

RICHARD GEOFFREY BULL

v

THE QUEEN

Court: Elias CJ and Blanchard J

Counsel: J Haigh QC for Applicant
B J Horsley for Crown

Judgment: 8 December 2005

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal against the dismissal by the Court of Appeal of his appeal against conviction for sexual offending involving three teenage boys. The application is made well out of time and an extension of time is sought. The main ground of appeal was that the applicant's representation by trial counsel was inadequate. In relation to convictions for sexual violation in respect of the first complainant, it was said that counsel had (contrary to the applicant's instructions) failed to run the defence that the offending had not occurred at all, in addition to a defence of consent. In relation to the indecent assaults relating to the other complainants, it was contended that trial counsel had failed adequately to put to the complainants the sole defence which was that the offending had not occurred to the complainants.

[2] The matters of complaint about the conduct of the defence by trial counsel were fully considered by the Court of Appeal. Both the applicant and trial counsel filed affidavits and were cross-examined. To the extent that their accounts conflicted, the Court of Appeal accepted the account given by trial counsel. Although the Court of Appeal judgment was delivered before the decision of this Court in *Sungsuwan*¹ the Court of Appeal correctly recognised that ultimately the issue was whether there was a real risk of miscarriage of justice.

[3] All elements of the offences were in issue at trial. In respect of the first complainant, the defence (in accordance with the written instructions given by the applicant to his counsel at trial) concentrated upon the issue of consent without conceding that the physical acts occurred. Accordingly, the jury was instructed by the trial judge that it was required to find proved both the physical acts of penetration and the absence of consent or reasonable belief in consent. The Court of Appeal took the view that the issue of consent in respect of the first complainant was one which competent counsel would pursue, as it was here with the consent of the applicant, because it was plainly tenable on evidence of co-operation and association between the complainant and the applicant over a comparatively lengthy period. No error of principle is raised in respect of the approach of the Court of Appeal. It considered on the evidence, including the written instructions given by the applicant to his counsel at trial, that there was no risk of miscarriage of justice. The Court found that Mr Bull understood the choices he was given by defence counsel and chose to accept the advice to give priority to the issue of consent in relation to the first complainant and to the course of not giving evidence himself. That did not preclude leaving denial of the fact of the offending to be left to the jury and, as the judge's summing-up makes clear, it was left to the jury. No proper basis for doubting the conclusions reached by the Court of Appeal are advanced.

¹ [2005] NZSC 57.

[4] In relation to the second and third complainants, the defence was a denial of the indecent assaults. Consent could not be a defence under s 140A of the Crimes Act 1961. The applicant maintains that the complainants were insufficiently challenged in cross-examination in relation to the alleged indecencies. No basis upon which the complainants could have been effectively challenged in cross-examination is however put forward. It is quite clear from the judge's summing-up that, contrary to the submissions in support of the application, the defence of denial in relation to the charges in respect of the second and third complainants was put to the jury. The Court of Appeal came to the conclusion that, overall, counsel was not shown to have acted other than with competence and in accordance with instructions which had been carefully explained. No basis for suggesting that these assessments were wrong is disclosed by the submissions in support of the application.

[5] The grounds required for leave under s 13 of the Supreme Court Act 2003 in relation to the convictions are not made out. No matter of general or public importance is disclosed. Nor is there any basis to believe that there was any risk of miscarriage of justice.

[6] Since it is acknowledged that the proposed appeal against sentence could only succeed if the conviction appeals in relation to the charges of sexual violation against the first complainant succeed, it follows from the denial of leave to appeal those convictions, that the proposed sentence appeal is also not appropriate for leave.

Solicitors:
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