IN THE SUPREME COURT OF NEW ZEALAND

SC 41/2017
[2017] NZSC 98

BETWEEN	JOHN ARCHIBALD BANKS Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	D P H Jones QC for Applicant M L Wong for Respondent
Judgment:	28 June 2017

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B The applicant must pay costs to the respondent of $2,500.

REASONS

[1] The applicant was tried before Wylie J sitting alone, for the offence of knowingly transmitting a false return of his electoral expenses in relation to his unsuccessful 2010 campaign for the Auckland mayoralty.[1] The Crown case was that three donations, one from SkyCity Management Ltd for $15,000 and two from Megastuff Ltd of $25,000 each, had been falsely returned as having been given anonymously when the applicant knew who the donors were. Wylie J concluded that the particulars in relation to the SkyCity Management donation had not been established but that the charge had been proved in relation to the two Megastuff donations.[2]

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1 *R v Banks [Reasons for verdict]* [2014] NZHC 1244, [2014] 3 NZLR 256.
2 At [147] and [153]–[155].

[2] The case against the applicant on the Megastuff donations had two features. The first was the general narrative of events, given by Mr and Mrs Dotcom[3] and a Mr Tempero, of a lunch on 9 June 2010 at Mr Dotcom's house which was attended by Mr and Mrs Banks at which the proposed donation was discussed. Their evidence was that Mr Banks had proposed that the $50,000 that Megastuff was to donate should be provided by way of two cheques so that it could be recorded anonymously. The impugned return referred to a total of five anonymous donations of $25,000. The second was evidence from Mr Dotcom's solicitor of a discussion with Mr Banks in the aftermath of Mr Dotcom's arrest in respect of extradition proceedings against him in which he said that Mr Banks had acknowledged the financial assistance which Megastuff and Mr Dotcom had provided in respect of his mayoral campaign.

[3] Unbeknownst to the prosecution before trial, Mr and Mrs Banks had what was, in effect, an alibi for 9 June 2010; in other words, they could not have had lunch with Mr Dotcom that day at his house. They were able to establish by other evidence that the lunch took place on 5 June 2010. In their statements to the police Mr and Mrs Banks had referred to other people having been present at the lunch albeit in reasonably general terms. In her evidence, Mrs Banks said that on that occasion there had been no discussion of donations. She also referred to two American businessmen having been present. Her evidence was not accepted by the Judge.

[4] By the time the applicant's appeal was heard in the Court of Appeal, Mrs Banks had tracked down the two American businessmen who confirmed her account of the lunch. On the basis of this new evidence the Court of Appeal allowed the applicant's conviction appeal and ordered a new trial.[4] It then transpired that counsel acting for the Crown had, before the hearing of the appeal, arranged for Mr Dotcom to be interviewed by another barrister. The statement which he gave to the barrister involved an acceptance that Mr and Mrs Banks had had lunch at his house on 5 June, the two American businessmen had been there and that donations were not discussed on that occasion. He suggested, however, that there had been a

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3 The Dotcoms are linked to Megastuff Ltd.
4 *Banks v R* [2014] NZCA 575.

second lunch on 9 June. There is no indication that Mrs Dotcom and Mr Tempero have been re-interviewed.

[5] When this statement was disclosed to the applicant, he successfully sought a recall of the order directing a retrial, the Court of Appeal concluding that there was no longer any reasonable prospect of a conviction.[5]

[6] The applicant's application for costs in relation to the Court of Appeal proceedings was settled.[6] In issue now is his application for costs in respect of his trial. This application was refused by Wylie J[7] and the applicant's appeal against that refusal was later dismissed.[8]

[7] Primarily in issue is whether the applicant has established that he is not guilty of the offence for which he was convicted.[9]

[8] It does not appear to have been suggested that this criterion was satisfied in respect of the SkyCity particular and, in his judgment refusing the application for costs, Wylie J made it clear that he was not satisfied the applicant was innocent in this respect.[10]

[9] In respect of the Megastuff donations, the evidence from the American businessmen and Mr Dotcom's response meant that the Crown narrative of events as advanced at trial had collapsed. As well, there are legitimate issues as to how it was that Mr and Mrs Dotcom and Mr Tempero came to give such similar evidence as to what they said had happened on 9 June. As we have noted, however, there was other evidence capable of supporting the inference that Mr Banks knew that Mr Dotcom had financially supported his mayoral campaign. And although Wylie J did not say so in as many words, he was plainly not satisfied that the applicant was innocent in respect of the Megastuff donations.[11]

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5 *Banks v R* [2015] NZCA 182.
6 See *Banks v R* [2016] NZHC 1596 (Wylie J) [HC judgment] at [39].
7 HC judgment, above n 6.
8 *Banks v R* [2017] NZCA 69 (Wild, Simon France and Duffy JJ) [CA judgment].
9 See s 5(2)(f) of the Costs in Criminal Cases Act 1967.
10 HC judgment, above n 6, at [51]–[68].
11 At [69]–[105].

[10] The Court of Appeal judgment is to the same effect.[12]

[11] There is no point of general or public importance involved in the appeal. Instead the case turns on a factual issue, in respect of which there are now concurrent findings of fact. There is no appearance of a miscarriage of justice. Accordingly, the application for leave to appeal is dismissed. Costs follow the event; accordingly, the applicant must pay costs to the respondent of $2,500.

Solicitors:
Parlane Law, Auckland for Applicant
Crown Law Office, Wellington for Respondent

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12 CA judgment, above n 8.