IN THE SUPREME COURT OF NEW ZEALAND

SC 32/2014
[2014] NZSC 88

BETWEEN		ISRAEL ZUYDENDORP Applicant
AND		THE QUEEN Respondent

Court: McGrath, William Young and Glazebrook JJ

Counsel: Applicant in person
J M Jelas and K J Cooper for Respondent

Judgment: 7 July 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty on three counts of making a false statement with intent to deceive. His subsequent appeal against conviction was based on allegations of error and failures to follow instructions on the part of his trial counsel. This appeal was dismissed by the Court of Appeal.[1] The applicant now seeks leave to appeal to this Court, relying in part on arguments which are similar to those advanced in the Court of Appeal and, as well, on three other grounds (alleged errors on the part of his counsel in the Court of Appeal, new evidence and a misdirection by the trial Judge).

[2] The applicant controlled NZGlobal Consulting Ltd (NZGC), which operated a telecommunications brokering business that the applicant wished to franchise. The income for the business came from commissions paid by suppliers on completed

1 *Zuydendorp v R* [2014] NZCA 35.

sales. The three charges laid against the applicant related to financial statements which he provided to the three complainants who were contemplating acquiring franchises from NZGC. The case against the applicant proceeded on the basis that the applicant had deliberately misstated the performance of the business in these statements in order to attract prospective franchisees.

[3] For the reasons given by the Court of Appeal, the case against the applicant was objectively strong.[2] The figures provided in the documents differed between themselves and were well adrift of the figures recorded in the accounts for the business prepared by NZGC's accountant, Mr Brady. Other evidence indicative of fraud is reviewed in the Court of Appeal judgment.[3] The applicant's explanation was that (a) the sales figures were accurate, (b) it was appropriate to record on an accruals basis the associated income, and (c) the expenses and other figures were forecasts. He said that he made it clear to the franchisees that the figures did not represent actual cash receipts or expenses.

[4] The applicant was represented at trial by senior counsel and assisted at and before trial by two laypersons. It is clear that there were differences of opinion as to how the case should be conducted. Most particularly, the applicant and the two laypersons wanted the defence case to be advanced on the basis of a conspiracy theory involving at least one of the complainants and the officer in charge of the case. Counsel had no enthusiasm for this strategy. On the other hand, counsel did wish to have the assistance of a forensic accountant which was never provided.

Allegations against trial counsel

[5] The allegations against trial counsel which were advanced in the Court of Appeal were summarised by that Court as involving failures to (a) follow instructions as to cross-examination, (b) lead evidence as to the strength of the business and business model, (c) call character evidence and (d) call Mr Brady, the liquidator of NZGC and an industry expert (Mr Shannon) whose report apparently formed the basis of statements made in a report by the liquidator.[4]

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2 At [10].
3 At [6]–[9] and [15]–[17].
4 At [18].

[6] The Court of Appeal rejected all of the applicant's allegations.

[7] The Court found that the basis of counsel's retainer was that he was responsible for the tactical approach at trial.[5] To the extent that this was overtaken by express instructions which required compliance, such instructions were complied with.

[8] The Court held that counsel recommended to the applicant that one particular character witness (Mr Thompson) not be called and that this advice was reasonably based and was accepted (albeit reluctantly) by the applicant. The Court had affidavits from three other possible witnesses, but these affidavits did not set out what they would actually say as to the applicant's character. The Court was not much impressed by what the other material suggested that those witnesses might say at trial and held that the failure to call them was not significant.[6] The Court also analysed the position as to the failure to call the liquidator and Messrs Shannon and Brady. The liquidator's evidence would have been of no assistance.[7] Mr Shannon swore an affidavit for the appeal but did not provide a brief of the evidence he could give.[8] As for Mr Brady's affidavit, the Court noted that he offered no explanation for the differences between the figures in the accounts he prepared and those in the documents given to the prospective franchisees.[9] Messrs Shannon and Brady have sworn affidavits for the purposes of the application for leave to appeal to this Court, which we will discuss shortly.

[9] The challenge to the Court of Appeal's factual findings encompasses a number of complaints, but none of them raise an issue of law of public or general importance. As well, and despite the lengthy submissions of the applicant and other material which he has supplied, we see no appearance of a miscarriage of justice in relation to the conclusions reached by the Court.

[10] For the sake of completeness, we note that some of the allegations against counsel advanced in support of the leave application appear to go beyond those

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5 At [23].
6 At [36]–[38].
7 At [43].
8 At [44].
9 At [46]–[47],

advanced in the Court of Appeal. As well, some of the affidavits filed in this Court refer back to questions which were in issue in the Court of Appeal (as to the interactions of counsel with proposed witnesses). Having considered them in light of the Court of Appeal judgment, we are satisfied that they are not suggestive of a miscarriage of justice.

Complaints about appellate counsel

[11] The complaints in relation to appellate counsel relate to what are said to be the failures of appellate counsel (a) to appropriately put before the Court of Appeal evidence which the proposed character witnesses and Messrs Shannon and Brady could have given and (b) to adduce evidence from Miles Dixon (who stood trial with the applicant and was acquitted).

