IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CRI 2008-488-68

PETRINA CATHERINE ERSKINE
Appellant

v

MINISTRY OF SOCIAL DEVELOPMENT
Respondent

Hearing: 21 July 2009

Appearances: R Bowden for appellant
M Smith for respondent

Judgment: 24 July 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 2.00 pm on Friday 24 July 2009

Solicitors:
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Crown Solicitor Whangarei

[1] The appellant seeks leave to appeal to the Court of Appeal from the judgment of Stevens J given on 2 April 2009, in which His Honour dismissed an appeal against conviction on charges laid under s 127 of the Social Security Act 1964.

Background

[2] The appellant's offending background was summarised by Stevens J in the following way:

> Following a matrimonial settlement, the appellant acquired a property at Kopeti Road, Hukerenui, where she resided with her two children. In January 1999, the appellant was involved in a motor vehicle accident as a result of which she received a mild brain injury. It seems that the appellant's rehabilitation was reasonably good because she was subsequently able to achieve a significant degree of success with her studies and complete a full time course in social work. Further, she was able to contribute to her financial situation by obtaining employment in a variety of occupations. In April 2001, the appellant made an application for a domestic purposes benefit. Later the same month, she made an application for a disability allowance on the basis of depression and anxiety. She then made an application for a special benefit in July 2001.
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> On 20 March 2003, Work and Income NZ carried out a review to determine whether there were any changes in the appellant's circumstances affecting the entitlement or rate of her weekly domestic purposes benefit. On 4 April 2003, the appellant purchased a property at Peach Orchard Road for the sum of $50,000. It seems that the purchase price was met through adding to the mortgage on the Kopeti Road property. There is no dispute that the appellant was, following the purchase of the Peach Orchard Road property, obliged to disclose this property to Work and Income NZ as a non-cash asset together with any sum owing in respect of it and any value that was placed upon the property which would have been available from Quotable Value New Zealand Ltd.
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> Between July 2003 and October 2006, the appellant was required to fill out some 15 Work and Income NZ forms of various types. Some were special benefit review forms in which the appellant was required to tell Work and Income NZ about any changes in her circumstances affecting the entitlement or rate while receiving a special benefit. There were also application forms for an invalid's benefit and other benefit applications in which the appellant was required to provide information to Work and Income NZ.
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> In the applications or reviews that occurred between July 2003 and October 2006, the appellant was required to answer a question as to whether or not she had any non-cash assets. On each occasion the appellant answered "no". This answer was incorrect as the appellant owned the Peach Orchard Road property in addition to the Kopeti Road property. The relevant forms

> required the appellant to sign directly below a statement that "the information I have given in this special benefit review form is true and I have not left anything out". Other forms had similar wording attesting to the truth of the information provided and confirming that nothing had been left out. There is no need to detail the various applications or reviews and the dates upon which they were presented to Work and Income NZ.

[3] The appellant's trial took place in the District Court before Judge David Harvey on 11-12 November 2008. Evidence for the respondent was given by four case managers; two gave viva voce evidence. The evidence of the other two, including a Ms Rogers, was given by way of production of written statements, Judge Harvey ruling pursuant to s 18 of the Evidence Act 2006 that the statements were to be admitted in evidence.

[4] The statement from Ms Rogers was received over the objection of Mr Watson, counsel for the defendant in the District Court. He argued that it was vital to his client's defence that Ms Rogers give her evidence in person, and that she be cross-examined, because the appellant's case was that she had disclosed to Ms Rogers the existence of the property at Peach Orchard Road. Judge Harvey gave a detailed ruling on the point, in the course of which he said:

> [4] …Section 18 of the Evidence Act deals with issues of general admissibility and essentially what has to be established is that the hearsay statement is reliable and either the maker of the statement is unavailable as a witness or undue expense or delay would be caused if the maker of the statement were required to be a witness. Unavailability is a critical feature in both s 18 and in s 22 dealing with the admissibility of hearsay evidence in criminal proceedings. Although there is no documentary evidence available to support the assertion that Ms Rogers is in hospital I have been advised from the bar today that she is and I accept what Mr Williams has told me and that, as a result of ill health, she is unavailable to give evidence.
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> [5] The witness, Milina, apparently is no longer in the country and has gone to Australia. Her whereabouts in that country is unknown. She too is unavailable to give evidence. Once again, there are notice requirements to be given under s 22 of the Evidence Act and such notice has not been given although, once again, there is a power of dispensation. A similar set of circumstances arise in this case. The briefs of evidence have been in the hands of Mr Watson since May of this year and there can be little prejudice or surprise as far as the contents of them are concerned.
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> [6] Having satisfied myself that the witnesses are unavailable and, on the face of it, there being too little or no prejudice to the defence as to the contents of the documents, it is necessary to consider the issue of reliability. The evidence of Ms Taylor, an investigator with the Ministry of Social Development, revealed that the witness, Rogers, was consulted about this

