Supreme Court of New Zealand
Te Kōti Mana Nui

24 MAY 2019

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

YUSUKE (DAVID) SENA v NEW ZEALAND POLICE

(SC 60/2018) [2019] NZSC 55

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

The publication of the names, addresses, occupations or identifying particulars of any persons under the age of 18 who appeared as a witness is prohibited by section 204 of the Criminal Procedure Act 2011.

This appeal raised two main issues. First, whether the Criminal Procedure Act 2011 requires the same approach to appellate review of factual findings made by a judge in criminal cases as applies to appeals in civil cases. Second, whether the reasons given in this case for the verdicts were adequate.

The issues arise in this way. Mr Sena, the appellant, was found guilty after a trial in the District Court before a judge alone of five charges of assaulting two children under s 194(a) of the Crimes Act 1961.

The appellant appealed against his conviction to the High Court under s 232(2)(b) of the Criminal Procedure Act challenging the factual findings made by the trial Judge. That section provides for the appellate court, dealing with a challenge to a finding of fact made in a judge alone trial, to allow the appeal if satisfied that "the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred".

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The High Court treated the factual findings of the trial Judge as the equivalent of a jury verdict. This meant that to succeed on appeal the appellant had to show that the factual findings made by the trial Judge were not open to her on the evidence. The High Court found the factual findings made by the trial Judge were open to her on the evidence and accordingly dismissed the appeal. A later application to the Court of Appeal for leave to appeal against conviction was dismissed on the same basis.

The Supreme Court granted leave to appeal direct from the High Court on whether that Court was correct to dismiss the appellant's appeal against conviction brought under s 232(2)(b). Leave to appeal directly was granted because the issue about the approach to be taken on these appeals was not otherwise likely to get to the Supreme Court.

The appellant argued that the High Court should have adopted the same approach to the appeal as applies to civil appeals – which is by way of rehearing. This would mean that an appellate court is required to form its own view of the facts and determine the appeal accordingly. He argued that if this approach was adopted the charges were not proved beyond reasonable doubt. Alternatively, he argued that the reasons given by the trial Judge for finding the appellant guilty were inadequate.

The Supreme Court has unanimously allowed the appeal.

The Court found that appeals from judge-alone trials under s 232(2)(b) are to be conducted by way of rehearing. Accordingly, if an appellate court comes to a different view on the evidence, the trial judge necessarily will have erred and the appeal must be allowed. To this extent, the Court accepted the appellant's argument as to the approach to be adopted to the appeal. The Court relied on a number of factors in reaching this conclusion, including: the language of s 232(2)(b) and the distinction drawn in the section between appeals from jury trials and that for judge-alone trials. The Court also considered there was no logic in adopting a less intensive appellate review of decisions made by a judge in criminal cases than applies to appeals in civil cases. The Court also drew some support from the legislative history of s 232.

The Court rejected, however, the appellant's suggestion that an appeal should be conducted as if there had been no hearing at first instance. A rehearing still requires the appellant to identify an error. Moreover, an appellate court will take into account any advantages a trial judge may have had in assessing whether there has been an error.

The Court agreed with the appellant's alternative argument that the reasons given by the trial Judge were inadequate. The Court rejected the appellant's submission that, on the basis of a reconsideration of the evidence, the charges on which the appellant was found guilty had not been established beyond reasonable doubt. It said that if the trial Judge had squared up to the inconsistency between the children's evidence and that of the appellant's witnesses in relation to two of the charges she might have been able to justify convictions. However, the reasons did

not adequately explain or address this evidential dispute. Accordingly, the process in respect of those charges miscarried and the charges were quashed. The inadequacies identified in respect of those charges cast a shadow over the other convictions. The result being that those convictions were also quashed. An order for retrial was made.

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