NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985

IN THE SUPREME COURT OF NEW ZEALAND

SC 17/2013
[2013] NZSC 38

JACOB ADRIAAN BRITZ

v

THE QUEEN

Court: William Young, Chambers and Glazebrook JJ

Counsel: A J Holland for Applicant
M J Lillico for Crown

Judgment: 19 April 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] This case came before the Court of Appeal in an unusual way. On 22 October 2009 Jacob Britz, the applicant, pleaded guilty in the Hamilton District Court to charges of sexual offending involving two victims, NK and JV. Bruce Hesketh was his counsel at that time. Before Mr Britz was sentenced, he applied to vacate his pleas, but later that application was withdrawn. By this time,

however, Mr Britz faced further charges with respect to a third complainant, FM. He pleaded not guilty to those charges, but in October 2011 following a trial was found guilty.

[2] Mr Britz came up for sentence on all matters on 30 November 2011. Woodhouse J adjourned the sentencing and ordered reports from two health assessors under s 88 of the Sentencing Act 2002. Dr Ian Goodwin, a psychiatrist, and Ms Sabine Visser, a psychologist, in their reports expressed the opinion that Mr Britz had been unfit to stand trial when he entered his guilty pleas in respect of NK and JV and when he stood trial in respect of FM. The Crown later instructed Professor Graham Mellsop, a psychiatrist, who concluded Mr Britz had been fit to stand trial.

[3] Given these divergent views, counsel and the Judge agreed on a strategy for resolving the conflict in the expert opinion. It was agreed Mr Britz would appeal against his convictions. In the meantime, the Judge would defer sentencing.

[4] The Court of Appeal dismissed the appeal against conviction.[1]

[5] Mr Britz, through his counsel, Mr Holland, seeks to raise four grounds of appeal. In so far as Mr Britz challenges the "weight" the Court of Appeal accorded some experts' opinions over others, there is no point of principle justifying a further appeal.

[6] There are, however, two matters Mr Holland raises which we have considered in depth. The first is an argument that the Court of Appeal adopted a "high threshold" in relation to post-trial fitness arguments, in reliance, it is said, on an earlier decision of the Court of Appeal, *SR v R*.[2] We think, with respect, that the proposed argument misses the point the Court of Appeal was making and which had also been made in two English Court of Appeal decisions cited in *SR*.[3] What both Courts of Appeal were emphasising was simply the practical problem of

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1 *Britz v R* [2012] NZCA 606.
2 *SR v R* [2011] NZCA 409, [2011] 3 NZLR 638.
3 *R v Erskine* [2009] EWCA Crim 1425, [2010] 1 All ER 1196 at [89] and *R v Walls* [2011] EWCA Crim 443, [2011] 2 Cr App R 61 at [22], cited in *SR v R* at [55]–[59].

reconstructing later an accused's mental state at trial in circumstances where no one qualified had examined the accused at the relevant time and no one involved in the case at that time (lawyers and the judge) had perceived there to be a potential difficulty as to fitness to plead or stand trial. That there is a practical difficulty in "later reconstruction" is undeniable. That is not to say the courts generally impose, or the Court of Appeal in this case imposed, a "high threshold" in these circumstances. The fact an accused has an intellectual disability, as Mr Britz does, does not mean a different test is called for in the post-trial situation. That disability will simply be another factor to be weighed, as it was weighed by the Court of Appeal in this case.

[7] The second matter is an argument that Mr Britz was deprived of his rights to be assessed under the Criminal Procedure (Mentally Impaired Persons) Act 2003 by Mr Hesketh's failure to take up Dr Jane O'Dwyer's suggestion that "an assessment of the alleged offender's intelligence level would be appropriate". (Dr O'Dwyer was a psychiatrist Mr Hesketh consulted when he became concerned about Mr Britz's level of cognitive functioning.) Mr Holland submitted that, had Mr Hesketh acted on Dr O'Dwyer's recommendation, it would have been "inevitable" that the Act's procedures would have been triggered.

[8] The Court of Appeal addressed the evidence surrounding Dr O'Dwyer's report and Mr Hesketh's reaction to it. The Court concluded, on the basis of all the evidence before it, that Dr O'Dwyer's suggestion was not sufficient to trigger the necessity for Mr Hesketh to initiate the statutory process under the 2003 Act.[4] Whether that conclusion is right or wrong is, however, beside the point. Mr Britz's appeal had been brought on the basis that "a miscarriage of justice" had occurred in terms of s 385(1)(c) of the Crimes Act 1961. On such an appeal, the focus is not so much on whether the statutory process was or was not triggered but rather on whether a miscarriage of justice occurred. A miscarriage of justice would occur if the "mental disorder [made] the trial unfair".[5] The Court of Appeal investigated with great care and thoroughness the evidence as to Mr Britz's fitness to stand trial and to plead at the time he entered his guilty pleas and at the time of his trial. They

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4 At [96].

5 *Cumming v R* [2008] NZSC 39, [2010] 2 NZLR 433 at [13].

concluded he had been fit to stand trial and accordingly the processes were fair.[6] There can be no realistic challenge to the way in which the Court of Appeal approached its appellate task. We are not satisfied an arguable case has been made that the Court's weighing of the evidence was in error.

[9] There is no point of general or public importance warranting a second appeal. Nor are we satisfied a substantial miscarriage of justice may or will occur unless we hear this appeal.

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6 At [115].