NOTE: PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985.

IN THE SUPREME COURT OF NEW ZEALAND

SC 113/2016
[2017] NZSC 4

BETWEEN	SAMUEL OWEN WEENINK Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: D P H Jones QC for Applicant
J E L Carruthers for Respondent

Judgment: 9 February 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was one of five men convicted at trial of sexual offending against a single complainant. His appeal and those of three of the other men against convictions for rape as principals were dismissed by the Court of Appeal.[1] The fifth man, Richard Morton had been found guilty of being a party to those rapes. His appeal was allowed and a retrial was directed.[2] The background to all of this is fully discussed in the judgment of this Court in *Morton v R* which was delivered last year.[3] At the first trial none of the five men gave evidence. At the retrial which took place

1 *Morton v R* [2013] NZCA 667 (White, Venning & Andrews JJ). Their appeals against convictions as parties in relation to the rapes committed by the others were allowed.

2 At [150](e)–[150](f).

3 *Morton v R* [2016] NZSC 51 [*Morton* (SC)]. By this stage there had been an attempt to retry Mr Morton, but this trial was aborted. The details as to this are not material for present purposes.

after our judgment, they all gave evidence and the jury returned verdicts of not guilty in respect of Mr Morton.

[2] The applicant now seeks leave to appeal against the judgment of the Court of Appeal dismissing his initial conviction appeal. The application is well out of time. This is material to one of the proposed grounds of appeal as we will explain. But given the other two proposed grounds, we grant an extension of time. We note that in the aftermath of Mr Morton's acquittal, the other three men applied unsuccessfully to the Court of Appeal to re-open the dismissal of their conviction appeals.[4]

[3] Mr Morton's retrial was complicated by awkward issues as to the application of s 49 of the Evidence Act 2006 and, in particular, the weight to be placed on the convictions of the applicant and the other three men for rape. Section 49 prevented Mr Morton advancing the defence that the complainant had consented to the sexual activity with the applicant and the other three men. It did not, however, preclude Mr Morton claiming that he had honestly and reasonably believed that the complainant had consented. As well, s 49 had no bearing on the separate question whether Mr Morton had assisted or encouraged the other men to commit rape and related questions as to the application of s 66(2) of the Crimes Act 1961. It is fair to say, however, that on the particular facts, a jury which concluded that the applicant and the other men had raped the complainant could also be expected to conclude, without much difficulty, that Mr Morton had been a party to those rapes. Indeed, Mr Morton's defence of honest and reasonable belief was very much along the lines that he believed the complainant consented and had reasonable grounds for doing so because she had in fact consented.[5]

[4] At Mr Morton's retrial, the applicant and the other three men gave evidence in support of his defence – evidence which proceeded on the basis that the complainant had consented to all sexual activity which had occurred. Despite directions given by the Judge as to the effect of s 49 – that the jury was required to proceed on the basis that the applicant and the other three men had raped the complainant – it is possible that Mr Morton was acquitted because some or all of the

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4 *McMaster v R* [2016] NZCA 612.

5 For a more elaborate discussion see this Court's earlier decision: *Morton* (SC), above n 3.

jurors were left in reasonable doubt as to whether the complainant consented.[6] This provides the basis for the first two proposed grounds of appeal both of which rely on what is said to be the inconsistency of the verdicts at the first trial and the retrial leading to the acquittal of Mr Morton.

[5] We do not see such possible inconsistency as warranting a grant of leave.

(a) If the jury at the retrial did not comply with the Judge's direction as to the effect of s 49, all this would mean is that the juries at the two trials assessed the case differently. Leaving aside for the moment the direction given by the Judge, such different assessment would not be surprising as the evidence adduced at the trials differed appreciably; not least in that all five men involved in the case gave evidence at the retrial whereas none of them had given evidence at the first trial.

(b) Where inconsistency is relied on successfully in conviction appeals, it is usually, perhaps always, of a kind which impeaches the reasoning process of the jury. In the present case, where the verdicts in issue were given at separate trials, the asserted inconsistency does not raise any doubt as to the reasoning of the first jury. Interestingly, no cases were cited involving inconsistency of verdicts at separate trials resulting in successful conviction appeals.[7]

(c) The evidence against all defendants at the first trial (which included inculpatory text messages) was formidable.

[6] The applicant also wishes to rely on new evidence. This consists of an affidavit from a man who claims that the complainant admitted to him that her evidence at the first trial was untrue. The deponent first swore an affidavit to this effect in September last year, which was after Mr Morton's retrial. The substance of

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6 There are other explanations for the acquittals which were explored in the submissions of counsel for the respondent.

7 We do not see as applicable here cases in which the setting-aside of a conviction of a principal has sometimes been held to warrant allowing of an appeal by an alleged accessory, as in *Stewart v R* [2011] NZSC 62, [2012] 1 NZLR 1. In that case, the basis upon which the conviction of the principal was set aside was equally applicable to the conviction of the accessory.

what the deponent says is similar to evidence which was tendered at the first conviction appeal and rejected by the Court of Appeal as unreliable. The evidence now relied upon has, of course, not been assessed by the Court of Appeal. The argument is raised more than three years after the Court of Appeal dismissed the applicant's conviction appeal. If the applicant wishes to pursue any arguments based on this affidavit he must do so under s 406 of the Crimes Act.

[7] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Cook Morris Quinn, Auckland for Applicant
Crown Law Office, Wellington for Respondent