**NOTE: PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF WITNESSES UNDER 17 YEARS OF AGE PROHIBITED BY S 139A OF THE CRIMINAL JUSTICE ACT 1985.**

**NOTE: ORDER OF GILBERT J RESTRICTING PUBLICATION OF THE APPLICANT'S NAME TO HER CORRECT SURNAME "FILIHIA" REMAINS IN FORCE.**

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 94/2014**
**[2014] NZSC 154**

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| BETWEEN | MARIAM TOHUIA FILIHIA<br>Applicant |
| AND | THE QUEEN<br>Respondent |

Court: William Young, Arnold and O'Regan JJ

Counsel: M M Wilkinson-Smith for Applicant
D J Boldt and K A Courteney for Respondent

Judgment: 29 October 2014

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

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**REASONS**

[1] The applicant was found guilty of the murder of a boy to whom we will refer as Terepo. He was born on 29 October 2010 and was in the care of the applicant (a) from time to time between February and 30 September 2011 and (b) from 31 October to 4 November 2011. At around 9.30pm on 4 November, the applicant and her husband took Terepo to a medical centre. He was extremely ill. He died two days later. The cause of death was blunt force trauma to the head. The medical evidence showed that he had a chronic subdural haemorrhage which had been caused some weeks at least before 4 November and more recent injuries consisting of a

fractured skull, an associated acute subdural haemorrhage, haemorrhaging in his eyes and bruising (behind his left ear).

[2] The applicant stood trial on two charges: (a) that between 1 May and 30 September 2011 she, with reckless disregard for his safety caused Terepo grievous bodily harm (being the chronic subdural haemorrhage) and (b) that she murdered Terepo. She was found not guilty on the first count but guilty on the second. She was later sentenced to life imprisonment with a minimum period of imprisonment of 17 years. Her appeal against conviction and sentence was dismissed by the Court of Appeal[1] and she now seeks leave to appeal to this Court, again in respect of both conviction and sentence.

[3] At interview, the applicant explained the injuries which led to Terepo's death by reference to falls which she said Terepo had suffered: (a) from a deck on 1 or 2 November; (b) from the bath on the evening of 4 November; and (c) after the bath incident, into a mirror on the same evening. She did not give evidence at trial.

[4] The Crown case against the applicant encompassed the following components:

(a) Her final explanation as to the events of 4 November as provided to the police was not consistent with her earlier explanations to Terepo's family, the doctors and the police officers and there were unsatisfactory features about her account of the deck incident.

(b) There was evidence from her children to the effect that she had been violent towards both them and Terepo.

(c) The applicant was not in a good frame of mind. She was very short of money to the point that she had to borrow to pay for food. On the evening of 4 November she was in an agitated state, as indicated by texts to Terepo's grandmother. Terepo, while in the bath, had poured away most of a container of liquid soap. On the Crown case, she

[1] *Filihia v R* [2014] NZCA 401 (Wild, Ronald Young and Cooper JJ).

became angry and, probably with the use of his left ear, caused his head to strike a hard flat surface, most probably the side of the bath. This resulted in Terepo's fractured skull, the acute subdural haemorrhage and the haemorrhaging in his eyes.

(d) At about the time the fatal injuries had been caused, she sent a series of texts in which she falsely claimed not to be at home.

(e) The medical evidence was inconsistent with her falls explanation and her general account of events.

[5] The basis of the proposed appeal against conviction is twofold:

(a) A failure by the defence to explore fully at trial the possibility that Terepo's death was caused by a seizure; and

(b) The admission of reconstructive evidence.

[6] The medical evidence called by the Crown at trial was very detailed. The defence called a pathologist, Dr John Rutherford to give evidence. As well, the defence had retained a paediatrician and an ophthalmologist who assisted counsel with cross-examination but did not give evidence. Dr Rutherford's thesis was that Terepo's injuries were not necessarily inconsistent with the defence's falls explanation as the fractured skull and acute subdural haemorrhage may have been caused by the fall from the deck with the subsequent fall from the bath triggering a fatal re-bleed. The substance of this evidence had been put to the Crown witnesses. But in his evidence he also suggested another cause of death – a seizure associated with a disturbance of electrical activity caused by the chronic subdural haemorrhage. This theory had not been put to the Crown witnesses. There followed a voir dire at which Dr Rutherford made it clear that he saw this as a possible separate and different cause of death.

[7] Defence counsel made a deliberate decision not to pursue this theory. Counsel told the Court of Appeal that this was because it did not explain the

haemorrhaging in Terepo's eyes (which was indicative of major trauma). In the result the prosecutor did not cross-examine Dr Rutherford on the point and Dr Kelly, one of the Crown medical witnesses produced, by consent, a written reply which described Dr Rutherford's theory as "incredibly unlikely". In the course of this, he made the general point that a child is extraordinarily unlikely to die of a seizure.

[8] The applicant's position is that trial counsel was wrong not to pursue the seizure theory. In the Court of Appeal, counsel for the applicant produced a brief of evidence from Dr Ogilvie. While Dr Ogilvie disagreed with the general point made by Dr Kelly – as to the improbability of any child dying of a seizure – he considered the seizure theory in this particular case to be "extremely unlikely" and he was of the opinion that Terepo died as a result of "major trauma to his head".

[9] In assessing this aspect of the case, it is important to recognise that the case against the applicant did not turn solely on the medical evidence. And on the basis of the evidence of Dr Rutherford, there was at least an evidential basis for the defence's explanation of Terepo's injuries. In this context, the seizure theory would not have added much to the defence, particularly as, at its highest, it provided an "extremely unlikely" explanation for Terepo's death. More generally, the whole issue was fully traversed in the judgment of the Court of Appeal which concluded that there was no error on the part of trial counsel and that the failure to pursue the seizure theory did not give rise to a miscarriage of justice. We see no appearance of error in that analysis.

[10] In the course of a police interview the applicant showed the police at her house how she said that Terepo fell from the bath. In doing so she used a doll. Later in the investigation, the police obtained a mannequin of approximately the same height as Terepo and the mannequin was placed beside the bath and in the bath. Photographs and DVDs recording these exercises were shown to the jury. The applicant's challenge to the admissibility of this evidence was carefully reviewed by the Court of Appeal and dismissed. Again we see no appearance of error in the analysis.

[11] The minimum period of imprisonment of 17 years was imposed under s 104 of the Sentencing Act 2002 which was engaged because of Terepo's particular vulnerability (as a young child in the applicant's care). A minimum period of imprisonment of 17 years was thus required unless the sentencing judge was satisfied that its imposition would be "manifestly unjust". The sentencing Judge was not so satisfied. The applicant's position was not assisted by the lies she told (a) when asserting that she had been at work at the time of the fatal assault and (b) in her explanations to Terepo's family and the doctors who treated him when he was first admitted. These lies were told at a time when Terepo was still alive. The applicant has no relevant prior convictions and it is reasonable to assume that she had not intended to kill Terepo but there was no evidence of any other mitigating factors. The Judge's approach was reviewed carefully by the Court of Appeal.

[12] The proposed sentence appeal does not involve a question of public or general importance and there is no appearance of a miscarriage of justice.

Solicitors:
Crown Law Office, Wellington for Respondent