Supreme Court of New Zealand
Te Kōti Mana Nui

20 December 2018

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

S (SC 36/2018) v THE QUEEN

(SC 36/2018) [2018] NZSC 124

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

A suppression order made by the Court of Appeal under section 200 of the Criminal Procedure Act 2011 prohibiting the publication of the name, address, occupation or identifying particulars of the appellant remains in force. In addition, the publication of the names, addresses, occupations or identifying particulars of complainants or persons under the age of 18 who appeared as a witness is prohibited by sections 203 and 204 of the Criminal Procedure Act.

Introduction

In issue in this appeal is whether a miscarriage of justice arose because Mr S was denied the right to elect to be tried by a judge without a jury (a Judge-alone trial) under section 50 of the Criminal Procedure Act 2011.

Background

Mr S was convicted following a jury trial in the District Court of serious sexual offending against two complainants. Mr S's lawyer at trial had elected a jury trial on his behalf not realising that Mr S could have elected a Judge-alone trial. Mr S's lawyer said, however, that had she realised

there was an election, she would have advised Mr S to elect a jury trial because his defence was that the complainants consented.

After his conviction, Mr S said he learned that he could have elected a Judge-alone trial. He appealed to the Court of Appeal on the basis that, among other things, he had been denied the right to elect a Judge-alone trial and therefore he should be given the opportunity to re-elect. By a majority, the Court of Appeal dismissed his appeal on this ground.

Supreme Court decision

The Supreme Court granted leave on the question whether the Court of Appeal was right to dismiss the appeal on the mode of trial point.

It was common ground between the parties that the mistake by Mr S's lawyer was an error or irregularity. The appellant's case was that the error had led to an unfair trial. In support of this submission, Mr S argued that the choice as to the mode of trial is an important election within the scheme of the Criminal Procedure Act and that he was entitled to some advice as to which mode of trial was to be preferred in his case. In the alternative, Mr S argued that the trial was a nullity and therefore of no effect because he was denied a fundamental choice.

In response, the Crown argued the error did not give rise to any unfairness and there was no nullity.

The Supreme Court has dismissed Mr S's appeal and upheld the convictions. The Court unanimously agreed that, while the election as to mode of trial was an important decision, the failure to make that election did not affect the jurisdiction of the District Court to try the proceedings and did not constitute a nullity. The Court was also agreed that there was nothing to support the conclusion that the error had created a real risk that the outcome of the trial was affected. Nor was the trial unfair. The Court did not need to decide whether the position was different where a defendant was denied the right to elect a jury trial.

In addressing the fairness of the trial William Young, O'Regan and Ellen France JJ said that, in assessing the importance of the absence of informed choice in this case, any advice about the mode of trial would involve experience and impression and so necessarily involve a degree of speculation. Further, William Young, O'Regan and Ellen France JJ saw it as relevant that Mr S had been given the rights protected in the New Zealand Bill of Rights Act 1990 which include the right to trial by jury in certain cases. Nor could it be said Mr S had received an inferior process where there was no criticism of the conduct of the trial other than the absence of an informed choice as to whether to elect a Judge-alone trial.

Glazebrook and Arnold JJ, writing separately, differed in some aspects of the reasoning. They considered that a trial where the defendant lost the ability to choose the mode of trial could be characterised as unfair if the

defendant could show with something other than hindsight that a different mode of trial would have been elected. They considered that in this case no other basis was provided.

Contact person:
Kieron McCarron, Supreme Court Registrar (04) 471 6921