



**Supreme Court of New Zealand
Te Kōti Mana Nui**

2 December 2019

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

LEMUEL MISA v THE QUEEN

(SC 93/2018) [2019] NZSC 134

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Suppression

This judgment is subject to suppression orders under ss 202 and 203 of the Criminal Procedure Act 2011. These suppression orders prohibit publication of the names, addresses, occupations or identifying particulars of the complainants, AB and BC, and a connected person, CD.

Background

Mr Misa was convicted after a jury trial of 20 counts of physical and sexual offending against two former partners, AB and BC. The complainants’ accounts had consistent features including that Mr Misa was possessive and controlling, that they became isolated from friends and family and both described frequent violence, bullying and abuse.

At trial, an agreed summary of facts noted that Mr Misa had pleaded guilty to an assault on AB which led to her jumping out of a window on the third floor of an apartment that she was living in with Mr Misa and onto a neighbouring building. One of the counts Mr Misa was convicted of at trial related to an incident in the course of which BC said she jumped from the third floor of an apartment onto the ground below to escape an assault by Mr Misa. One strand of Mr Misa’s case was that the fact BC’s account

mirrored that of AB was further evidence of collusion between AB and BC. Mr Misa also said that he had never lived in such an apartment with BC.

On his unsuccessful appeal against conviction to the Court of Appeal, Mr Misa argued that his trial counsel was not adequately prepared for trial and that there was new evidence which, if admitted, would have affected the outcome. This new evidence came from the manager of the apartment building which the Crown said Mr Misa had lived in with BC, and evidence from an official from the Ministry of Social Development (MSD), who described MSD's records of Mr Misa's addresses at the relevant times. The manager's evidence was directed at whether BC had, in fact, lived at the apartment building with Mr Misa. He also expressed his view that BC would have been seriously injured by the fall.

The Supreme Court granted leave for Mr Misa to appeal against his conviction. The approved question was whether there was a miscarriage of justice at Mr Misa's trial. The Court indicated the parties should address the interpretation of s 232(2)(c) of the Criminal Procedure Act 2011. That section states that a first appeal court must allow an appeal if satisfied that "in any case, a miscarriage of justice has occurred for any reason".

The Supreme Court's decision

The Supreme Court has unanimously dismissed Mr Misa's appeal. There was no real dispute about the interpretation of s 232(2)(c) in this case. The Court confirmed that the starting point should be the statutory language. The Act says that a "miscarriage of justice" means any error, irregularity, or occurrence in relation to or affecting the trial that "has created a real risk that the outcome of the trial was affected". The test, as adapted from earlier authorities, was whether as a result of the error, irregularity, or occurrence there was a reasonable possibility that another verdict would have been reached.

On the facts of this case, the Court said there was no reasonable possibility that the new evidence would have made a difference to the outcome of the trial. The manager's evidence about the living arrangements in the apartment complex would have added little and was, at best, evidence of opportunity. That was because in trying to recollect events of some ten years earlier the manager could not rule out that BC had stayed at the complex with Mr Misa. Further, this evidence was not inconsistent with evidence at trial. The MSD records supported the prosecution's case at trial.

The manager's evidence that BC would have been injured by the jump was also not material. Mr Misa made the same point in his evidence. Further, the copycat nature of BC's account had been used by the defence to support the argument that both complainants had colluded in giving their evidence. Finally, the suggestion that BC had fabricated this part of her evidence was well-ventilated before the jury.

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