matter in 2007 and made her witness statement in May of 2008. Indeed, the only record of discussions between Ms Taylor and Ms Roberts were in the preparation of the brief of evidence. Ms Rogers' recollections go back to 2003. Those recollections can only be based upon the documents that were prepared at the time and evidence of what would be general practice is speculation, if I can call it that, of what a person might have done in accordance with the normal practices that that person undertook in the course of their duties.

[7] In respect that the evidence is a construct based on contemporaneous documents in part, the evidence could be said to be reliable notwithstanding that some considerable time has elapsed. But there is a rather critical issue that arises regarding the document of 13 November 2003. I say that because the defence case, as I apprehend it, is that Ms Erskine disclosed to the Ministry that she had non-cash assets that she was obliged to disclose in the form of a second piece of real estate and that she did disclose this information, perhaps not directly, but at least insofar as it was brought to the attention of the Ministry by referring to mortgage debt increases noted in one respect in the document of 13 November 2003. Ms Rogers, in her witness statement, addresses that particular matter and speculates as to what she might or might not have done. Because she is not available she cannot be cross-examined but in any event if she was to give the evidence viva voce the evidence would still be of a speculative nature and, if given viva voce would have to be accorded whatever weight was considered appropriate to the qualifications that have been set out in the third paragraph of page 3 of the brief of Ms Rogers. Certainly the evidence that she would propose to give in terms of documentation and so on is irrelevant and should be heard and, subject to the matters to which I have already referred, is substantially reliable and, in my view, is admissible. Of course the statements that she has made, particularly insofar as matters contained in paragraph 3 of page 3, cannot be the subject of cross-examination so were the defendant to be called and were she to give evidence it is possible, and this is all speculative at this stage, that she might be able to shed some light upon the events of the 13 November 2003 document or events surrounding it, but of course that evidence could not be challenged by tested evidence from the prosecution. Be that as it may, essentially the matter can be resolved by accordance of weight. For that reason I think that Ms Rogers' statement should be admitted.

[8] Ms Milina's statement is not so contentious and Mr Watson is not offering any real objection to that. Her statement is more recent in terms of origin of statement and proximity with the events which are deposed therein and certainly is of stronger reliability in that particular context and I am prepared to dispense with the requirements of subsections 2, 3 and 4 of the Evidence Act s 22, and allow those statements to be admitted.

[5] On appeal to this Court, Stevens J upheld Judge Harvey's ruling in respect of the evidence of Ms Rogers. He said:

[40] Counsel for the appellant submitted that the evidence ought not to have been admitted. Mr Bowden argued that the appellant's counsel was deprived of the opportunity of cross-examining Ms Rogers on an important document, exhibit 16. Counsel submitted that there was both prejudice and

unfairness to the appellant in the decision of the Judge to admit the hearsay evidence from Ms Rogers.

[41] Ms Hyndman, counsel for the respondent, submitted that the Judge correctly ruled that the requirements in s 18 of the Evidence Act had been satisfied. Counsel also submitted that, as is evident from the ruling, the Judge was alive to the exclusionary principles set out in s 8 of the Evidence Act, although there was no specific reference to that section in the ruling. Accordingly, counsel submitted that the probative value of Ms Rogers' evidence was not outweighed by the risk of any unfair prejudicial effect on the proceeding, particularly in relation to the appellant's right to offer an effective defence.

[42] Counsel for the respondent further submitted that none of the aspects relating to an inability to cross-examine Ms Rogers, raised on behalf of the appellant, were decisive. Rather, they were pure speculation. Counsel therefore supported the ruling by noting the nature of the evidence and the fact that the incident was some years beforehand. Accordingly, Ms Rogers would have been giving evidence about her general practice. This was a point which the Judge anticipated, noting that the appellant might (if she gave evidence) shed some light on the matter which he proposed to resolve by way of weight of the evidence.

