IN THE SUPREME COURTOF NEW ZEALAND

SC 88/2014
[2015] NZSC 38

BETWEEN		HELEN ELIZABETH MILNER Applicant
AND		THE QUEEN Respondent

Hearing:	16 February 2015
Court:	Elias CJ, William Young, Glazebrook, Arnold and O'Regan JJ
Counsel:	R G Glover, M I Sewell and A C Kelland for Applicant M J Lillico and K J Basire for Respondent
Judgment:	16 April 2015

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Helen Milner, was charged with the murder of her husband, Philip Nisbet, on 4 May 2009 and two charges of his earlier attempted murder. At the trial it was accepted that Mr Nisbet had died from an overdose of the drug promethazine hydrochloride, sold under the trade name Phenergan. The Crown case was that Ms Milner drugged Mr Nisbet without his knowledge. The defence case was that the drug had been self-administered and the death was suicide. The jury rejected the defence contention and convicted the applicant of murder and of one of the counts of attempted murder.

[2] Ms Milner appealed to the Court of Appeal against both convictions. Ms Milner appealed the murder conviction on the basis that the verdict was unreasonable because the Crown had not proved beyond reasonable doubt how the

drug, which in the quantities required to kill was bitter, had been administered without Mr Nisbet's knowledge. The appeal against the attempted murder conviction stood or fell with the appeal against the conviction for murder. The Court of Appeal dismissed the appeal.[1] It held that the manner of administration of the drug was not an element of the offence and was not one of the rare collateral circumstances which must be proved beyond reasonable doubt illustrated by Turner J in *Thomas v the Queen*[2] by reference to *R v Dehar*,[3] a case concerning reliance on lies. The Court considered that the question how the drug was administered was "not of the same character"[4] as the lies in issue in *Dehar* and was "just a factor to be assessed in the context of the other circumstantial evidence".[5] The issue had been fully ventilated at the trial and the trial Judge had placed it squarely before the jury by directing the jury it had to be sure that Ms Milner had drugged Mr Nisbet "with Phenergan without his knowledge".[6] The Court set out at some length the strong circumstantial evidence against Ms Milner.[7]

[3] Ms Milner sought leave to appeal to this Court against the Court of Appeal judgment. The sole ground in the application for leave to appeal was that the mode of administration of the drug, although not an ingredient of the offence of murder, was so fundamental to the Crown case that the verdicts were unsafe unless the Crown established beyond reasonable doubt how Ms Milner administered the drug to Mr Nisbet without his knowledge and despite his history of anxiety which was likely to have made him suspicious.

[4] The submissions later filed in support of the application for leave to appeal raised a further matter which had emerged after the notice of application for leave to appeal had been filed. Counsel for Ms Milner was contacted by a forensic pathologist in the United States, Dr Wigren, who had formerly worked in New Zealand and who had read reports of the case. Dr Wigren questioned whether it was in fact promethazine that had caused Mr Nisbet's death. Dr Wigren indicated that he

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1 *Milner v R* [2014] NZCA 366 (Ellen France, Randerson and Harrison JJ).
2 *Thomas v The Queen* [1972] NZLR 34 (CA).
3 *R v Dehar* [1969] NZLR 763 (CA).
4 *Milner v R* [2014] NZCA 366 at [21].
5 At [22].
6 At [22].
7 At [25]–[53].

had discussed the case with an expert in toxicology, Dr Karch, who shared his doubts. This was the first time that there had been any indication by an expert that there could be doubt about the cause of death. Neither Crown nor defence experts consulted for the purposes of the autopsy or trial had questioned the cause as being ingestion of promethazine. Much of the circumstantial evidence relied upon by the Crown at the trial had concerned Ms Milner's access to and handling of Phenergan. Indicating that they were unsure how to proceed, counsel for Ms Milner attached a summary of the expert views obtained and sought directions from the Court. Subsequently, affidavits by Dr Wigren, and Dr Karch were filed with the Court on behalf of the applicant and were subsequently responded to by affidavits from the Crown expert witnesses Dr Sage, a pathologist, and Dr Russell, a forensic toxicologist. A reply affidavit was filed for the applicant by a British toxicologist, Dr Allan.

[5] In the meantime, by minute of the Court, counsel for both parties were asked to address how the Court should deal with the indicated further ground based on doubt as to the cause of death.[8] The minute asked counsel to consider whether it should be dealt with as part of the leave application or whether it should be left to be advanced in a separate application to the Court of Appeal, perhaps under the inherent powers invoked in *R v Smith.*[9] In a further minute the Court set this question down for an oral hearing at which counsel would be expected to address whether the proposed ground for questioning the verdict:[10]

> (a) falls within the principles in *R v Smith*;
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> (b) satisfies the criteria for leave to appeal in s 13 of the Supreme Court Act 2003; or
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> (c) is more appropriately made the subject of an application to the Governor-General in Council under s 406 of the Crimes Act 1961.

[6] At the oral hearing, and in accordance with the direction given in the minute, counsel were heard on the question how the potential new point might be advanced, leaving the ground of proposed appeal originally advanced to be considered by the

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8 Minute of the Court dated 24 September 2014.
9 *R v Smith* [2003] 3 NZLR 617 (CA).
10 Minute of the Court dated 24 October 2014.

Court on the basis of the written submissions. This judgment covers both matters: the application for leave to appeal based on the proof necessary for administration of the drug by Ms Milner (on the continued assumption that it caused the death of Mr Nisbet); and the proper process for advancing the recent expert doubts expressed about the cause of death.

