

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 12/2010  
[2010] NZSC 25**

**PHILIP JAMES WHITLEY**

v

**THE QUEEN**

Court: Elias CJ, McGrath and Wilson JJ

Counsel: J N Bioletti for Appellant  
B J Horsley for Crown

Judgment: 18 March 2010

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

**REASONS**

[1] The applicant seeks leave to appeal against a Court of Appeal judgment<sup>1</sup> upholding a District Court Judge's ruling<sup>2</sup> that the applicant should be tried before a judge without a jury on charges of making false statements as a promoter. The statements in issue were made by the applicant in raising money from investors for a project for compression of software which would substantially reduce the size of computer files. The trial commenced on 22 February 2010 and is continuing.

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<sup>1</sup> *Whitley v R* [2010] NZCA 35.

<sup>2</sup> *The Serious Fraud Office v Whitley* DC Nelson CRI-2008-042-3052, 18 November 2009.

[2] Under s 361D of the Crimes Act 1961, to obtain an order for trial by judge alone, the Crown must show, first, that the duration of the trial seems likely to exceed 20 days and, secondly, that in the circumstances of the case the accused's right to a jury trial is outweighed by the likelihood that jurors will be unable to perform their duties effectively. The latter factor requires consideration of specific matters relevant to length and complexity that are set out in s 361D(4).

[3] In the Court of Appeal the accused sought to challenge the Judge's finding that the trial was likely to exceed 20 days. The Court of Appeal was satisfied that this aspect of the test was met.

[4] The applicant now wishes to raise different issues in an appeal to this Court. He invokes the right to a jury trial under s 24(e) of the New Zealand Bill of Rights Act 1990 and wishes to argue that it is separate from the provisions for a jury trial in the Crimes Act, which are the subject of s 361D. The applicant also wishes to raise a question concerning the approach a judge must take under s 361D(3)(b) in deciding whether the right to a jury trial is outweighed by the likelihood that potential jurors cannot perform their duties effectively.

[5] As indicated, these are new questions which the Court of Appeal was not asked to address. This Court is not prepared to countenance an application for leave to challenge this pre-trial ruling on different grounds to those advanced in the Court of Appeal, especially in circumstances where the trial is under way. Our judgment does not, of course, preclude the possibility that such grounds may be raised, if the applicant is convicted, in an appeal against conviction.

[6] The application is accordingly dismissed.

Solicitors:  
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