

IN THE SUPREME COURT OF NEW ZEALAND

SC 83/2015
[2015] NZSC 175

BETWEEN SHANE JAMES OLD
Applicant

AND THE QUEEN
Respondent

Court: Elias CJ, Glazebrook and Arnold JJ

Counsel: R A Barnsdale for Applicant
S K Barr for Respondent

Judgment: 18 November 2015

JUDGMENT OF THE COURT

A The application for an extension of time within which to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] At a jury trial before Judge Rollo, the applicant, Mr Old, was found guilty of one count of causing grievous bodily harm with intent to cause grievous bodily harm and one count of assaulting a police officer with intent to obstruct him in the execution of his duty. He was sentenced to a term of imprisonment of eight and a half years, with a minimum period of imprisonment of four years.¹ Mr Old's appeal to the Court of Appeal against his conviction on the grievous bodily harm count was unsuccessful.² He now seeks leave to appeal to this Court in respect of that count only. His application was filed several weeks out of time, so that he needs an extension of time, which we grant.

¹ *R v Old* DC Tauranga CRI-2014-019-934, 12 November 2014.

² *Old v R* [2015] NZCA 252 (Wild, Venning and Williams JJ).

[2] The victim was found by an associate in his bed, badly beaten mainly about the head. The victim told the associate that he had been beaten up by Shane Old, whom he had known for four or five years and with whom he had lived for some months. However, when asked by another associate what had happened, he replied that he could not remember anything. The victim then told the attending police officer that he had been beaten up by Mr Old, but said that he did not want anything done about it. At hospital, he gave a detailed account to another police officer of what had happened, again saying that Mr Old had assaulted him, and completed a written statement to the same effect the following day.

[3] The victim suffered significant head injuries as a result of the assault. At trial the victim said that while he could remember waking up in hospital, he could not remember anything else – not the assault nor making his statements to police. The victim’s statements were admitted into evidence.

[4] On appeal, Mr Old contended that the statements should not have been admitted. He argued that because of his mental condition, the victim was “unavailable” to give evidence within the meaning of s 18 of the Evidence Act 2006. Accordingly, the four statements in which the victim identified Mr Olds as the assailant were hearsay statements and should have been ruled inadmissible because the circumstances relating to them did not provide reasonable assurance that they were reliable. The Court of Appeal rejected this contention.³ It noted that the victim was the first witness for the prosecution. He had been cross-examined at some length by defence counsel, who had obtained some valuable answers. In particular, when asked in the course of cross-examination whether he believed that Mr Old had assaulted him, the victim replied:

No. We’d been ... friends for too long for him to have done that.

[5] Mr Old seeks leave to appeal to this Court on this ground and also on the ground that the prosecutor improperly cross-examined the victim about his statements, in particular the written statement.

³ At [14].

[6] We are not satisfied that it is necessary in the interests of justice that we hear and determine this appeal. In relation to the first ground, we do not consider that it raises any issue of general or public importance, nor do we consider that there is any risk of a substantial miscarriage of justice. As the Court of Appeal recognised, a person may suffer from a mental disability of such a nature that, in practical terms, he or she is “unavailable” to give evidence for the purposes of s 18.⁴ The victim is in a different position, however. While he had little or no recollection of the details of the assault (as can occur with those who suffer serious head injuries), he was able to give evidence on other relevant matters, unimpaired. Moreover, his statements identifying Mr Old as his assailant were made shortly after the assault to three different people.

[7] As to the point that the prosecutor improperly cross-examined the victim by putting leading questions to him, the Crown notes that this appears to be a new point and submits that this Court will not usually grant leave on a ground not raised in the Court of Appeal.⁵ In any event, we see nothing in the point as the prosecutor was clearly entitled to put the written statement to the victim and to direct the victim’s attention to particular parts of the statement. This does not amount to improper cross-examination.

[8] The application for an extension of time within which to apply for leave to appeal is granted. The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁴ At [17].

⁵ *Pavitt v R* [2005] NZSC 24 at [4].