NOTE: DISTRICT COURT INTERIM ORDER PROHIBITING PUBLICATION OF THE APPLICANT'S NAME OR IDENTIFYING PARTICULARS REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

SC 119/2016
[2016] NZSC 172

BETWEEN	S (SC 119/2016) Applicant
AND	THE QUEEN Respondent

Court:	Arnold, O'Regan and Ellen France JJ
Counsel:	S J Bonnar QC and C S Fredric for Applicant C J Hurd for Respondent
Judgment:	22 December 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted on six counts of importing a Class B controlled drug. The evidence against him consisted almost entirely of information obtained from two mobile phones seized by Customs officers at the border, using the power conferred by s 151 of the Customs and Excise Act 1996 (1996 Act).

[2] After the mobile phones were seized, a Customs officer read through text messages and contacts on the phones and found text messages referring to a package being sent to the applicant's address, for which the applicant had paid $55,000. The applicant was then interviewed and subsequently arrested.

[3] The mobile phones were then delivered to a forensic investigator for further examination. Evidence obtained from a forensic examination of the mobile phones indicated that the applicant was involved in a pseudoephedrine importing syndicate. The mobile phones were seized using the power conferred by s 175D of the 1996 Act.

[4] The applicant challenged the admissibility of the evidence from the mobile phones before his trial, but was unsuccessful. After he was convicted, he appealed against conviction to the Court of Appeal. One of the grounds of appeal was that the evidence obtained from the mobile phones was unlawfully obtained and that the evidence derived from the forensic examination of the mobile phones should not have been admitted at his trial. The Court of Appeal dismissed his appeal.[1]

[5] The applicant seeks leave to appeal against that aspect of the decision of the Court of Appeal. He argues that the challenge he wishes to make to the interpretation of ss 151 and 175D of the 1996 Act involves points of public importance. He says there is an arguable case that the Court of Appeal erred in its conclusion that s 151 and/or s 175D of the 1996 Act authorised the Customs officers to carry out the initial examination of the mobile phones and the later forensic examination.

[6] The arguments that the applicant seeks to raise were carefully considered by the Court of Appeal. The Court rejected them.[2] It also expressed the view that, even if the initial examination and later forensic examination were unlawfully conducted, it would still have found the evidence was admissible applying the balancing test under s 30 of the Evidence Act 2006.[3]

[7] While we accept that the power of Customs officers to seize and examine mobile phones may involve issues of some significance, we do not consider that the present case is an appropriate vehicle for these issues to be considered by this Court. We note that a Bill to replace the 1996 Act is currently before Parliament.[4] If passed,

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1 *S (CA712/2015) v R* [2016] NZCA 448 (Randerson, Woodhouse and Wylie JJ).
2 At [46].
3 At [48]–[49].
4 Customs and Excise Bill 2016 (209).

it would change the provisions in issue in this case. The significance of the points the applicant wishes to raise may therefore be limited. In addition, the arguments the applicant wishes to pursue on appeal do not appear compelling. Even if we were to accept them, we would also need to take a different view on the balancing test under s 30 of the Evidence Act than that taken by the Court of Appeal for the appeal to succeed.

[8] We are not satisfied the proposed appeal raises matters of sufficient public importance to justify a further appeal. Nor do we consider there is any likelihood of a miscarriage of justice occurring if leave is declined.

[9] As the criteria for leave to appeal in s 13 of the Supreme Court Act 2003 are not met, we dismiss the application for leave to appeal.

Solicitors:
McVeagh Fleming, Auckland for Applicant
Crown Law Office, Wellington for Respondent