[12] An affidavit as to the applicant's character was produced from Mr Thompson. On the findings made by the Court of Appeal, the applicant accepted counsel's advice not to call this witness. And, despite the criticisms of the Court of Appeal about lack of detail, all that Mr Thompson relevantly says in his affidavit is:

> My evidence would have been based on the following:
>
> 1. My experience with Israel as an honest and reliable person, both professionally and personally.
>
> 2. His knowledge of the telecommunications industry.
>
> 3. My experience and understanding of the legislative changes happening at the time of conception of his business, NZGlobal Consulting. i.e. Local loop unbundling, full number portability.

[13] In his submissions, the applicant claims also to have put in proper form the evidence of two other character witnesses, Messrs Vedder and Wheeler. An affidavit from Mr Vedder was filed but as far as we can tell, there is no affidavit from Mr Wheeler additional to the one which he swore in the Court of Appeal. Having considered Mr Vedder's affidavit, we accept that he could have given character evidence which would have been admissible and we are prepared to assume that the same is so of Mr Wheeler. This, however, does not impeach the conclusion of the Court of Appeal that the failure to call this evidence was not material.

[14] Mr Brady has sworn another affidavit in which he says that if he had given evidence he would have explained the differences between the figures in the accounts he prepared and those used in documents given to the prospective franchisees. But save for a vague reference to post-balance date events such as "a bad debt and supplier payment adjustments", no explanation was provided despite the comments made on this issue in the Court of Appeal judgment.[10] We have also carefully considered the affidavit from Mr Shannon which was filed in support of the application for leave to appeal. While in one sense detailed, it does not really engage with the substance and detail of the Crown case. We see neither of these affidavits as materially advancing the position of the applicant when compared with what was before the Court of Appeal.

[15] Mr Dixon's affidavit filed in support of the application for leave to appeal provides some corroboration of the applicant's accounts of (a) his dealings with the prospective franchisees and (b) interactions between the applicant and his counsel during the trial (albeit that some of the allegations made against trial counsel may go beyond those advanced in the Court of Appeal). According to the applicant, an affidavit from Mr Dixon (which we assume was in similar terms) was supplied to appellate counsel for use in the Court of Appeal but was not filed. We are not sure why this was not provided to the Court. The applicant gave evidence in person in the Court of Appeal and it must have been apparent to him that the Dixon affidavit was not being used. We are satisfied that such an affidavit, if tendered to the Court of Appeal, would not have affected the result of the case.

Other new evidence

[16] The applicant has tendered other affidavits which respond to aspects of the reasoning of the Court of Appeal. There is, for instance, evidence (from a Mr Staniland) as to work carried out by NZGC for Mike Pero Mortgages. There is also an affidavit from a Mr Wills relating to the same work. There is no reason why this evidence could not have been led at earlier stages in this litigation. Rather, it is responsive to aspects of the Court of Appeal judgment. We do not accept that it is fresh.

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[10] At [47].

The alleged misdirection

[17] In the course of his summing up the trial Judge summarised the defence in this way:[11]

> *[The applicant] says in regard to counts 1 and 2, that there was no false statement, the monies had been received.* As to count 3, he says there was no false statement and the business had been completed and I should say by "the monies had been received" he's saying that the monies had been made certain, but if they hadn't actually arrived they were definitely going to.

The complaint is that the italicised words mischaracterised the defence which was that the sales had been made but that the income had not been received. While this is so, it is clear that the Judge immediately corrected his error. It is possible that the correction represented a slight overstatement of the applicant's position but as there is no obvious reason why commissions from completed sales would not be paid, we do not see this as material.

[18] The applicant has also referred generally to other errors in relation to a question trail but he has not provided any particulars of them and his complaint therefore does not provide a basis for a grant of leave to appeal.

Some concluding comments

[19] As will be apparent, the applicant's case is largely over evidence which could have been, but was not, called at trial. It is clear that trial counsel conducted the case on a more limited basis than had been suggested by the applicant and the laypersons assisting him. The Court of Appeal found that the case was conducted by counsel in accordance with instructions and the interests of the applicant. This finding does not give rise to the appearance of a miscarriage of justice and largely disposes of the application. The underlying logic, however, warrants brief explanation.

[20] On the Crown evidence, it was well open to the jury to conclude that the documents were false and were intended to deceive. The best way to rebut that case

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[11] *R v Maynard* DC Christchurch CRI-2009-009-016437, 1 November 2012 at [21] (emphasis added).

– assuming it was rebuttable – was with detailed evidence of the sales[12] and evidence, either from Mr Brady or a forensic accountant, showing that the financial figures were an accurate representation of what the applicant asserted they were intended to portray. In the absence of such evidence, the jury would have seen as diversionary a defence advanced on the basis of elaborate evidence which was not addressed directly to accuracy of the financial statements and the transactions which lay behind the income figure. The more detailed such evidence, the more obvious the lack of a direct and detailed evidential rebuttal of the core elements of the Crown case.

[21] For the reasons stated, we are not satisfied that it is necessary in the interests of justice to hear and determine the proposed appeal. The proposed appeal does not raise any matter of general or public importance and there is no risk of a miscarriage of justice. Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[12] The Court of Appeal noted that although the applicant complained that one of the complainants had hacked into his computer system and removed many business records, he could have gone to the other parties to obtain copies of invoices: *Zuydendorp*, above n 1, at [30].