

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 5/2019
[2019] NZSC 16

BETWEEN CALEB AFAMASAGA
 Applicant

AND THE QUEEN
 Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: C G Tuck for Applicant
 K L Kensington for Respondent

Judgment: 27 February 2019

JUDGMENT OF THE COURT

The application for an extension of time to make an application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Afamasaga was convicted of murder and wounding with intent to cause grievous bodily harm in the context of a multi-accused trial.

[2] He seeks leave (almost three years out of time) to appeal against a Court of Appeal judgment dismissing his appeal against conviction.¹ The reason given for the delay is difficulty in instructing counsel from prison and then counsel needing time to consider the file.

¹ *Afamasaga v R* [2015] NZCA 615, (2015) 27 CRNZ 640 (Stevens, Heath and Collins JJ).

[3] The application concerns four text messages exchanged between a co-accused (Mr Makalima) and a woman friend (Ms Fifita). The text messages in question referred to “Chucky” (Mr Afamasaga) going to shoot “Big D” and “the dudes that came last night”.

[4] The texts were ruled inadmissible against Mr Afamasaga (on the basis that they were not in furtherance of the conspiracy). A judicial direction to that effect was given in the summing up:

[115] One final direction on the use of these text messages. There are a number of messages between one of the defendants charged with Count 1 and a third person, such as Rose Fifita and Edgar or Sosaia Laloni. Virtually all of these are before around 9.00 p.m. on 16 December 2012 and are therefore only admissible against the defendant who sent it, not against the other two defendants. There are, however, a few text messages after 9.00 p.m. on 16 December between one of the defendants and a third person, such as Rose Fifita and Edgar Laloni.

[116] An example, which has been referred to often by counsel, is the text message at 5:16 p.m. on 17 December 2012 between Mr Makalima and Ms Fifita “Yeah an dn chuky gna shoot big d”. This is just 18 hours before the shooting. However, I direct you that this message and all others between Mr Makalima and Ms Fifita are only evidence against Mr Makalima and not Mr Afamasaga and Mr Banaba because the Crown does not allege Ms Fifita was part of the joint criminal enterprise to shoot Mr Turner and also the messages were not in furtherance of the conspiracy. They are best interpreted as Mr Makalima trying to impress Ms Fifita with whom he was trying to form a romantic attachment.

...

[118] Now those directions may seem rather artificial, but it is important you follow them in order to ensure a fair trial for all the defendants. If you have any difficulties please come back to me with a question. But remember that in general text messages between two of the defendants in the relevant time period are admissible against a third defendant, but any text messages between Mr Makalima and Ms Fifita are not to be used as evidence against the other two defendants.

The submissions

[5] Mr Afamasaga’s argument, as in the Court of Appeal, is that these text messages were inadmissible and any prejudice was not able to be dealt with adequately by judicial direction.

[6] Mr Afamasaga asserts that particular prejudice arose when he was required to read the messages out in cross-examination at trial. As the Crown explains, this was at the behest of Mr Makalima who was seeking an exculpatory explanation as to why he would have sent those messages.²

[7] The Crown submits that leave to extend time should not be granted and there is no matter of general importance and no risk of a miscarriage of justice.

Our assessment

[8] There has been no adequate explanation for such a long delay in applying for leave to appeal. In any event, nothing raised by Mr Afamasaga suggests any risk of a miscarriage of justice.

[9] It was made quite clear by Woolford J that the texts were not to be used against Mr Afamasaga and, in any event, the Judge minimised their relevance, saying that they were best interpreted as "Mr Makalima trying to impress Ms Fifita".

Result

[10] The application for an extension of time to apply for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

² The Crown did then ask Mr Afamasaga about the messages but did not rely on them in closing.