IN THE SUPREME COURT OF NEW ZEALAND

SC 10/2013
SC 11/2013
[2013] NZSC 39

NEAL MEDHURST NICHOLLS
WAYNE LESLIE DOUGLAS

v

THE QUEEN

Court: Chambers and Glazebrook JJ

Counsel: B D Gray QC and R J Sussock for Applicants
N R W Davidson QC, N R Williams and M K Thomas for Crown

Judgment: 19 April 2013

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] Neal Nicholls and Wayne Douglas, as directors of Capital + Merchant Finance Ltd, were found guilty of three charges under s 220 of the Crimes Act 1961 of theft by a person in a special relationship. They were tried by Wylie J sitting without a jury.[1] The Court of Appeal dismissed their appeal against conviction and sentence.[2]

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1 *R v Douglas* [2012] NZHC 1746.
2 *Tallentire v R* [2012] NZCA 610, [2013] 1 NZLR 548.

[2] Messrs Nicholls and Douglas now seek leave to appeal on the basis of what they say was an error in *the Crown's* approach at trial with respect to mens rea under s 220. They assert that leave should be granted because guidance from this Court is required "for future proceedings to correct the approach taken by the Crown at the trial". We do not accept the premise upon which this submission is based. What we do know is that counsel agreed at trial on what the elements of a s 220 offence are. Wylie J recorded that agreement in the following terms:[3]

> Prior to counsel making their closing submissions, I circulated a draft setting out what I considered to be the elements of the offence created by the section, and invited counsel to comment on the same. They did so, and it was agreed that the elements of the offence are as follows:
>
> (a) Did the accused have control over property?
>
> (b) Was the property in the control of the accused, in circumstances that required him to deal with the property, or any proceeds arising from the property, in accordance with the requirements of any other person?
>
> (c) Did the accused know of those circumstances? And,
>
> (d) Did the accused intentionally deal with the property, or any proceeds of the property, otherwise than in accordance with those requirements?

[3] Elements (c) and (d) are the two so-called mens rea requirements. The applicants in their submissions paraphrase these elements. They correctly paraphrase element (c) but do not accurately paraphrase element (d). They then go on to explain why element (d) is incorrect – but it is the paraphrase which is in error. The whole argument advanced by the applicants is built on that false initial premise. The High Court's approach, with which the Court of Appeal agreed and we agree, was endorsed by the Crown at trial, as Wylie J recorded, and remains the Crown's position now.

[4] The applicants then refer to a passage in Wylie J's reasons for verdict[4] which the Court of Appeal described as "unhelpful",[5] although not crucial to the trial Judge's decision. We do not need to express a view as to whether the passage in the reasons for verdict was correct because it was not central to Wylie J's reasoning.

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3 At [149].
4 At [247].
5 At [80].

The passage concerned (and the possible error in it) was not, as the applicants imply, the reason why the Court of Appeal "independently" assessed the impugned transactions. The reason the Court of Appeal assessed the evidence for itself was because that was its duty as an appellate court in circumstances where the appellants had challenged the Judge's assessment of the evidence.

[5] The applicants develop a thesis that Wylie J adopted "essentially a strict liability approach" by requiring the accused to establish lack of intent on the balance of probabilities. The Judge did not adopt such an approach. He adopted the approach on which all counsel agreed. The first mens rea element was effectively conceded: of course the directors had to admit they knew the terms of the trust deed. The only real issue was the second mental element, namely whether they intentionally dealt with the company's property otherwise than in accordance with the requirements of the trust deed. If the applicants, knowing the terms of the trust deed, then intentionally dealt with the company's property contrary to the requirements of the deed, they acted with a "guilty mind".

[6] The applicants deal with some alleged errors in the Court of Appeal's factual analysis. They claim the Court of Appeal overlooked some evidence. Those alleged errors do not come close to being worthy of an appeal to this Court.

[7] Earlier this week, the applicants filed further submissions, referring to the reasons for verdict delivered by Lang J in the case of *R v Whale*.[6] Mr Gray QC and Ms Sussock, for the applicants, submitted that Lang J's approach was inconsistent with Wylie J's. It is inappropriate for us to comment in detail on Lang J's reasoning in case the matter should come on appeal. Suffice it to say we see no inconsistency.

[8] We dismiss the applications for leave. The test applied by Wylie J and the Court of Appeal was agreed and even now is not in truth challenged. Rather what is put up is the strawman of an alleged *Crown* approach at trial. Mr Davidson QC disputes that it was the Crown approach at trial, but in any event it was not the approach adopted by Wylie J or the Court of Appeal. When properly analysed, there

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6 *R v Whale* [2013] NZHC 731.

is no question of general or public importance. Nor are we satisfied that a substantial miscarriage of justice will occur if the proposed appeal is not heard.

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