ORDER PROHIBITING PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF THE PARTIES AND THE CHILD.

IN THE SUPREME COURT OF NEW ZEALAND

SC 64/2014
[2014] NZSC 116

BETWEEN	AD Appellant
AND	THE QUEEN Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: F P Hogan for Applicant
J E Mildenhall for Respondent

Judgment: 22 August 2014

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty of causing her daughter (then aged eight months) grievous bodily harm with reckless disregard for her safety. This was following a retrial as the jury at her first trial had not been able to agree. Her appeal against conviction was dismissed by the Court of Appeal.[1] The proposed appeal to this Court is against the rejection by the Court of Appeal of her contention that the verdict against her was unreasonable.

[2] At the time the child suffered her injury, she was in the care of the applicant. The applicant and child were living at the home of the child's father, who was also in the house at the time of the injury. The applicant's explanation for the injury was

1 *AD v R* [2014] NZCA 223 (Harrison, Courtney and Clifford JJ).

that the child, who had been sitting in a child-sized armchair, had stood herself up using the chair for support and fallen over forwards, striking her head on the carpet. The child was admitted to hospital where a CT scan showed an acute subdural haemorrhage at the rear of her brain and, towards the front, chronic subdural collections (of fluid of some kind, possibly blood and/or spinal fluid). This was consistent with more than one episode of trauma. She also had retinal haemorrhaging in both eyes.

[3] The child's father's brother gave evidence which, if accepted, would have exonerated the applicant. This evidence was, however, not consistent with what he had told the police or his evidence at the applicant's first trial.

[4] At the applicant's first trial, the trial Judge (Andrews J) ruled that the evidence in respect of the subdural collections was not admissible as evidence that the applicant had a propensity to injure her daughter. The point was not revisited at the retrial but there was, apparently, no objection to the admissibility of the evidence.

[5] The Crown case was that the injuries were such as to be explicable only by an assault by the applicant on the child. There was much expert evidence on this point. In dismissing the appeal ground that the verdict was unreasonable, the Court of Appeal commented:

> [29] … it was for the jury to determine on all the evidence judged against its own collective life experiences and evaluative skills whether [the applicant's] explanation might possibly raise a reasonable doubt.
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> …
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> [33] … Certain immutable facts in combination would have enabled a jury to draw an inferential conclusion of guilt in the absence of a compelling explanation to the contrary. In particular we refer to: (1) the severity of [the child's] injuries; (2) the multiple subdural haemorrhages of different densities, consistent with more than one episode of trauma; (3) the separate existence of retinal haemorrhaging; and (4) [the child's] fall on to carpet, a relatively soft surface, rather than a wooden or concrete floor. And the jury would well understand the force of [an expert witness's] observation that infants who are unable to walk do not fall forward like a pole in an arc (a defence hypothesis) but rather crumple because they lack strength in their joints.

[6] Counsel for the applicant suggested that paragraph [29] of the Court of Appeal judgment is inconsistent with the right to be presumed innocent. We disagree. The Crown had produced a circumstantial case which pointed to guilt. The applicant sought to rebut that case with an innocent and accidental explanation for the injuries. One way of approaching the case was to consider whether that explanation might possibly be true.

[7] At paragraph [33] of its judgment, in the passage we have set out above, the Court of Appeal referred to what had been described in evidence as "subdural collections" as "subdural haemorrhages". There is also complaint that when the Court of Appeal used this evidence as indicative of more than one episode of trauma, it was relying on propensity reasoning of the kind rejected by Andrews J at the first trial.

[8] The point made by the Court of Appeal that what was found on the CT examination was consistent with more than one episode of trauma is supported by the evidence which was led at trial and is not affected by the conflation of subdural haemorrhages and subdural collections. More generally, that this was consistent with more than one episode of trauma was legitimately part of the Crown case as it reflected adversely, at least to some extent, on the accidental injury theory.

[9] The applicant has advanced other complaints about the facts or comments as stated by the Court of Appeal in paragraph [33] which we can deal with briefly:

(a) There is a complaint about the word "severity" in relation to the child's injuries. It is clear, and indeed, acknowledged, that the injuries were severe.

(b) There is a complaint about the reference to "retinal haemorrhaging". On the evidence referred to by the Court of Appeal[2] this was indicative of non-accidental injury.

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[2] At [16].

(c) There is a complaint about the expression "relatively soft surface". The carpet was described in evidence as "old and worn and hard" but it did have an underlay and the relativity comparison made by the Court of Appeal was with a "wooden or concrete floor" as opposed to other carpeted surfaces.

(d) The applicant says that the "arc" explanation was what she advanced in her statement and that it was a summary of what had occurred and not a "defence hypothesis". This is a semantic issue which does not address the substance of the comment made by the Court of Appeal.

[10] There is no point of public or general importance in the case and no appearance of a miscarriage of justice.

Solicitors:
Crown Law Office, Wellington for Respondent