NOTE: COURT OF APPEAL ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES A AND B PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 109/2018
[2019] NZSC 34

BETWEEN	GEORGE ROBERT JOLLEY Applicant
AND	THE QUEEN Respondent

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

Counsel: S N B Wimsett for Applicant
R K Thomson for Respondent

Judgment: 1 April 2019

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted in the High Court at Rotorua of attempted murder, participating in an organised criminal group and unlawfully being in an enclosed building. The offending was committed in the course of a clash between members of Black Power and Mongrel Mob gangs. The applicant is associated with Black Power. His conviction appeal to the Court of Appeal was dismissed.[1]

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1 *Jolley v R* [2018] NZCA 484 (Asher, Courtney and Moore JJ) [*Jolley* (CA)].

[2] The basis of the application for leave to appeal to this Court is as follows:

(a) The system of jury vetting carried out in Rotorua (and thus in this case) lies outside the practices approved by this Court in *R v Gordon-Smith (No 2)*.[2]

(b) A series of challenges to the Court of Appeal's decision in respect of a run of the trial issues, including: (i) the way that the prosecutor opened the case; (ii) evidence given by a police officer; (iii) hearsay evidence in respect of identification evidence; and (iv) alleged jury intimidation.

[3] Jury vetting in Rotorua involves the police accessing the National Intelligence Application and, in this way, obtaining information about potential jurors which includes, but is not confined to, convictions. The police use this information to mark up the jury list so as to identify those who they do not wish to serve as jurors. This is done without reference to particular trials (and thus without reference to particular defendants). Those recommended for exclusion are those with extensive criminal histories or active alerts such as gang membership, drug use or unlawful firearms convictions. The primary vetting information is not made available to the prosecutor. The details of the practice are set out at [20] of the Court of Appeal's decision.

[4] The Rotorua practice differs from the process explicitly approved in *Gordon-Smith* in that the information provided by the police to the prosecutor does not consist of the details of previous convictions. In that case, the process under challenge involved the police examining the jury list to see whether potential jurors had criminal convictions and then supplying an annotated list to the Crown setting out the result of their inquiries. The Supreme Court indicated that the Crown should disclose to the defence any previous conviction which gave rise to a real risk that the juror might be prejudiced against the defendant or in favour of the Crown.[3] Under the Rotorua process, information which might be disclosable to the defence under the *Gordon-Smith* procedure does not come into the hands of the prosecutor and thus cannot be disclosed.

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2 *R v Gordon-Smith (No 2)* [2009] NZSC 20, [2009] 2 NZLR 725.
3 At [22].

[5] The primary complaint of the applicant is that the Rotorua system does not provide for the Crown to have the details to make such disclosure as required by *Gordon-Smith* and thus results in the Crown receiving the benefit of the jury being vetted, but in a way which does not trigger disclosure obligations.

[6] We accept that it is not sensible for jury vetting practices in New Zealand to differ by region and we note that, in the wake of similar comments made by the Court of Appeal,[4] the Solicitor-General is considering whether to issue national guidelines. That said, we do not see this complaint and the associated arguments as warranting the granting of leave.

[7] There is no suggestion in the submissions of actual tangible prejudice to the applicant associated with what happened. Convictions which would, in this case, have been disclosable to the defence under the *Gordon-Smith* procedure would, in all probability, be confined to those related to an association with the Mongrel Mob. It is most unlikely that anyone with such convictions would have been empanelled on the jury. An orthodox empanelling process as supervised by the Judge would normally result in the exclusion of anyone with such convictions. Further, under the Rotorua system (which is not directed to particular trials and defendants) such convictions would result in a negative recommendation to the prosecutor and a likely Crown challenge to any potential juror who had not already been excluded. Likewise, any potential juror with Mongrel Mob associations known to the defendants would have been open to defence challenge if not otherwise excluded or challenged by the Crown. Perhaps unsurprisingly, it is not suggested that there were any jurors who, by reason of previous convictions, whether involving an association with the Mongrel Mob or otherwise, were relevantly prejudiced. So, and more generally for the reasons given in *Gordon-Smith* at [17], we are unable to see how the applicant's argument could result in the convictions being quashed.

[8] Although *Gordon-Smith* concerned jury vetting by reference only to previous convictions, the majority recognised that the police might well obtain other information in respect of prospective jurors and observed "that it is not immediately

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4 *Jolley* (CA), above n 1, at [29].

apparent why such other information … should be treated in any different way from information about previous convictions".[5]

[9] We are not prepared to grant leave to appeal on the run of trial issues. They do not raise issues of public or general importance. As well, they were adequately dealt with by the Court of Appeal and we see no appearance of a miscarriage of justice.

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

Solicitors:
Crown Law Office, Wellington for Respondent

5 *Gordon-Smith*, above n 2, at [14].