IN THE SUPREME COURT OF NEW ZEALAND

SC 14/2017
[2017] NZSC 62

BETWEEN	RONNIE JOSEPH DE WYS First Applicant
	PENELOPE HELEN LOUISA DE WYS Second Applicant
AND	THE COMMISSIONER OF POLICE Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	D J Taylor for Applicants S K Barr for Respondent
Judgment:	4 May 2017

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] The applicants seek leave to appeal against the decision of the Court of Appeal that they unlawfully benefited from cultivation and sale of the Class C controlled drug, cannabis, and so their property was liable for forfeiture under the Criminal Proceeds (Recovery) Act 2009.[1] The Court of Appeal accordingly allowed an appeal by the Commissioner of Police against the judgment of Faire J declining to make forfeiture orders.[2]

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1 *Commissioner of Police v de Wys* [2016] NZCA 634 (Cooper, Clifford and Katz JJ) [*de Wys* (CA)].

2 *de Wys v Commissioner of Police* [2015] NZHC 540 [*de Wys* (HC)].

[2] The applications are advanced on the basis there has been a miscarriage of justice because, it is contended, the Court of Appeal erred in relation to its assessment of the facts.[3]

[3] The background is set out in full in the judgments of the High Court[4] and Court of Appeal.[5] We need note only that over the relevant period the applicants lived and worked on a farm at Arapuni Road, near Putaruru.

[4] Essentially, the applicants wish to argue the Court of Appeal was wrong to rely on the evidence of Terry O'Brien, a maize crop harvester who did some work on the maize field at Arapuni Road. He gave evidence that each time he worked on the property there were rows of maize missing from the middle of the field and of, on one occasion, when Mr de Wys was not forewarned that the harvesting crew were coming, seeing a male removing mature cannabis plants from these central rows. He identified the man as Mr de Wys.

[5] The applicants say Mr O'Brien's evidence was inconsistent with that of the first applicant, Mr de Wys. The latter gave evidence directed to the proposition that, because of the way in which the maize harvesting operation was conducted, it was physically impossible for the man removing the cannabis plants to be Mr de Wys. Further, the applicants submit the Court of Appeal was wrong to rely on the fact that there was no evidence of another adult male living on the farm. While there was no evidence of any other adult male living on the property before either Court, the submission is that there was in fact another man living there at the relevant time.

[6] The evidence was canvassed in detail by the Court of Appeal. As the High Court had done, the Court of Appeal found that Mr O'Brien's identification evidence was unreliable.[6] However, the Court accepted Mr O'Brien did see mature cannabis plants and a person taking them away. After noting it was "common ground" that the

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3 Supreme Court Act 2003, s 13(2)(b). Although that Act has now been repealed, this application is still governed by the Act by reason of the transitional provisions of the Senior Courts Act 2016: sch 5, cl 10; and see s 186.

4 *de Wys* (HC), above n 2, at [14]–[30].

5 *de Wys* (CA), above n 1, at [2]–[7].

6 That was because he saw the person very briefly and from some distance away. He did not see the person's face: *de Wys* (CA), above n 1, at [28].

man carrying the plants was either Mr de Wys or an "unknown intruder",[7] the Court of Appeal concluded:

> [60] Even when this evidence is considered in isolation we find the intruder scenario to be implausible. It becomes even more implausible when Mr O'Brien's evidence is considered together with the other strands of evidence relied on by the Commissioner to link the respondents to cannabis offending. The logical inference is that Mr de Wys was the cultivator of the cannabis and also the unidentified man who removed the cannabis plants and walked away with them towards a stand of trees.

[7] Nothing has been raised by the applicants that throws doubt on the Court's analysis or to suggest any risk of a miscarriage.[8] We make three points.

[8] First, there is not necessarily any conflict between the account of Mr de Wys and that of Mr O'Brien. Mr O'Brien explained that on the day in question a different approach to harvesting was adopted. That was because Mr O'Brien arrived unexpectedly, and was not able to contact Mr de Wys. Although Mr O'Brien was cross-examined about the reliability of his identification of the man he saw as Mr de Wys, it was not put directly to him that Mr de Wys could not have been the man he saw due to the way the harvesting was conducted.

[9] Second, there was no direct evidence that another adult male lived on the farm. Mr de Wys was asked in cross-examination whether there were really two options, that the man seen was the occupier (Mr de Wys and his wife), or "somebody else coming on and doing it". He accepted those were the options.

[10] Finally, there was other circumstantial evidence which was appropriately taken into account such as significant unexplained income and the discovery after the applicants had moved to another property of cannabis remnants in the attic in the house at Arapuni Road.

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7 *de Wys* (CA), above n 1, at [59].

8 As noted by this Court in *Junior Farms Ltd v Hampton Securities Ltd (in liq)* [2006] NZSC 60, (2006) 18 PRNZ 369, the miscarriage ground under s 13(2)(b) of the Supreme Court Act for civil appeals will only enable this Court to review a decision of the Court of Appeal in the rare case of a sufficiently apparent error of "such a substantial character that it would be repugnant to justice to allow it to go uncorrected": at [5].

[11] The applications for leave to appeal are accordingly dismissed. As the applicants are legally aided, we make no order as to costs.

Solicitors:
Gavin Boot Law, Hamilton for Applicants
Crown Law Office, Wellington for Respondent