

LI FAN

v

THE QUEEN

Court: Elias CJ, Tipping and McGrath JJ

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

Judgment: 5 April 2011

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to bring an appeal 13 months out of time against a judgment of the Court of Appeal dismissing his appeal against conviction on serious charges of possessing methamphetamine for the purpose of supply, sale of methamphetamine and unlawful possession of firearms.¹

[2] The lengthy delay in bringing this appeal is not adequately explained by the need for Mr Fan, who was not represented in his conviction appeal, to instruct new counsel and his claimed difficulties in obtaining funding for an application for leave to bring a further appeal. In the context of a 25 year term of imprisonment it can be

¹ *Chen v R* [2009] NZCA 445, [2010] 2 NZLR 158.

in the interests of justice in the particular case to extend time for seeking leave despite such substantial delay, provided that apparent miscarriage of justice is well arguable. We are satisfied however that there is no such appearance of a miscarriage on the proposed grounds of appeal. They lack merit.

[3] The applicant relies on an unexplained absence by a juror for two days, during which the trial did not proceed. He submits that the trial judge erred in failing to make enquiry of the absent juror, when the juror returned to court, and to investigate whether the juror was able to discharge his duties. No objection was made to the way in which the matter was dealt with by the judge at trial, nor was there any request to make further enquiries as to the circumstances in which the juror was absent (which the trial judge appears to have attributed to miscommunication). No tenable basis upon which the episode could be said to cause the verdict to be unsafe is put forward. The suggestion of possible contamination of the trial is purely speculative. The matter was one for the judge to assess in the context of the lengthy trial in circumstances in which no basis of suspicion was put forward. The short point made by the Court of Appeal in dismissing the appeal on this ground was that there was no basis to consider that the absence of the juror was other than through miscommunication. There is nothing to suggest any miscarriage of justice in what transpired.

[4] The applicant also contends that the trial judge erred in giving a direction in her summing-up that an accused may have a motive to lie. In context the direction was not capable of causing any miscarriage of justice. It arose out of a cut-throat defence in which two of the accused on trial (not the applicant) tried to blame each other. The judge made a general comment that someone facing a criminal charge might have an incentive to lie about his part and to seek to implicate others. The judge's direction as to motive to lie could only be taken to refer to the two accused who gave evidence implicating each other and could not have been taken to be a general direction to take care in assessing the evidence of all accused because of a motive to lie. The remarks were appropriate and not misleading in context. No point of general or public importance arises.

Solicitors:
Stephen Williams, Hamilton for Applicant
Crown Law Office, Wellington for Respondent