Proof of method of administration of promethazine

[7] The matter sought to be raised in the proposed appeal is the same issue argued in the Court of Appeal. It relied on the acknowledgement by Turner J in *Thomas v The Queen* that there may be exceptional cases, of which the example given by Turner J was *R v Dehar*, where a circumstance may be of such significance that, even though it is not an element of the offence which the Crown must prove beyond reasonable doubt, it is appropriate to direct the jury to apply the same standard as for an essential element of the offence.

[8] The existence of a power to give a direction as to proof of a particular circumstance in a case where it is in the interests of justice to do so is not challenged. It is part of the inherent powers of the court to ensure that guilt is established by the Crown beyond reasonable doubt. Where a disputed circumstance is not an element of the offence charged however there must be some exceptional reason particular to the case to justify such a course, as Turner J in *Thomas* made clear. Such an exceptional reason would arise if in the absence of such proof of a particular fact, there must necessarily be a reasonable doubt about the verdict of guilty.

[9] The principle is not in issue. In its application to the facts of the particular case by the Court of Appeal there is no point of general or public importance which justifies leave being granted by this Court. The reasons given by the Court of Appeal for rejecting the submission that manner of administration of the drug needed to be proved beyond reasonable doubt are compelling.

[10] Proof of the manner of administration was not comparable to the fact of lying in issue and its particular importance in *R v Dehar*, where without proof that the defendant had lied in his evidence there was insufficient evidence to establish the

charges beyond reasonable doubt. There was, too, risk in *Dehar* of impermissible reasoning by the jury. By contrast, the circumstantial evidence against Ms Milner, as the Court of Appeal said, was substantial. It included expressions of intent by her to others, purchases of promethazine and the presence of promethazine in Mr Nisbet's system. The question how the drug was administered without Mr Nisbet's knowledge was one circumstance to be set in the wider context. It was fully canvassed at the trial. The jury was directed by the Judge it had to be sure that Ms Milner had drugged Mr Nisbet "with Phenergan without his knowledge". That was the fact that had to be proved to the satisfaction of the jury and to the standard beyond reasonable doubt. The jury was left in no doubt as to that requirement. There was no risk of miscarriage of justice.

[11] For these reasons leave to appeal on the ground contained in the notice of application of 23 August 2014 is declined.

The new doubts as to the acceptance of cause of death

[12] The application in relation to the new expert opinions provided to the Court is in form one for directions as to whether the correct procedure to be followed is to seek leave to appeal to the Supreme Court, make application for rehearing to the Court of Appeal, or to apply under s 406 of the Crimes Act 1961 for reference of the matter to the Court of Appeal under the Crown's prerogative of mercy. Such approach for directions from the Court is irregular. It is for the applicant to decide what course to pursue where new information throws doubt on the safety of a conviction or arises following appeal. That is not to be critical of the course taken by counsel who was taken by surprise by the unsolicited approach by Dr Wigren at a time when he had already filed an application for leave to appeal to this Court. But it means that the Court does not have a properly constituted application for the exercise of its jurisdiction. The possible applications to the Court of Appeal for rehearing or under s 406 to the Governor General are not matters appropriate for any direction by this Court. The only matter we could entertain is an application for leave to appeal on the basis of new evidence.

[13] By the time of the oral hearing, Mr Glover no longer sought to argue that it would be appropriate for the recent expert opinions to be used to seek a new hearing in the Court of Appeal. He accepted that there was no procedural error or breach of natural justice, such as would justify recourse to the inherent power exercised in *R v Smith*. Instead, we were asked to deal with the matter as one for grant of leave to appeal on the basis that the new opinions, if before the jury, would have raised a reasonable doubt and that the convictions ought therefore to be quashed and a new trial ordered. It was also argued that the proposed additional ground of appeal raised an issue of general or public importance, justifying appeal under s 13 of the Supreme Court Act, because the experts raised questions about the reliability of the procedures adopted by forensic pathologists at post-mortems in New Zealand since they were critical of the methodology used.

[14] It is clear however that, in the result, the matter is not yet capable of resolution and that any application for leave to appeal to this Court on the basis of further expert opinion as to the cause of death is premature. The opinions provided by the experts are extremely tentative and in essence do no more than raise lines of inquiry into other explanations for death which have not yet been undertaken, as indeed Mr Glover accepted in the course of the hearing. There are suggestions in the Crown affidavits in response (some of which are couched in unfortunately intemperate terms, although it has to be acknowledged that the affidavits by the applicant's experts are similarly offensive) that some of the criticisms made of the methodology of the Crown witnesses is based on misunderstanding of the facts. Whether the lines of inquiry suggested by the three experts for the applicant will yield evidence of sufficient cogency to warrant its admission on further appeal is at present quite unclear. Depending on the cogency of any evidence that emerges, there may be questions (foreshadowed by the Crown) as to its admissibility based on whether it was fresh or whether the failure to make further inquiry into alternative causes of death was a tactical choice by the defence because it was a substantial plank of the defence case that the drug was taken by Mr Nisbet and that it was too bitter for him to have been unaware he was taking it.

[15] Given the preliminary and tentative nature of the material put before us, we consider there is no basis to entertain an application for leave to appeal based on it.

If cogent evidence emerges from the further inquiries that have been suggested by the experts for the applicant, a properly constituted application for leave can be considered at that stage. That is not to suggest that the applicant should not consider further the option of recourse to s 406 of the Crimes Act instead of second appeal. The procedure under s 406 may be better suited to the investigation the experts indicate to be necessary before there could be sufficient basis for doubting the correctness of the convictions.

[16] The informal application for leave to appeal to this Court on the basis of the expert opinions provided to the Court by memorandum of 23 January 2015 is declined.

Solicitors:
Crown Law Office, Wellington for Respondent