IN THE SUPREME COURT OF NEW ZEALAND

SC 19/2012
[2012] NZSC 42

MICHAEL SANTO COLOSIMO

v

THE QUEEN

Court: Elias CJ, Blanchard and William Young JJ

Counsel: G P Curry for Applicant
M J Lillico for Crown

Judgment: 30 May 2012

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant has sought leave to appeal to this Court against a decision of the Court of Appeal dismissing his appeal against convictions for forgery and dishonestly using a document.[1] The allegation against him at his trial, which the jury found proved, was that he forged a financial statement concerning a restaurant business and presented it to persons who were negotiating a purchase of the business. The document purported to have been prepared by his former accountants and substantially overstated the profits of the business for a ten-month period to November 2005.

1 *Colosimo v R* [2012] NZCA 60.

[2] At the beginning of the trial the defence was opened on the basis that the document was not a forgery but that, if it were, then Mr Colosimo was unaware of it and any forgery had been committed by a Mr Harvey. The "no forgery" defence ran into immediate difficulty when the accountant who supposedly prepared the document, Mr McFadden, disowned it. His evidence to that effect was not challenged in cross-examination.

[3] New accountants had been engaged by the applicant in January 2006. An employee of the new firm, Mr Manning, was called to give evidence for the Crown. In the course of his evidence he disclosed that he had an electronic file which included a draft trading statement for the ten-month period. That statement was qualified as to its accuracy and showed a trading profit some $100,000 below that in the statement given to the purchasers. It was apparent that the draft had been used to create the forgery by the addition of $100,000 to the sales revenue and net surplus figures and by the deletion of the qualification. The forgery combined the altered draft and a front page which bore the letterhead of Mr McFadden's firm and a form of waiver statement used by his firm. Neither the police nor the Crown had been aware of Mr Manning's electronic file but it is evident that the defence already had a copy of the draft statement in its unaltered form. Computer experts subsequently gave evidence that the alterations were done on Mr Colosimo's office computer on 3 February 2006.

[4] Nonetheless, the defence claimed to have been taken by surprise by Mr Manning's disclosure. The Judge therefore adjourned the trial overnight. The next morning he ruled that the documents disclosed by Mr Manning were admissible. He then adjourned the hearing for a further day to enable the parties to consider them and make further inquiries. When the trial resumed, trial counsel for the defence sought a mistrial on the ground of prejudice caused by the late disclosure of the documents. The Judge dismissed that application. He considered that, although the draft trading statement married up with Mr McFadden's evidence that the November financial statement tendered to the purchasers was untrue, even without it that had been established. No application for any further adjournment was made and the trial continued.

[5] The Court of Appeal rejected the argument that it was unfair to proceed with the trial in these circumstances. It pointed out that the draft trading statement produced by Mr Manning was by no means a complete surprise to the defence. It had in opening, while maintaining the "no forgery" defence, signalled that it would also be saying that there must have been a forgery committed by Mr Harvey of which Mr Colosimo knew nothing. No further adjournment had been sought after the Judge's ruling on admissibility and in the Court of Appeal Mr Colosimo had presented no evidence about any further matters he would have explored or about how the defence would have been run differently if given further time.

[6] Aside from a proposed re-running of the arguments advanced in the Court of Appeal, whose response we find convincing, counsel for the applicant, Mr Curry, who did not appear below, has indicated that the appeal to this Court would focus on an alleged failure by the prosecution to disclose Mr Manning's electronic file as required by the Criminal Disclosure Act 2008. But, as the Crown has submitted, the Act understandably does not place the prosecution under a duty to disclose material not in its possession and of which it is unaware. In fact in s 15 it provides that disclosure is not required where the prosecutor is not in possession or control of the information and does not hold it in recorded form. Section 13(5) provides that, where information comes into the possession or control of the prosecutor or is prepared in recorded form after disclosure has been made in accordance with the section and before the hearing or trial is completed, the prosecutor must disclose the information to the defendant as soon as it is reasonably practicable. That is what occurred in this case. The trial was adjourned and disclosure made when Mr Manning mentioned the electronic file.

[7] We are satisfied that the proposed appeal cannot succeed. There is no appearance of any substantial miscarriage of justice.

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