

NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE SUPREME COURT OF NEW ZEALAND

**SC 72/2017
[2017] NZSC 134**

BETWEEN MUSAB HAMDI
 Applicant

AND THE QUEEN
 Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: E R Fairbrother QC for Applicant
 Z R Johnston for Respondent

Judgment: 5 September 2017

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] Mr Hamdi was convicted after a trial by jury of sexual violation by rape. He appealed unsuccessfully against conviction to the Court of Appeal¹ and now seeks leave to appeal to this Court.

Background

[2] Mr Hamdi met the complainant at a bar when he and a friend were out one night. The Crown case at trial was that at the end of the evening, instead of dropping the complainant home as she had asked, Mr Hamdi drove her to his house where he

¹ *Hamdi v R* [2017] NZCA 242 (Kós P, Asher and Williams JJ).

raped her in his car in the garage. Some support for the complainant's account came from DNA analysis of a semen stained swab taken from the complainant and semen staining in Mr Hamdi's car.

[3] When the police came to Mr Hamdi's house after the incident to execute a search warrant, he was cautioned and told of his right to remain silent. When the police officer told Mr Hamdi that the search related to the allegation of rape, Mr Hamdi said: "No never, I never brought anyone back here. I only dropped her off". Mr Hamdi was taken to the police station and again cautioned. He obtained legal advice about making a formal statement to the police and then declined to be interviewed.

[4] Mr Hamdi gave evidence at trial. He said the complainant tried to seduce him while they were in the car and that she masturbated him causing him to ejaculate. His evidence was that the complainant then put her hand on her vagina. Mr Hamdi said he then dropped the complainant back in the city.

[5] Mr Hamdi was cross-examined on the basis he only raised the complainant's assault of him once he knew DNA evidence would link him to the complainant. Both the prosecutor and defence counsel referred to this in closing. The prosecutor's closing remarks included the suggestion that Mr Hamdi's evidence about the complainant's actions in the car "was only added in after the police asked him for his DNA and sent it off ... for testing".² The trial Judge, Judge E M Thomas, directed the jury not to make anything of this, noting Mr Hamdi had an absolute right to silence and it would be "unfair and wrong to hold it against him or read anything into that".

² Defence counsel made the point it was Mr Hamdi's right not to make a statement and told the jury Mr Hamdi could not be criticised for his earlier silence.

The proposed appeal

[6] Mr Hamdi seeks leave to appeal on the basis a miscarriage of justice has arisen because:

- (a) his lawyer advised him not to make a statement to the police; and
- (b) the prosecutor, in breach of s 32 of the Evidence Act 2006, invited the jury to infer guilt from Mr Hamdi's initial failure to offer an explanation of events and the Judge's directions to the jury failed to remedy this breach.

[7] In addition, Mr Hamdi says the Court of Appeal was wrong to consider these issues in light of whether what occurred resulted in a miscarriage. He says that means the Court has considered s 232(4)(a) of the Criminal Procedure Act 2011, that is, whether what occurred "created a real risk that the outcome of the trial was affected" when the issue should have been considered under s 232(4)(b), namely, whether what occurred "has resulted in an unfair trial".

[8] The first proposed ground relating to the legal advice given to Mr Hamdi was considered by the Court of Appeal in the context of what was then a broader complaint about the conduct of trial counsel. The Court concluded the conduct did not give rise to a miscarriage. In relation to the advice given about making a statement, the Court of Appeal said this:³

... at the time of arrest trial counsel advised him he was under no obligation to make a statement, but emphasised that it was his choice. More significantly, Mr Hamdi indicated he was not feeling well and was confused about the nature of the allegation. In those circumstances advice not to make a statement at that stage cannot be criticised.

[9] We see no appearance of a miscarriage arising from that assessment. In context, on the material before us, the advice given seems unremarkable. The challenge is, in any event, ultimately about the way in which Mr Hamdi's silence was dealt with at trial. We turn now to that aspect.

³ *Hamdi*, above n 1, at [50].

[10] The Court of Appeal found the prosecutor’s approach breached s 32 of the Evidence Act⁴ but said that the Judge’s summing up (along with the defence closing) remedied the position such that no miscarriage was caused.⁵ In this context, the Court also placed some weight on the strength of the Crown case and the limited nature of the references made by the prosecutor in closing.⁶

[11] Again, we see no appearance of a miscarriage arising from the Court’s careful evaluation of the matter. Assuming, for these purposes, that there was a breach of s 32, the Judge’s directions were clear and firmly endorsed the position taken by defence counsel in closing.

[12] The point Mr Hamdi seeks to raise as to which limb of s 232(4) applied may raise a matter of general or public importance but not one that can have any impact in the present case.⁷

[13] For these reasons, the proposed grounds do not meet the criteria for leave to appeal.⁸

[14] The application for leave to appeal is out of time. The delay is explained and there is no objection to an extension of time. The application for an extension of time is granted. The application for leave to appeal is dismissed.

Solicitors:
Fairbrother Family Law, Napier for Applicant
Crown Law Office, Wellington for Respondent

⁴ At [28]–[33].

⁵ At [34]–[40].

⁶ At [40].

⁷ Section 232(4) defines what comprises a miscarriage of justice for the purposes of s 232(2) of the Criminal Procedure Act 2011 as “any error, ... or occurrence” in the trial that has “(a) ... created a real risk that the outcome of the trial was affected; or (b) ... resulted in an unfair trial”.

⁸ Supreme Court Act 2003, s 13; and Senior Courts Act 2016, s 74.