IN THE SUPREME COURT OF NEW ZEALAND

SC 36-37/2011
SC 39-43/2011
[2011] NZSC Trans 23

URS PETER SINGER
EMILY FELICITY BAILEY
VALERIE MORSE
PHILLIP PUREWA
TRUDI PARAHA
RANGI KEMARA
Appellants

v

THE QUEEN
Respondent

Hearing:	14 September 2011
Coram:	Elias CJ Blanchard J Tipping J McGrath J William Young J
Appearances:	C W J Stevenson, A Shaw and E A Hall for Appellants Singer, Morse, Purewa, Paraha, Kemara V C Nisbet for Appellant Bailey A Markham, A R Burns and H R B Stallard for the Respondent

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CRIMINAL APPEAL

MR STEVENSON:

May it please the Court, counsel's name is Stevenson. I appear for the appellants along with my learned friends, Mr Shaw and Ms Hall. My learned friend, Mr Nisbet, appears for Ms Bailey.

ELIAS CJ:

Thank you. Thank you, counsel.

MS MARKHAM:

May it please the Court, Ms Markham, together with Mr Burns and Ms Stallard for the respondent.

ELIAS CJ:

Yes, thank you, Ms Markham, counsel. Well, thank you for your memoranda and your helpful written submissions. It seems that effectively the Court is being invited by consent to allow the appeal, and then there is an issue as to whether we proceed to hear, as part of that, the substantive arguments that have been filed, and we have your memoranda on that matter. Mr Stevenson, is there anything you wish to add to the submissions you've made as to why we should proceed to determine the substantive appeal?

MR STEVENSON:

No, Your Honour, plainly acknowledging that it is a matter of discretion. Our contention is that we fall into the exception to the mootness rule, whichever way one looks at it. I suppose there's a jurisdictional issue arguably in the sense that if the appeal is allowed against the four remaining appellants, it may be that mootness is more properly applicable to those who have been discharged but I just simply make that observation. The essential question is whether or not this Court should exercise its discretion, consider the question of statutory construction, and in answer to Your Honour's question, there's nothing, I don't think, I can properly add to what's been put forward in the memorandum.

ELIAS CJ:

Thank you, and Mr Nisbet, you're for – no, thank you. Ms Markham, is there anything you wish to add to the rather brief indication in your written memorandum?

MS MARKHAM:

Yes, well, thank you, Ma'am. The respondent certainly accepts that the issue identified by my friend, that's the meaning of "likelihood", is something that's capable of being extracted from the facts in terms of the Gordon Smith analysis, and to that extent I suppose it's a matter for the Court as to whether it considers the issue raises a seriously arguable question of public significance, but the respondent's position is that it doesn't and that essentially that issue was squarely before the Court of Appeal in *R v Porter* [2009] NZSC 107 That's the case cited as *R v A* [2009] NZCA 380, I think, at tab 12 of my friend's bundle, where the Court applied the well known substantial risk formula and expressly disallowed the balance of probability standard, and while, of course, it's the case that the leave application to this Court took a slightly different focus, this Court didn't see that there was any error of principle discernible in the Court of Appeal's judgment, and –

ELIAS CJ:

It was a leave judgment, of course.

MS MARKHAM:

It was a leave judgment, yes, Ma'am, and the second point that the respondent would make is that the Court of Appeal in this case essentially left the issue open, and to that extent, I suppose, the issue is moot twice over and the key point in the respondent's submission is captured in the Court of Appeal's analysis of the issue at paragraphs 35 to 37 of the judgment, where the Court essentially noted that the section requires a balancing exercise in which the likelihood of juror ineffectiveness is weighed against the right to trial by jury, and then as such it's not an absolute or a mathematical standard but something that has to be assessed in each case, bearing in mind the principle that the right is not likely to be departed from.

So the stronger the likelihood, the more likely it is that the right will be departed from and vice versa. So to that extent, in my submission, there's a fair amount of common ground between the parties because it's not being suggested by the respondent that a mere possibility or a naked possibility, as it's referred to in the materials, is sufficient to displace the right.

ELIAS CJ:

It's not a standard –

MS MARKHAM:

It's just not an absolute.

ELIAS CJ:

– a standalone standard. It's – yes. It's a comparative assessment.

MS MARKHAM:

Indeed, and it's a predictive and evaluative judicial function under that subsection which doesn't lend itself to a standard of proof in a classic fact-finding sense. So we're not suggesting that the threshold is anything other than high, simply that the importation of a balance of probability standard is inapt for the nature of the judicial task under the section.

So that, in a nutshell, Ma'am, is the respondent's position.

ELIAS CJ:

Yes, thank you, Ms Markham. We'll take a short adjournment and consider what we'll do, thank you.

COURT ADJOURNS: 10.08 AM

COURTS RESUMES: 10:16 AM

ELIAS CJ:

We have concluded that it is not appropriate to hear the substantive appeal for reasons which will be given in writing later. On that basis the appeal is allowed by consent and the order for judge alone trial is set aside. Thank you counsel for your extremely helpful submissions.

COURT RETIRES: