IN THE SUPREME COURT OF NEW ZEALAND

SC 97/2015
[2015] NZSC 164

BETWEEN	JEREMY GEORGE EDWARD MCLAUGHLIN Applicant
AND	THE QUEEN Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: R M Lithgow QC for Applicant
M D Downs for Respondent

Judgment: 3 November 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] During September and October 2011, the applicant was in a relationship with Patricia Bayliss. He and Ms Bayliss parted on bad terms by early November. On 10 November, Ms Bayliss' 13 year-old daughter Jade did not go to school because she was ill. Instead she stayed at home, at the house where she, her two younger siblings and their mother lived. On the same day the applicant, having waited until the two younger children left for school and their mother for work, burgled the house and stole a number of items, including large televisions, one of which was taken from Jade's room. He then pawned some of the items which he had stolen. He also visited a mall. Jade's empty wallet was later found near where he had parked his car. He then acquired a little under 10 litres of petrol and a lighter and returned to the

house. While there, he stole some other items and then set the house alight using the petrol and the lighter.

[2] When the fire brigade attended the fire, Jade's body was found in the house. She had been murdered, the cause of death being strangulation with a ligature and the stuffing of socks in her mouth. The applicant's DNA was found under Jade's fingernails. Also found there was material which was probably blood, although this could not be confirmed by analysis. In the absence of evidence suggesting that Jade had left the house and given the clothes she was found in, it was open to inference that she had been in the house at the time of the burglary. It was not likely that the applicant could have committed the burglary and removed the items which he stole without attracting Jade's attention. She, however, did not contact her mother in the aftermath of the burglary. On the evidence as a whole, there would have been very little opportunity in terms of time for anyone other than the applicant to have entered the house on 10 November at any time that could have been relevant to Jade's murder.

[3] When questioned by the police on the evening of 10 November, the applicant denied having been at the house that day.

[4] At the commencement of his trial the applicant pleaded guilty to burglary and arson but denied murder. During the trial he gave evidence acknowledging that he had burgled the house and had later returned to it and set it alight. He claimed not to have seen Jade on 10 November on the two occasions when he entered the house. The defence thus rested on the proposition that on the same day as he burgled and later set fire to the house, another person must have entered the house and murdered Jade in one of the limited opportunities available on the evidence.

[5] On the scientific evidence, the DNA could have come directly from the applicant in the course of a struggle with Jade (direct transference) or it could have resulted from indirect transference, picked up from deposits of the applicant's DNA in the house (or clothing left in the house) associated with him having spent time there. The scientific evidence was neutral as to the comparative likelihood of direct or indirect transfer. On the Crown case, of course, the DNA came to be under Jade's

fingernails as a result of direct transference. This theory was (a) at least consistent with the scientific evidence; (b) supported to some extent by evidence as to the practicalities of indirect transference (including for instance by reference to Jade's hygiene practices); and (c) supported strongly by the other evidence in the case which pointed compellingly to the applicant being the murderer.

[6] The applicant was found guilty at trial and a subsequent appeal against conviction was dismissed by the Court of Appeal.[1] He now seeks leave to appeal to this Court.

The proposed appeal

[7] The proposed grounds of appeal rest on:

(a) The treatment by the prosecution and Judge of the DNA evidence;

(b) The way the Judge summed up as to lies;

(c) The absence of a direction under s 32 of the Evidence Act 2006 in relation to the statement of 10 November; and

(d) The balance of the summing up.

The treatment by prosecution and Judge of the DNA evidence

[8] At trial the prosecution, while acknowledging that there were two possible explanations for the presence of the DNA, placed some emphasis on the DNA evidence and advanced the proposition that it was for the jury to determine how the DNA came to be under Jade's fingernails by reference to all the evidence in the case. The primary complaint of the applicant on this aspect of the case is that the Judge should have told the jury that the DNA evidence did not assist in the identification of the murderer, something which he did not do.

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1 *McLaughlin v R* [2015] NZCA 339 (Randerson, French and Cooper JJ) [*McLaughlin* (CA)].

[9] We think it clear that the Judge was not required to direct the jury in this way. The DNA evidence was, as the Court of Appeal pointed out,[2] a single strand of evidence and the jury was entitled to evaluate in the overall context of a compelling Crown case.[3]

The lies direction

[10] On the defence case, the lies the applicant told the police on 10 November were explicable on the basis of (a) his desire to avoid criminal responsibility for the burglary and arson that he had committed and (b) a fear of being wrongly accused of her murder. In the opinion of the Court of Appeal, counsel for the defence had requested the Judge to sum up in accordance with s 124(3) of the Evidence Act,[4] a view which, for present purposes, we accept. The Court of Appeal also concluded the Judge did not direct in terms of s 124(3)(c) that the jury should not necessarily conclude that "just because [the applicant had] lied" he was guilty.[5] Despite this conclusion, the Court held that, in the context of the case as a whole, the misdirection was of insufficient materiality to warrant allowing the appeal. This conclusion was reached following a careful analysis of the evidence.[6] As a result of its analysis, the Court concluded that a guilty verdict was the only reasonably possible verdict on the evidence as a whole.[7] We see nothing in the applicant's arguments which would warrant us granting leave to appeal on this issue.

[11] We add that we have distinct reservations whether there was a misdirection. Certainly the Judge did not use the exact language of the subsection. The Judge did, however, make it perfectly clear to the jury that they should not necessarily find the applicant guilty "just because" he had lied.

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2 *McLaughlin* (CA), above n 1, at [34].
3 See *R v Guo* [2009] NZCA 612 at [49]–[50]. This approach broadly accords with that taken in Australia (see *Shepherd v R* (1990) 170 CLR 573) and Canada (see *R v Morin* [1988] 2 SCR 345).
4 *McLaughlin* (CA), above n 1, at [45].
5 At [47].
6 See [48]–[56].
7 In accordance with *Matenga v R* [2009] NZSC 18, [2009] 3 NZLR 145.

The absence of a s 32 direction in relation to the statement of 10 November

[12] The applicant maintains that the Judge should have given a direction under s 32 of the Evidence Act in relation to the applicant's statement to the police made on 10 November. Section 32 applies where a defendant has not answered questions put in the course of an investigation of an offence or has not disclosed a defence before trial. The Judge did give the required direction in relation to occasions in which the applicant had exercised his right of silence after 10 November but did not do so in the context of the statements actually made. The Court of Appeal held he was not required to do so.[8]

[13] Counsel for the applicant described the applicant's lies on 10 November as "hopeless" and said that where "the method of interview avoidance behaviour" consists of hopeless lies, s 32 applies. But even "hopeless lies" are likely to affect a jury's assessment of the credibility of the liar. The impact on credibility was a primary focus of the Judge's direction and such impact is not the subject of s 32. And, in any event, an analysis of lies as (a) just a "method of interview avoidance behaviour" and (b) thus engaging s 32 would result in that section trumping s 124. In this respect we see no point of law of general or public importance and no appearance of a miscarriage of justice.

The balance of the summing up

[14] The applicant's arguments in this respect were addressed and rejected by the Court of Appeal.[9] We see no appearance of error in the judgment of the Court of Appeal and there is nothing in the arguments which would warrant a grant of leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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8 *McLaughlin* (CA), above n 1, at [62]–[64].
9 At [65]–[70].