

IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2016  
[2016] NZSC 131

BETWEEN                      BODIE HOANI NGAPAKI STEWART  
   Applicant  
  
AND                                THE QUEEN  
   Respondent

Court:                      William Young, Glazebrook and Arnold JJ  
  
Counsel:                    M J Phelps for Applicant  
   J E L Carruthers for Respondent  
  
Judgment:                    3 October 2016

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**JUDGMENT OF THE COURT**

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- A      The application for an extension of time to appeal is granted.**
- B      The application for leave to appeal is dismissed.**
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**REASONS**

[1]      At a jury trial before Judge Mackintosh, the applicant, Mr Stewart, was convicted on three counts and acquitted on five others. He had previously entered guilty pleas to five other charges and had been discharged on a further four. All of the offending was associated with domestic violence against his partner. He was sentenced to a term of imprisonment of four years and eight months, with a minimum period of imprisonment of two years, four months.<sup>1</sup>

[2]      He appealed against his convictions on the three counts of which he was found guilty at trial and against his sentence. His appeal was dismissed.<sup>2</sup>

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<sup>1</sup>      *R v Stewart* [2015] NZDC 25885.

<sup>2</sup>      *Stewart v R* [2016] NZCA 217 (Wild, Courtney and Gilbert JJ).

[3] Before the Court of Appeal, Mr Stewart argued that his trial had miscarried as a result of a combination of factors, only one of which is relevant for present purposes, namely that the jury had been reduced to 10 people. This came about because two jurors were discharged, one immediately after the Judge had made her opening remarks to the jury at the beginning of the trial and the other part way through the evidence. The jury were unanimous in finding Mr Stewart guilty of one of the three counts and found him guilty by majority (9/1) on the other two.

[4] At the hearing of the appeal, the Court raised with Mr Stewart's counsel, Mr Phelps, the question whether the second juror had been properly discharged in terms of s 22 of the Juries Act 1981 (it was clear that the first juror had been properly discharged).<sup>3</sup> This point had not been raised specifically as a ground of appeal because Mr Phelps had accepted at trial that the Judge should discharge the second juror.<sup>4</sup> Having received and considered further written submissions on the point, the Court of Appeal was not persuaded that the Judge was wrong to discharge the juror.<sup>5</sup> This is the only point on which Mr Stewart now seeks leave to appeal.

[5] As the application for leave to appeal was filed several months out of time, Mr Stewart seeks an extension of time to appeal. There is no opposition from the Crown to that application, and we grant it.

[6] The Court of Appeal agreed with counsel's submission that in determining whether or not a juror should be discharged, a broad, fact specific inquiry was required.<sup>6</sup> As the Court detailed,<sup>7</sup> the Judge in the present case explored the reason that the juror faced a difficulty, and possible mechanisms for dealing with that difficulty. The Judge had the opportunity to assess the juror's circumstances and the likely impact of her predicament upon her ability to continue to perform her function as a juror. On the basis of what this revealed, and having discussed the position with counsel, both of whom agreed, the Judge decided that she should discharge the juror. Against this background, even if the question of the approach to the discharge of

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<sup>3</sup> At [5].

<sup>4</sup> At [18].

<sup>5</sup> At [38].

<sup>6</sup> At [35].

<sup>7</sup> At [9]–[19].

jurors is one that this Court might consider at some point, we are satisfied that this is not an appropriate case to do so. We see no risk of a substantial miscarriage of justice.

[7] Accordingly, the application for leave to appeal is dismissed.

Solicitors:  
Crown Law Office, Wellington for Respondent