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IN THE SUPREME COURT OF NEW ZEALAND

SC 52/2016
[2016] NZSC 76

BETWEEN	T (SC 52/2016) Applicant
AND	THE QUEEN Respondent

SC 53/2016

BETWEEN	N (SC 53/2016) Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	N P Chisnall and M A Stevens for Applicants I R Murray for Respondent
Judgment:	21 June 2016

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] The applicants are charged with committing incest. The applicant T is the father of the applicant N. They first met each other as adults and a sexual relationship developed between them. They had a daughter in 2011, following which they were charged with, and pleaded guilty to, incest in August 2012. In August 2013, the police were called to their home and found that there were two children, the daughter and an infant boy. Subsequently the infant boy died.

[2] The Coroner requested that a post mortem examination be undertaken. During the post mortem examination, a blood sample was taken from the body of the infant boy at the request of the police because of their suspicion that the infant boy was also the result of the incestuous relationship between T and N. T and N consented to the post mortem examination, but were unaware of the request for the blood sample to be taken. The Crown wishes to adduce evidence at trial that DNA obtained from the blood sample establishes that the infant boy is the child of T and N.

[3] T and N challenged the admissibility of this evidence. The challenge failed in the District Court, the Judge finding that the evidence was not improperly obtained and that, in any event, exclusion of the evidence under s 30 of the Evidence Act 2006 would be disproportionate to any impropriety.[1] T and N appealed unsuccessfully to the High Court. The High Court found that the evidence was unlawfully obtained but also came to the view that excluding the evidence obtained would be disproportionate to the impropriety and therefore dismissed the appeal.[2]

[4] A further appeal to the Court of Appeal also failed.[3] The Crown did not contest the High Court's finding that the evidence was unlawfully obtained, so the Court of Appeal decision is confined to the application of s 30 of the Evidence Act. Again, the Court found that exclusion of the evidence would be disproportionate to the gravity of the breach.

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1 *R v [T]* [2015] NZDC 4740 (Judge Crosbie).
2 *R v [T]* [2015] NZHC 1588 (Gendall J).
3 *T (CA438/2015) v R* [2016] NZCA 148 (Randerson, Stevens and Miller JJ).

[5] The applicants wish to argue on appeal that the Court of Appeal erred in its assessment of some of the factors set out in s 30(3) of the Evidence Act. In particular, they wish to argue that the Court of Appeal underestimated the importance of the right breached by the taking of the blood sample and the nature of the impropriety. They argue that there are points of public interest arising under the Human Tissues Act 2008, the Coroners Act 2006, the Search and Surveillance Act 2012 and the New Zealand Bill of Rights Act 1990 in relation to those issues.

[6] We do not consider that leave is appropriate in this case. The Courts below have uniformly concluded that the s 30 balancing exercise favours the admission of the evidence. The issues the applicants seek to raise are specific to the unusual facts of this case and even if decided in their favour are unlikely to alter the overall outcome. Nor do we see any risk of a substantial miscarriage of justice occurring if leave is not granted.

[7] We therefore dismiss the applications for leave to appeal.

Solicitors:
Public Defence Service, Wellington for Applicants
Crown Law Office, Wellington for Respondent