[43] With respect to this evidence, it is pertinent to note that the appellant commented on exhibit 16 in her interview with Ms Taylor of Work and Income NZ on 31 October 2006. The appellant was asked specifically about the application for an invalid's benefit completed on 7 November 2003 and date stamped 13 November 2003. She confirmed that she completed it. She was asked:

> Q: When we look at this form what have you advised under assets on the accommodation supplement?
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> A: Nothing, I put my house but they crossed it out and I had to sign it.
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> Q: Why did you not write in the land you owned?
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> A: I didn't.

[44] Further, it is to be recalled that Ms Rogers was only one of four case managers. The defence of the appellant in the District Court turned on whether or not she advised the case managers at Work and Income NZ that she had in fact obtained this property. This was a point in respect of which two of the case managers, Ms Anderson and Ms Batkin, gave evidence and were cross-examined. Their answers on cross-examination were unequivocal. Each witness was clear that the appellant had not informed them about the acquisition of the Peach Orchard Road property. The Judge found each of these witnesses credible and their evidence reliable.

[45] Having carefully considered the ruling of Judge Harvey, I am satisfied that he was correct to admit the brief-of-evidence of Ms Rogers as hearsay evidence. Essentially, what she was doing was producing the documents as the person who had processed them. In many respects the documents speak for themselves. With respect to exhibit 16, the appellant

> had commented specifically on the alterations. With a minor variation as to who made the correction, her statement coincides with that of Ms Rogers. To the extent that she later gave evidence about the document in Court in her own defence, the Judge was able to assess the credibility and reliability of her response. I am satisfied that the Judge was able to deal with the evidence of Ms Rogers on the basis of giving the appropriate weight to the evidence bearing in mind the fact that no cross-examination was possible. For the reasons outlined, I agree that the probative value of the evidence is not outweighed by any unfairness through an inability to cross-examine. The evidence was properly admitted.

[6] The appellant now seeks leave to appeal to the Court of Appeal against the decision of Stevens J, confirming that the statement of Ms Rogers was properly admitted by Judge Harvey.

Leave principles

[7] Applications for leave to appeal to the Court of Appeal are governed by s 144 of the Summary Proceedings Act 1957, which provides:

> **144 Appeal to Court of Appeal**
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> (1) Either party may, with the leave of the High Court, appeal to the Court of Appeal against any determination of the High Court on any case stated for the opinion of the High Court under section 107 of this Act or against any determination of the High Court on a question of law arising in any general appeal:
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> > Provided that, if the High Court refuses to grant leave to appeal to the Court of Appeal, the Court of Appeal may grant special leave to appeal.
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> (2) A party desiring to appeal to the Court of Appeal under this section shall, within 21 days after the determination of the High Court, or within such further time as that Court may allow, give notice of his application for leave to appeal in such manner as may be directed by the rules of that Court, and the High Court may grant leave accordingly if in the opinion of that Court the question of law involved in the appeal is one which, by reason of its general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.
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> (3) Where the High Court refuses leave to any party to appeal to the Court of Appeal under this section, that party may, within 21 days after the refusal of the High Court or within such further time as the Court of Appeal may allow, apply to the Court of Appeal, in such manner as may be directed by the rules of that Court, for special leave to appeal to that Court, and the Court of Appeal may grant leave accordingly if in the opinion of that Court the question of law involved in the appeal is one which, by reason of its

> general or public importance or for any other reason, ought to be submitted to the Court of Appeal for decision.

[8] The application of the section was discussed in the leading case of *R v Slater* [1997] 1 NZLR 211. There, Thomas J, delivering the judgment of the Court said at 215:

> Section 144 was not intended to provide a second tier of appeal from decisions of the District Court in proceedings under the Summary Proceedings Act. Parliament intended such proceedings to be brought to finality with the defendant having an appeal to the High Court other than when the conditions it has specified in subss (2) and (3) are met and leave to appeal is granted. Neither the determination of what comprises a question of law, nor the question whether that point of law raises a question of general or public importance, are to be diluted.

