

IN THE SUPREME COURT OF NEW ZEALAND

SC 125/2015
[2016] NZSC 56

BETWEEN ANTHONY PAUL MOUNT
Applicant

AND THE QUEEN
Respondent

Court: Elias CJ, William Young and O'Regan JJ

Counsel: Applicant in person
Z R Johnston for Respondent

Judgment: 19 May 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Following trial before Judge Tompkins sitting alone, the applicant was convicted on 75 counts alleging various frauds and one count of forgery.¹ The substance of the case against him was that in the course of running a business in which he invested money on behalf of clients, he accounted to his clients on:

- (a) acquisitions of securities at costs which were greater than the acquisition price of the securities; and
- (b) dispositions of securities for proceeds which were less than the actual realisations.

¹ *R v Mount* DC Nelson CRI-2011-042-968, 10 December 2014 [*Mount* (DC)].

The forgery count related to the record of a transaction with a sharebroker which he had altered so as to make it accord with the way in which he had accounted to the client.

[2] Since the prosecution was able to establish (a) the amounts paid and received on the acquisition and disposition of securities and (b) the different figures for which the applicant accounted to his clients, the case against him was formidable. Analysis of the computers and computer records associated with the business – all fully recorded in the reasons given by Judge Tompkins – further enhanced the strength of the prosecution case to point that it was overwhelming.

[3] Judge Tompkins later sentenced him to six years nine months imprisonment and specified a minimum period of imprisonment of half the sentence imposed.²

[4] The applicant's subsequent appeal against conviction was dismissed but his sentence appeal was allowed to the extent that the sentence was reduced to six years and no minimum period of imprisonment was imposed.³

[5] The grounds of appeal proposed by the applicant in his application for leave focused on:

- (a) his fair trial rights which he says were breached in various ways largely because of his lack of legal representation at trial; and
- (b) an apparent failure to give him, at the start of the trial, the advice then required to be given to an unrepresented defendant by s 364 of the Crimes Act 1961.

[6] At an earlier but aborted trial the applicant had been represented by senior and junior counsel but they sought and obtained leave to withdraw before the second trial (that is the one before Judge Tompkins).⁴ The applicant applied for and obtained a grant of legal aid but the grant was conditional upon him submitting to a

² *R v Mount* DC Nelson CRI-2011-042-968, 17 December 2014 at [20].

³ *Mount v R* [2015] NZCA 489 (Ellen France P, Courtney and Clifford JJ) [*Mount (CA)*] at [98].

⁴ *Mount (CA)*, above n 3, at [15], [19] and appendix 1.

charge over his house. He declined to give such a charge and was therefore unrepresented at trial.⁵

[7] In the Court of Appeal he claimed that his refusal to give a charge was a function of his general financial position and a concern as to whether such a charge would have been proper. There being no contemporaneous indication of this concern in the applicant's dealing with the legal aid authorities or the Court, the Court of Appeal was unimpressed by his explanation.⁶ More generally, the Court considered the principles expressed in *R v Condon*⁷ and concluded that the applicant's trial was fair.⁸

[8] It is likely that at the start of his trial, the applicant was not given the warning then required by s 364 of the Crimes Act 1961. That provided:

364 Caution to accused when undefended

Where on arraignment any accused person who is not defended by counsel pleads not guilty, the Court shall cause to be handed to him, before the evidence for the prosecution is heard, a written statement in the following words, or in words to the like effect, that is to say:

“When the evidence against you has been heard, you will be asked whether you wish to give evidence yourself or to call witnesses. You are not obliged to give or call evidence but, if you do, that evidence may be used against you. You should consider in particular whether evidence which you can give is relevant and will assist you in your defence. If you do not give evidence no person other than the Judge and yourself may comment on that fact.”

[9] In giving his reasons for verdict, Judge Tompkins referred to *Trompert*⁹ and commented on the fact that the applicant had not given evidence.¹⁰ The applicant's position is that in the absence of s 364 warning, he was not aware that there might be adverse consequences for him if he did not give evidence. His complaints in this regard were fully analysed by the Court of Appeal.¹¹ As that Court noted, in the context of the case as a whole, the Judge's references to *Trompert* and the absence of

⁵ *Mount* (CA), above n 3, at [19].

⁶ At [48]–[51].

⁷ *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300.

⁸ At [39]–[87].

⁹ *Trompert v Police* [1985] 1 NZLR 357 (CA).

¹⁰ *Mount* (DC), above n 1, at [219]–[223].

¹¹ At [60]–[63].

evidence from the applicant were not critical to his conclusions.¹² As well, as the Court also noted, there has not been any indication as to the evidence which the applicant might have given if he had been given a s 364 warning.¹³

[10] In his submissions, the applicant raised other issues which he described as “subsidiary matters”. One concerned the timing of his arraignment and the other the fact that he did not make submissions prior to sentencing. The first does not warrant discussion in this judgment and the second falls away in light of the careful consideration which the Court of Appeal gave to his appeal against sentence following a hearing at which he was represented.

[11] The proposed appeal does not raise any issues of public or general importance and for the reasons given by the Court of Appeal, there is no appearance of a miscarriage of justice.

Solicitors:
Crown Law Office, Wellington for Respondent

¹² At [62].
¹³ At [63].