indecent assault of complainant H and four representative charges of assault on H.[1] The applicant's proposed arguments in this Court relate to evidence given of a complaint by J to his uncle concerning sexual violations (which were encompassed within the representative charge).

---

1 *G (CA 883/2010) v R* [2011] NZCA 395.

[2] First, he objects that the complaint evidence came in only at the end of the re-examination of J. He said he had no opportunity to cross-examine J about the complaint, and that the timing of this piece of evidence created unnecessary emphasis. It is not being submitted that J's evidence about the complaint was inadmissible. There had been cross-examination suggesting that J had made up stories about what the accused had done to him (that is, a suggestion of invention) and also suggesting that it was actually the uncle, not the applicant, who had been interfering with him. The evidence to rebut the suggestion of invention was introduced at the time in the trial contemplated by the section. The applicant's counsel could have sought leave to further cross-examine J about the making of the complaint to the uncle but evidently chose not to do so.

[3] Then it is said that it was unnecessary, in order to rebut the suggestion of invention, for evidence to be given, as it was, by the uncle about what was said to him. As there was no challenge to the complaint evidence on the basis that it was unnecessary, however, the evidence from the uncle confirming the making of the complaint was also available. It additionally tended to rebut the suggestion made in cross-examination of J, but apparently not further pursued, that the complaint may have transferred from the uncle to the accused an event which had actually happened.

[4] The uncle described in evidence how angry he was on hearing of J's complaint. That is said to have caused illegitimate prejudice to the applicant. But it must have been obvious to the jury that the complaint to the uncle had been treated seriously because the police had become involved soon afterwards. So the statement about anger (which was only to be expected from a relative) told the jury nothing that they would not have deduced anyway.

[5] The applicant now raises, apparently for the first time, an argument that a warning should have been given to the jury about being influenced by any apparent opinion of the uncle about the veracity of J. The uncle's evidence was, however, able to be used to prove that J was telling the truth. We are satisfied that the Judge's directions were sufficient, including a reminder that the account given by the uncle was simply of "the children telling their story to someone else".

[6] The applicant also wishes to argue that there should have been an order for severance of the counts of sexual offending. We are not persuaded that the Court of Appeal erred in agreeing with the District Court that all counts were properly to be tried together, for the reasons it gave.[2]

[7] None of the proposed grounds is sufficiently arguable. The leave criteria are not met.

Solicitors:
Crown Law Office, Wellington

[2] At [12]–[15].