Discussion

[9] Section 144 confers on this Court jurisdiction to grant leave to the Court of Appeal " … on a question of law arising in any general appeal". As is emphasised in *Slater*, the Court has no discretion to grant leave if no question of law arises in the appeal. During the course of argument I invited Mr Bowden to articulate the question of law upon which the appellant seeks leave to appeal. He was unwilling to do so, but as I understand his argument the contention is that:

a) Ms Rogers was the pivotal witness for the prosecution because the appellant's evidence was that she disclosed to Ms Rogers the existence of the Peach Orchard Road property;

b) By virtue of the ruling of Judge Harvey, confirmed by Stevens J, the appellant was prevented from cross-examining Ms Rogers about the detail of the meeting between them on 13 November 2003 at which disclosure allegedly occurred;

c) Because the evidence concerned was central to the prosecution case and vital to the appellant's defence, as a matter of law it was not open to Judge Harvey to admit Ms Rogers' evidence by way of hearsay statement.

[10] Mr Bowden further submits that the question is of general or public importance in that there has as yet been no detailed examination by the Court of Appeal of the manner in which the jurisdiction of the Court to admit hearsay statements under the Evidence Act 2006 ought to be exercised. Mr Bowden says that the Act has fundamentally altered the long standing general principle that hearsay statements may not be admitted as evidence: *Bishop v Police* HC GIS CRI 2008-406-03 28 February 2009 at [8], and that this case presents an opportunity for the Court of Appeal to offer guidance to Judges as to the circumstances (if any) in which hearsay statements may be adduced in evidence, notwithstanding the fact that the evidence concerned is important, and that a defendant may wish to cross-examine the witness if he or she gives viva voce evidence.

[11] In that respect, he referred to the decision of Miller J in *R v Holtham* HC NEL CRI 2006-042-2569 9 May 2008, where at [16] the Judge declined to admit a hearsay statement from a policeman who had recorded in his notebook an apparent admission by an accused person.

[12] The difficulty with Mr Bowden's submission is that he does not identify any question of law for consideration. The jurisdiction of a trial Judge to admit a hearsay statement is essentially discretionary once the provisions of s 18 are engaged. Under s 18 such a statement is admissible in any proceeding if the circumstances are such as to provide a reasonable assurance that the statement is reliable, and either the maker of the statement is unavailable, or the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.

[13] Of course, an important and probably dominant consideration will be whether the probative value of the evidence concerned is outweighed by any unfairness caused by an inability to cross-examine: *Holtham* at [12]. That was a factor to which both Judge Harvey and Stevens J expressly referred.

[14] So the discretion is not unfettered: *R v L* [1994] 2 NZLR 54, where the Court of Appeal considered aspects of the necessary balancing exercise under former legislation.

[15] In essence, the appellant's complaint is that Judge Harvey concluded in the exercise of his s 18 discretion that the proper course was to admit the hearsay statement of Ms Rogers, and that Stevens J upheld that ruling. He does not argue that either Judge misdirected himself as a matter of law in respect of the application of s 18. The complaint is simply that Judge Harvey wrongly exercised his discretion and that Stevens J failed to correct the error on appeal.

[16] In my opinion, Mr Bowden has not raised a question of law for the exercise of the Court's jurisdiction under s 144(1). He simply seeks a second opportunity to appeal against the exercise of a discretion.

Other matters

[17] The appellant also seeks leave to appeal against the decision of Stevens J to decline to receive on appeal fresh evidence, namely, a sickness benefit application dated October 2003 (discovered by the appellant after the District Court hearing), and a neuro-psychological assessment report prepared in February 2009, several months after Judge Harvey's decision.

[18] Pursuant to s 119(3) of the Summary Proceedings Act, the Court has a discretionary power to hear and receive further evidence, if that further evidence could not in the circumstances have reasonably been adduced at the hearing. A well established two-stage inquiry arises. The first step is to determine whether the evidence could reasonably have been adduced at the hearing; the second step is to assess whether the new evidence is credible and capable of being believed: *R v Bain* [2004] 1 NZLR 638. The over-riding criterion is that the interests of justice must be served.

[19] Again, Mr Bowden does not identify a relevant question of law. The jurisdiction to admit fresh evidence on appeal is plainly discretionary. There is no basis upon which the Court is able to consider the appellant's application for leave to appeal in respect of the two items of evidence concerned.

Result

[20] I am satisfied that no question of law has been identified by Mr Bowden in the course of his submissions. The Court has no jurisdiction to consider the appellant's application for leave to appeal to the Court of Appeal, which is accordingly dismissed.

C J Allan J