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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 100/2021
[2021] NZSC 174**

BETWEEN CALEB BENJAMIN JUDD
 Applicant

AND THE QUEEN
 Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: R M Mansfield QC for Applicant
 M L Wong for Respondent

Judgment: 9 December 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted at a retrial on two charges of engaging in sexual conduct with a 13 year old girl (he was 26 years old at the time). Prior to sentencing, he was referred to a registered clinical psychologist, Sabine Visser, who diagnosed him with Asperger's Syndrome. The trial Judge, Judge Collins, sentenced him to 12 months' home detention.¹ He has now served the sentence.

¹ *R v Judd* [2019] NZDC 12872.

[2] The applicant's appeal against conviction to the Court of Appeal was dismissed.² He now seeks leave to appeal to this Court.

[3] The applicant's appeal to the Court of Appeal was supported by a new report by Ms Visser. In essence, the tenor of this report was that, because of his Asperger's Syndrome, the applicant would have benefited from special measures taken at the trial. Most importantly, it was argued that the applicant's decision not to give evidence at the trial was partly because of his undiagnosed Asperger's Syndrome, and that his decision may have been different if he had known about his Asperger's Syndrome and the Court had taken measures to assist him in dealing with the stress of the trial (he also suffers from anxiety, but that was known at the time of the trial).

[4] The Court of Appeal admitted the evidence from Ms Visser. The Court also admitted affidavits from the applicant, the applicant's father and his trial counsel, and all three were cross-examined. The applicant's trial counsel said that she did not think there was any reason for concern about the way the applicant dealt with the trial and that his decision not to give evidence was one that was based on the normal considerations that go into such a decision, rather than being a product of his undiagnosed Asperger's Syndrome.

[5] The Court of Appeal made special arrangements to facilitate the applicant giving evidence in that Court (he gave evidence from outside the courtroom by CCTV).

[6] The Court of Appeal found, based on the evidence it heard from the applicant's trial counsel, that the concerns identified by Ms Visser about how a person with Asperger's Syndrome would respond to the trial process did not, in fact, occur in relation to the applicant. The applicant's trial counsel said in her affidavit that he was anxious but that his engagement with the trial was good, he was prepared to give evidence (and a full brief of evidence was prepared for this) but decided not to do so for quite logical reasons based on a standard risk-benefit analysis, and that she did not think he needed a communications assistant of the kind that Ms Visser referred to.

² *Judd v R* [2021] NZCA 345 (Courtney, Mander and Hinton JJ).

[7] The application for leave to appeal to this Court is accompanied by a new report from Ms Visser, responding to the Court of Appeal decision. The respondent objects to the admission of Ms Visser's new affidavit, arguing that it is essentially a submission critiquing the Court of Appeal decision. We see some substance in the respondent's submission, but it is not necessary for us to make a ruling on it.

[8] The applicant says that a miscarriage has occurred because his undiagnosed Asperger's Syndrome meant that he did not properly make an election about giving evidence and the steps that Ms Visser said would need to be taken to alleviate stress at the trial were not taken. It is also argued that this is a matter of general or public importance in the context of ensuring that those with disabilities are permitted to equally access justice by participating meaningfully in their trial.

[9] The respondent argues that the case for the applicant depends on the attempt to explain in retrospect what the trial might have been like for the applicant, having regard to the post-trial diagnosis of Asperger's Syndrome, but ignores the information available about how the applicant in fact functioned during the trial.

[10] We accept that the ability of people with disabilities to get a fair trial is a matter of general or public importance. But we do not consider that point truly arises in the present case. The Court of Appeal made findings of fact that the applicant's trial was not unfair because of his undiagnosed Asperger's Syndrome. The applicant is, in essence, seeking a second evaluation of the evidence adduced in the Court of Appeal. That is a factual question and does not involve a matter of general or public importance.³ Nor do we consider that a miscarriage of justice arises in this case.⁴

[11] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

³ Senior Courts Act 2016, s 74(2)(a).

⁴ Section 74(2)(b).