



Supreme Court of New Zealand

17 May 2010

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

R v Gwaze
(SC93/2009) [2010] NZSC 52

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 www.courtsofnz.govt.nz.

George Evans Gwaze was acquitted by a jury at his trial for sexual violation and murder. An important issue at trial was the cause of death of the ten year old victim, who was HIV positive. The defence case at trial was that the prosecution had not excluded natural causes for the death as a result of the victim's HIV status. The prosecution case was that the victim died through suffocation or strangulation during sexual violation. At trial, the Judge had admitted as evidence, over the objection of the prosecution, comments by Professor Rode, a South African medical expert, that he had seen HIV children with symptoms similar to those exhibited by the victim on her admission to hospital and who had deteriorated suddenly and died. Professor Rode was not called at the trial. Rather, his reported hearsay comments were put to Crown witnesses in cross-examination. They were relied upon in the

case put to the jury by the defence and were treated as important by the Judge in his summing up of the case to the jury.

The Crown applied to reserve as a point of law for the opinion of the Court of Appeal the question whether the evidence had been properly admitted. Such reservation is made under s 380 of the Crimes Act 1961 through the procedure of appeal by way of case stated. On such an appeal, s 382 of the Crimes Act permits the Court of Appeal to direct a new trial if it is of the opinion that the ruling was wrong and there has been a mistrial, but only if it is of the opinion that “some substantial wrong or miscarriage of justice was thereby occasioned on the trial”.

The Court of Appeal held that the comments made by Professor Rode should not have been admitted at the trial. They failed to meet the standards required for the admission of hearsay and opinion evidence under the Evidence Act 2006. By a majority, however, the Court of Appeal held that the error was not one of law but fact. Because the Court had jurisdiction under s 380 to hear appeals on questions of law only, the Crown appeal was dismissed.

On further appeal, the Supreme Court has agreed with the Court of Appeal that the evidence was wrongly admitted but has held that the admission of the evidence was an error of law. The comments made by Professor Rode did not amount to an opinion that the symptoms displayed by the victim were comparable to those observed in the HIV children (permitting the inference that the victim could have died through natural causes). They were accordingly irrelevant to the issue of cause of death and should have been excluded under s 7 of the Evidence Act. The comments should also have been excluded under s 8 as their probative value was outweighed by the risk of unfair prejudice, under ss 17 and 18 as inadmissible hearsay, and because they did not satisfy the conditions of admissibility of expert opinion under ss 23 and 25 of the Evidence Act.

The Supreme Court has held that the rules of exclusion provided by the Act do not confer discretion as to the admission of evidence, but prescribe standards which must be observed. Failure to comply with the legislative conditions for admissibility is an error of law which can be corrected on appeal limited to questions of law.

The Supreme Court has held that in the present case the error of law in the admission of evidence inadmissible under the rules of exclusion in the Evidence Act led to a mistrial which occasioned a substantial miscarriage of justice. Such substantial miscarriage of justice arises where the appeal court is satisfied that an error capable of affecting the verdict was in fact highly material to the verdict. Although at Mr Gwaze's trial the defence did not turn on the question of cause of death alone, the cause of the victim's death was a key issue in the trial. The inadmissible evidence was used to great effect, as defence counsel's description of it as "pivotal" made clear.

Although the Court is not obliged to grant a new trial even after finding an error of law giving rise to mistrial and a substantial miscarriage of justice, the Supreme Court considered that there was no proper basis to withhold a new trial in the circumstances. It has accordingly directed a new trial on the charges.

Contact person: Gordon Thatcher, Supreme Court Registrar (04) 914 3545