IN THE SUPREME COURT OF NEW ZEALAND

SC 77/2016
[2016] NZSC 162

BETWEEN	DAVID OBIAGA Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, Arnold and O'Regan JJ

Counsel: G L Turkington
K S Grau for Respondent

Judgment: 8 December 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Obiaga was convicted on a number of charges relating to the importation of methamphetamine. He was sentenced to 15 years and ten months' imprisonment.

[2] His appeal against conviction and sentence was dismissed by the Court of Appeal on 20 June 2016.[1] He now seeks leave to appeal to this Court.

Background

[3] Mr Obiaga was tried with a number of other defendants. In the course of the trial two jurors were discharged. The first was discharged on 20 February 2015,

1 *Obiaga v R* [2016] NZCA 270 (Harrison, Simon France and Woolford JJ).

some four days after the start of the trial. This was after the trial judge (Thomas J) received a medical certificate confirming the juror had been diagnosed with a condition rendering her unfit for jury service for a month.

[4] On 29 April 2015, during the jury's deliberation, the foreperson of the jury was also discharged. He had suffered a heart attack and was resuscitated by another juror and the detective in charge of the case. By the next day the foreperson had recovered and was out of immediate danger.[2] An application to discharge the jury pursuant to s 22(3) of the Juries Act 1981 was refused. The trial judge, Thomas J, had interviewed each of the jurors individually and was satisfied that they were willing and able to continue.[3]

The application

[5] Mr Obiaga's main ground for the proposed appeal against conviction relates to the decision to discharge the two jurors. He says that the trial judge should have considered whether s 22 of the Juries Act required a proportionality analysis to determine whether proceeding with fewer than 12 jurors was a justified limitation, having regard to s 5 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights) read purposively in conjunction with s 24(e) of the Bill of Rights and s 17 of the Juries Act.

[6] Mr Obiaga also wishes to challenge the decision not to discharge the jury. He submits that the trial judge failed to apply the established legal tests when making that decision.[4]

[7] Finally, on the conviction appeal Mr Obiaga says that the Court of Appeal erred in disallowing evidence from him and cross-examination of trial counsel on whether trial counsel error had affected the trial process.

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2 The remaining jury members had been told of the foreperson's recovery.

3 For more detail, see *Obiaga v R*, above n 1, at [19]–[25].

4 Mr Obiaga points to *Buddle v R* [2009] NZSC 117, [2010] 1 NZLR 717 at [36] (Blanchard J dissenting); *R v Marshall* [2004] 1 NZLR 793 (CA) at [16]; and *R v Hetherington* [2015] NZCA 248 at [39].

[8] On his sentence appeal, Mr Obiaga argues that the trial judge erred by allowing an uplift of two years for possessing the same drugs that he was convicted of importing and that she also erred by failing to take into consideration the principle of totality.

Our assessment

Discharge of jurors

[9] The issue of the compatibility with the Bill of Rights of continuing with ten jurors is raised for the first time in this Court. We accept the Crown's submission that the ability in limited circumstances to continue with ten jurors (or fewer than ten if all parties consent) contained in s 22 of the Juries Act implies legislative acceptance of the view that a defendant is still able to secure his or her constitutional right to a fair trial with a jury numbering less than 12. This means that Mr Obiaga's submissions amount to a challenge to the legislation.

[10] In any event, nothing suggests a risk of a miscarriage of justice in the present case. As the Court of Appeal pointed out, it is not uncommon for a juror to become unwell. We agree with the Court of Appeal that there was no basis for the proposition that the jury may have favoured the prosecution case out of admiration or gratitude to the officer in charge.[5]

Failure to discharge the jury

[11] This Court has considered the test for an emergency or casualty in the context of the predecessor legislation.[6] Nothing raised by Mr Obiaga suggests this test was improperly applied in this case.

[12] We agree with the Court of Appeal that there was no need to discharge a jury at such a late stage of the trial when they were willing and able to continue their task and the judge was satisfied they could do so in accordance with their oaths.[7]

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5 For more detail, see *Obiaga v R*, above n 1, at [24].
6 *Buddle v R*, above n 4.
7 *Obiaga v R*, above n 1, at [25].

Oral evidence at hearing of appeal

[13] The Court of Appeal did not prohibit Mr Obiaga from cross-examining his trial counsel or giving evidence. Mr Obiaga's appellate counsel, Mr Tennet, had agreed before the hearing that the issue of counsel error could be addressed in submissions by reference to the trial transcript and the summing up.[8]

[14] Nothing raised by Mr Obiaga suggests this may not have been the case. In any event, the Court of Appeal found that the matters Mr Obiaga had complained about were not pivotal and some were contrary to his interests.[9]

Sentence

[15] The proposed sentence appeal does not raise an issue of general or public importance. Nor is there any reason to suspect that a miscarriage of justice may have occurred. We accept the Crown submission that both the sentencing judge and the Court of Appeal applied well established sentencing principles. The end sentence of 15 years and ten months' imprisonment was not outside an appropriate range for offending of this nature.

Result

[16] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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8 *Obiaga v R* CA390/2015, 27 April 2016 (Minute of Harrison J) at [2].
9 *Obiaga v R*, above n 1, at [14].