

IN THE SUPREME COURT OF NEW ZEALAND

SC 87/2013
[2013] NZSC 109

BETWEEN JOHN DOUGLAS MCKENZIE
Applicant
AND THE QUEEN
Respondent

Court: McGrath, William Young and Glazebrook JJ
Counsel: J H M Eaton QC for the Applicant
A Markham for the Respondent
Judgment: 11 November 2013

JUDGMENT OF THE COURT

The application for leave to appeal is declined.

REASONS

Introduction

[1] Mr McKenzie was convicted of conspiring with a Mr Newton and others to manufacture methamphetamine. It was the Crown's case that Mr McKenzie knowingly financed part of the operation.¹

[2] A loan agreement dated 29 January 2010 was found at Mr McKenzie's address advancing \$180,000 to Mr Newton at an 80 per cent interest rate, repayable in three months and with no security.²

¹ *McKenzie v R* [2013] NZCA 378 at [3] [*McKenzie (CA)*].

² *McKenzie (CA)*, above n 1, at [7].

[3] Also found at Mr McKenzie's address was an undated note, attributed by the Crown to Mr Newton, inferentially referring to a part repayment of the loan (\$50,000) and to the further manufacture of methamphetamine.³

Court of Appeal judgment

[4] The Court of Appeal held that the note was admissible on the following grounds:

- (a) The note was not a "statement" within s 4 of the Evidence Act 2006.⁴ Accordingly it did not fall within s 27(1) of the Act, which prevents the use of a defendant's statement against a co-defendant.⁵
- (b) Alternatively, the co-conspirator's exception to the co-defendant's rule applied (s 12A).⁶
- (c) The note was not inadmissible hearsay because it was not a statement, it was not produced to establish the truth of its contents, and because in any case s 12A operated as an exception to the hearsay rule.⁷
- (d) The prejudicial effect of the note did not outweigh its probative value, in terms of s 8.⁸

[5] The Court of Appeal also held that there was sufficient evidence on which the jury properly directed could convict and that the verdict was not unreasonable.⁹

³ *McKenzie* (CA), above n 1, at [9]. It was the Crown case that the note had been delivered by Mr Newton in early June 2010.

⁴ *McKenzie* (CA), above n 1, at [22], relying on *R v Holtham* [2008] 2 NZLR 758 (HC); and *Hitchinson v R* [2010] NZCA 388.

⁵ *McKenzie* (CA), above n 1, at [22]–[25].

⁶ At [27]–[33].

⁷ At [34]–[40].

⁸ At [42]–[47].

⁹ At [48]–[50].

Leave to appeal grounds

[6] Leave to appeal is sought on the grounds that the Court of Appeal erred in its findings set out at [4](a), (b) and (d) above. Leave is also sought to appeal against the Court of Appeal's determination that the verdict was not unreasonable.

Whether the note was a statement

[7] The Crown accepts that [4](a) raises an arguable question of law but, given the conclusion on [4](b), submits that it would not determine the appeal in Mr McKenzie's favour.

[8] We agree. Leave is therefore not justified on this ground.

Co-conspirator rule

[9] As to [4](b), Mr Eaton QC submits, on behalf of Mr McKenzie, that the Court of Appeal did not address the undisputed evidence that Mr McKenzie had made a series of very high interest short term loans to Mr Newton and his father. In the light of that evidence, it is submitted that the loan and the fact of Mr Newton's involvement in the manufacture of methamphetamine could not amount to reasonable evidence of Mr McKenzie's membership of the conspiracy.

[10] Mr Eaton also submits that the note was not in furtherance of the conspiracy. Even if the inference could be drawn that Mr Newton intended repaying the loan out of methamphetamine manufacture, this did not, in Mr Eaton's submission, equate to a continuation of Mr McKenzie's role as the financier.

[11] The Crown submits that the documents apparently¹⁰ evidencing loans to Mr Newton senior were for lesser amounts, had lesser or no interest payable and were purportedly secured by Mr Newton senior's house. The terms were therefore quite different from the loan document relied on by the Crown. In addition, the Crown submits that the note was plainly written in the furtherance of the conspiracy.

¹⁰ The Crown does not accept that the documents were necessarily legitimate.

It informs Mr McKenzie there is \$50,000 to collect, updates him on the progress of the conspiracy and advises him of future steps to be undertaken.

[12] We accept the Crown's submission that there was sufficient evidence of Mr Newton's involvement in the conspiracy for the co-conspirator's rule to apply.¹¹ The evidence as to the other loans does not change that assessment. We also accept the Crown's submissions as to the note being in furtherance of the conspiracy. In any event, as part of the loan money remained outstanding, Mr McKenzie's role as financier was a continuing one.

Prejudicial/probative

[13] As to [4](d), the Crown submits that the probative value of the note was high as it provided an explicit link between the loan and Mr Newton's methamphetamine business. It is further submitted that the circumstances surrounding the note underscore its reliability, minimising prejudice.

[14] Mr Eaton submits that the probative value of the note was not high, given it came into existence months after the alleged loan and there is no evidence as to how it came into being or how it came to be in Mr McKenzie's possession. The prejudice Mr Eaton contends for is that this was a statement of a co-accused and Mr McKenzie was denied an opportunity to challenge that statement by cross-examination of Mr Newton.

[15] The inability to cross-examine will always be the case with co-conspirators' statements and therefore this is not a basis for exclusion. In any event, we accept the Crown submission that the probative value of the note was high.

¹¹ The Crown points to a number of factors, including the \$180,000 loan agreement which, after a short period, required the repayment of some \$324,000. Mr Newton was unemployed and there was no evidence of any other source of income sufficient to make repayments. A cash sum of \$37,970 had also been found at Mr McKenzie's address (consistent with being part of the \$50,000 part repayment of the loan referred to in the note). The cash was tied in coloured rubber bands, in common with other wads of cash seized during the operation from other co-accused.

Reasonableness of verdict

[16] Nothing in the submissions made on behalf of Mr McKenzie undermines the Court of Appeal's analysis on the unreasonable verdict point.

Result

[17] The application for leave to appeal is declined.

Solicitors:
Mortlocks for the Applicant
Crown Law Office for the Respondent