IN THE SUPREME COURT OF NEW ZEALAND SC 54/2012

[2015] NZSC Trans 14

H (Name Suppression)

Appellant

v

THE QUEEN

Respondent

Hearing:	7 May 2015
Coram:	Elias CJ William Young J Glazebrook J Arnold J O'Regan J
Appearances:	N Levy as Amicus Curiae J C Pike QC for the Respondent

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JUDGMENT OF THE COURT

ELIAS CJ:

No appearance, Mr H? No. All right, Ms Levy, you're appearing as Amicus?

MS LEVY:
Yes.

ELIAS CJ:
And Mr Pike for the Crown. We don't think we can proceed with this and I am going to indicate why, in reasons, now.

The appellant, MH, was on 28 February granted leave to appeal to this Court against a judgment of the Court of Appeal of 31 July 2012 dismissing his appeal against conviction on 14 counts of assault against his young son committed over a lengthy period of time.

The matter in issue in the proposed appeal was whether the Court of Appeal was right to refuse to accept an affidavit by the son recanting evidence he had given at the trial.

In the Court of Appeal, the appeal was based on retraction of the evidence of the son given at trial. The retraction was contained in an affidavit filed in the Court.

The Court of Appeal had received an application by the Crown to cross-examine the son on the affidavit but had been concerned that the affidavit itself had been prepared by Mr H's lawyers without independent advice being provided to the son.

The Court adjourned the hearing of the appeal, indicating in a minute of the decision to adjourn that it would be inappropriate to continue with the hearing of this appeal on its existing ground until the Court is satisfied in the unusual circumstances which prevail that the son has had the benefit of competent and independent legal advice before swearing an affidavit to the effect that he has previously given perjured evidence resulting in his father's conviction.

Following the adjournment, a second affidavit by the son in substantially the same terms as the first was filed in which he said, "It has been explained to

me by various lawyers and I fully understand my legal position and the possible consequences for cross-examination if requested at the appeal hearing." No solicitors were named on the affidavit.

The Court took the view that its concerns had not been addressed and required Mr H's counsel to arrange for the son to receive independent legal advice. On receiving that independent advice the son declined to swear a further affidavit on legal advice.

New counsel then instructed for Mr H sought a direction that the affidavits be admitted and the son cross-examined on them. The Crown responded seeking that the affidavits be removed from the file as filed through an abusive process and the Court acceded to that request.

The appeal therefore proceeded not on the grounds of withdrawal of the evidence of the son at trial but on other grounds. It was dismissed on 4 July 2012.

Application for leave to appeal was made to this Court. There were delays in dealing with the leave application. The Court sought from the Court of Appeal transcripts of hearings held in that Court on 3 November 2011 and 4 July 2012. There were delays in obtaining them.

Mr H was acting for himself and sought extensions of time for filing his submissions.

The Court appointed an Amicus, Ms Levy, to assist it.

Leave was granted on 28 February 2013. The Court identified the approved ground as being whether the Court of Appeal's treatment of the affidavits was correct. In the leave judgment given on 28 February 2013 it was suggested that the parties might need to consider the effects of section 389(b) of the Crimes Act 1961, section 83(1)(b) of the Evidence Act 2006, section 60(4) of

the Evidence Act 2006, section 60(4) of the Judicature Act 1908 and rules 12B and 12BA of the Court of Appeal Criminal Rules 2001.

Following the granting of leave, Mr H was notified by letter sent on 28 February 2013. The registrar enquired of him whether he was seeking legal counsel for the appeal. He did not respond. A follow-up letter was sent on 8 April asking Mr H to inform the Court if he was seeking legal representation. He was required to ensure that counsel was instructed by 17 April 2013. Again, there was no response to this letter.

Eventually, the registrar, after no communication with the appellant, in March 2015 set the matter down for hearing on today's date, 7 May 2015, and notified Mr H of the date by letter.

To date, no submissions have been received from Mr H on the appeal. Submissions have, however, been received both from the Amicus appointed, Ms Levy, and from the Crown.

Mr H made telephone contact with the registry in April indicating that he was considering abandoning his appeal. The registrar sent him the correct form for a notice of abandonment in this Court under cover of letter of 21 April.

On 28 April the registry received a notice of abandonment dated 20 April 2015, Mr H indicating that he did not intend further to prosecute his appeal and abandoned it from the date of his notice. The notice completed was not in the form sent by the registrar, the Supreme Court form, but on a Court of Appeal form. More importantly, Mr H had apted to the form in italicised typing the words, "I do acknowledge and agree the above appeal's abandonment at this stage. Nonetheless I will undoubtedly pursue the appeal in due date."

On 28 April the registrar advised Mr H that the Court was not prepared to accept the notice of abandonment as submitted. If a correct notice without

addition or alteration was not filed, he was advised that the Court would proceed to hear the appeal today.

When the matter was called this morning Mr H did not appear.

The failure to file written submissions as is required by rule 38 and the failure to appear to prosecute the case at the date fixed for the hearing or to apply alternatively for an adjournment justify its dismissal. The notice of abandonment provided to the Court, however, indicates an intention to pursue the appeal at a later stage. It is not open to the appellant to attempt to hold the position in this way.

On the other hand, the abandonment of the appeal is not unequivocal. The appellant is representing himself and may not have understood the need to apply for an adjournment if not abandoning the appeal and the Court has, in granting leave, been satisfied that it is necessary in the interests of justice for the Court to hear and determine the proposed appeal under section 13(1) of the Supreme Court Act 2003.

It is open to the Court to proceed to hear the appeal in the absence of the appellant. That is not a course we consider should be followed in the present case, both because it is not clear whether the appellant, who has served his sentence, wishes to proceed with the appeal and if not prepared to engage with this Court there is no reason to believe that if successful here he would engage with the Court of Appeal if that was the outcome.

In addition, it would only be in unusual circumstances that this Court would be justified in proceeding in the absence of the appellant in the case of an appeal against conviction even if there is a contra dicta to carry the argument, as there is in this case in the Amicus appointed.

In the circumstances, we consider the appropriate course is to revoke the grant of leave as was the course taken in different circumstances and for different reasons in the case of *LFDB v SM* [2014] NZSC 197.

Rule 6 of the Supreme Court Rules permits the Court to deal with non-compliance with the rules in any manner and on any terms that the Court decides. We have therefore decided that the leave to appeal should be revoked.

It remains to thank counsel for their comprehensive submissions and, in particular, Ms Levy, to thank you for the care that you brought to this matter.