IN THE SUPREME COURT OF NEW ZEALAND

SC 26/2010
[2010] NZSC 87

BRETT STEPHEN TAYLOR

v

THE QUEEN

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: C W J Stevenson for Applicant
G H Allan for Crown

Judgment: 20 July 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against dismissal by the Court of Appeal of his appeal to that Court against two convictions on charges of sexual violation of a male complainant. For the applicant it is contended that the trial Judge should have given the jury a direction under s 122 of the Evidence Act 2006 concerning possible unreliability of the evidence of the complainant; that the Judge's directions to the jury to avoid sympathy or prejudice were inadequate; and that the Court of Appeal

erred in refusing to admit further expert evidence concerning the effect of alcohol consumption on memory and functionality.

[2] The Judge did tell the jury that the complainant's credibility and reliability was pivotal. They were told that if they were not sure that the complainant's evidence was correct they must find the accused not guilty. The jury hardly needed to be reminded in this connection of the possibility that the complainant's recollection was affected by a drug taking and/ or consumption of alcohol. There was a good deal of evidence given about that at this short trial. And, as the complainant himself had given evidence that he was a "straight" male who had never had sexual contact previously with another male, the jury would also have been well aware of the possibility that his desire to be seen as such may have made suspect his claim that the sexual activity between the two men was not consensual. These points were so obvious as not to have needed any specific direction. It is unsurprising, therefore, that trial defence counsel did not seek a direction under s 122 and that the Judge saw no need for one.

[3] As to the proposed argument that the Judge should have given the jury something more than the standard direction counselling them against sympathy or prejudice in general terms, because of the nature of the sexual activity, we are not persuaded that it is arguable that the Court of Appeal erred in its overall conclusion that the absence of a tailored direction of this kind did not in the circumstances of the case give rise to a miscarriage of justice (by which we think the Court meant a substantial miscarriage of justice in terms of the proviso to s 385(l) of the Crimes Act 1961). The trial had proceeded in a way which seems to us to have made additional directions of this kind unnecessary. Indeed, it is noticeable that not only had Crown counsel studiously avoided anything in her closing address which might evoke sympathy for the complainant or prejudice against the applicant but she had actually urged the jury to put aside sympathy or prejudice and their own personal moral views.

[4] On the third proposed ground of appeal – the need for expert evidence of alcohol consumption on memory and functionality – we agree with the Court of

Appeal that the jury is unlikely to have required such assistance as the subject is plainly not something which goes beyond common knowledge and experience.

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