IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 92/2018
[2018] NZSC 113

BETWEEN	JIRI KUPEC Applicant
AND	THE QUEEN Respondent

Court: William Young, O'Regan and Ellen France JJ

Counsel: P L Borich QC for Applicant
K S Grau for Respondent

Judgment: 22 November 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty by a jury in the District Court of importing a Class A controlled drug (methamphetamine) into New Zealand. The methamphetamine was located by customs officers in suitcases which he and his mother had with them when they arrived in New Zealand from Thailand. His defence at trial was that he had understood that the suitcases contained currency which was to be smuggled into the United States (which is where the applicant and his mother intended to go after leaving New Zealand). His appeal against conviction and sentence was dismissed by the Court of Appeal[1] and he now seeks leave to appeal to this Court against his conviction.

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1 *Kupec v R* [2018] NZCA 377 (Brown, Clifford and Williams JJ).

[2] Counsel for the applicant raises three grounds which are said to justify the grant of leave.

[3] The first complaint is directed at the summing-up of the trial Judge, Judge McGuire.

[4] In his question trail for the jury, the Judge posed the following questions:

> [3] Are you sure that at the time he brought the suitcases into New Zealand, the defendant knew that the suitcases contained an illegal drug?
>
> If Yes, find him Guilty
>
> If No, go to [4]
>
> [4] Are you sure that at the time he brought the suitcases into New Zealand, the defendant believed that it was a real possibility that the suitcases contained an illegal drug?
>
> If Yes, go to [5]
>
> If No, find him Not Guilty
>
> [5] Are you sure that knowing there was a real possibility that the suitcases contained an illegal drug, he unreasonably disregarded that risk?
>
> If Yes, find him Guilty
>
> If No, find him Not Guilty

These questions reflect the judgment of this Court in *Cameron v R.*[2]

[5] Counsel for the applicant suggests that the Court should review the approach taken in *Cameron* so that the issues for the jury in a case such as this would come down to whether:

(a) the defendant was aware of the relevant risk; and

(b) in the circumstances known to the defendant it was unreasonable for the defendant to take that risk.

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2 *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [73] and [97].

This approach would suggest changes to questions [4] and [5] of the question trail with question [4] framed in terms of awareness rather than belief that it was a real possibility and question [5] making it clear that reasonableness is to be judged on the risk the defendant saw. In advancing his submission on this point, counsel for the applicant relied on the speech of Lord Bingham in *R v G*[3] which was cited in *Cameron*.[4]

[6] We consider that there is no practical difference between the test proposed by counsel and that adopted by this Court in *Cameron*. The *Cameron* test is subjective in terms of both: (a) the recognition of the risk; and (b) reasonableness being assessed by reference to that risk (ie the risk identified by the defendant). And in any event, nothing has been advanced to suggest that the formulation of the test adopted so recently in *Cameron* warrants reconsideration.

[7] The second complaint is that, as a result of an exchange between counsel and the Judge, counsel for the applicant was prevented from submitting to the jury that if they were of the view that the applicant honestly believed that the suitcases contained currency, he must be acquitted. The transcript of this exchange is in the Court of Appeal judgment[5] and we agree that in it, the Judge expressed the view that counsel should not advance that contention. As it turned out, counsel did submit to the jury that if they believed the applicant's explanation he should be acquitted and a summary of this contention was included in the Judge's summing-up.[6] The Judge did not, in express terms, tell the jury that the applicant must be acquitted if it was reasonably possible that he believed that the suitcases contained only currency.

[8] The difficulty with this point, as the Court of Appeal noted, is that if the applicant had believed that the suitcases contained only currency, it would follow that he could not have believed that there was a real possibility that they contained illegal drugs.[7] We are thus of the view that the approach taken by the Judge could not have given rise to a miscarriage of justice.

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3 *R v G* [2003] UKHL 50, [2004] 1 AC 1034 at [41].
4 *Cameron*, above n 2, at [68].
5 *Kupec*, above n 1, at [31].
6 See [47]–[48].
7 At [44].

[9] The third complaint relates to the Judge's directions in respect of the applicant's out of court statement. This was in a context in which the applicant had not given evidence. The Judge told the jury that they could take into account what the applicant had said in this statement and did so in orthodox terms. He did not give the jury what is often referred to as a tripartite direction. Nor did he say expressly in relation to the out of court statement that the jury could accept some parts even if they rejected other parts, albeit that this might be thought to have been implicit in his directions when considered as a whole. This argument was fully addressed by the Court of Appeal.[8] It does not give rise to any question of public or general importance and there is no appearance of a miscarriage of justice.

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

Solicitors:
Crown Law Office, Wellington for Respondent

8 At [52]–[61].