IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 13/2018
[2018] NZSC 44

BETWEEN		WAYNE JONES Applicant
AND		THE QUEEN Respondent

Court: Elias CJ, William Young and O'Regan JJ

Counsel: W T Nabney for Applicant
S K Barr for Respondent

Judgment: 10 May 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty of two charges of aggravated robbery which arose in the context of a forced entry by the applicant and others into a house. There were four people in the house during the course of the day, although only two were present during the robbery. One gave evidence at trial which directly implicated the applicant and was cross-examined in some detail. The other three (PT, CT and ED) had made statements to the police but at trial they proved to be generally uncooperative witnesses, albeit that they answered some questions from both the prosecutor and defence counsel. The Judge declared each of PT, CT and ED hostile and their earlier statements to the police were admitted into evidence. The trial Judge considered that the statements were admissible on the basis that in each case: (a) the maker was a

witness, so that the statement was not hearsay;[1] and (b) admission of the statement was not precluded by s 35 of the Evidence Act 2006 (the Act).

[2] Two of the statements which were admitted did not mention the applicant by name or identify him as one of the offenders. The third statement (made by ED) did identify the applicant as one of the offenders but in respects which were not entirely congruent with the primary thrust of the Crown case.

[3] In issue for the purposes of this application is the Judge's conclusion that PT, CT and ED were witnesses.

[4] "Witness" is defined in the Act as meaning:[2]

> a person who gives evidence and is able to be cross-examined in a proceeding.

[5] On appeal to the Court of Appeal, counsel for the applicant argued that PT, CT and ED were not witnesses because of their limited cooperation with the process which extended to their unwillingness to respond to questions in cross-examination.[3] This argument was premised on comments made by the Chief Justice in dissent in *Morgan v R*.[4]

[6] In dismissing this argument, the Court of Appeal noted that each of PT, CT and ED: (a) had entered the witness box and been sworn or affirmed; and (b) had been asked questions by both the prosecutor and defence counsel, some of which they answered responsively; but (c) were generally equally hostile to both prosecution and defence.[5] On this basis the Court concluded that they were witnesses.[6] The Court regarded their lack of cooperation with the process as going not to whether the makers of the statements were witnesses but rather to whether the applicant had been unfairly prejudiced by the admission of the statements for the purposes of s 8 of the Act.[7] It

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1 A hearsay statement is one that "was made by a person other than a witness": see s 4 of the Evidence Act 2006.
2 Evidence Act, s 4.
3 *Kerr v R* [2017] NZCA 498 (French, Williams and Woolford JJ) [CA judgment].
4 *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508 at [11] per Elias CJ dissenting.
5 CA judgment, above n 3, at [27].
6 At [27].
7 At [28].

concluded that admitting the statements into evidence had not been unfairly prejudicial to the applicant.[8]

[7] The approach taken by the Court of Appeal is consistent with that adopted by all members of the Court in *Morgan*.[9] All proceeded on the basis that admission of a statement by a witness who was hostile and unwilling to answer questions into evidence turned on whether there was unfair prejudice under s 8. The Chief Justice referred to the definition of witness under the Act not as a stand-alone point supporting her dissent but in support of her dissenting conclusion (based on the policy of the legislation) that there was unfair prejudice under s 8. The Court of Appeal also pointed to the evidence given in the present case which substantiated its conclusion that the makers of the statements were indeed witnesses in fact.

[8] There is thus no point of public or general importance in the proposed appeal and there is no appearance of a miscarriage of justice.

[9] The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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8 At [42].

9 *Morgan*, above n 4, at [14] per Elias CJ dissenting and at [40] per Blanchard, Tipping, McGrath and Wilson JJ.