IN THE SUPREME COURT OF NEW ZEALAND

SC 18/2015
[2015] NZSC 44

BETWEEN	RIKKI LEIGH SCOTT NGATAI-CHECK Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, Arnold and O'Regan JJ
Counsel:	W Lawson for the Applicant K J Cooper for the Respondent
Judgment:	24 April 2015

JUDGMENT OF THE COURT

An extension of time to make the application for leave to appeal is granted but that application for leave to appeal is dismissed.

REASONS

[1] Mr Ngatai-Check was found guilty, after a jury trial before Williams J, of murdering a two year old, Karl Perigo-Check, who had been left in his care. His appeal to the Court of Appeal was dismissed on 27 October 2011.[1] He now applies for leave to appeal to this Court. The application is out of time (by almost three and a half years).

Factual background

[2] The two year old, who had been asleep on the couch, had wet his pants and there was a puddle on the couch seat cover. Mr Ngatai-Check grabbed the boy and swung him away from the puddle. The boy's torso hit the edge of a coffee table,

1 *Ngatai-Check v R* [2011] NZCA 543 (Harrison, Fogarty and Simon France JJ).

breaking two ribs which in turn punctured his right lung and caused the boy to begin bleeding internally.

[3] Mr Ngatai-Check then took the boy to the toilet and left him there. The boy, after some five to ten minutes, came into the bedroom where Mr Ngatai-Check was playing video games. The boy was trailing some toilet paper. Mr Ngatai-Check lost his temper and kicked the boy in the stomach, causing him to fly back towards the wardrobe and leading to extensive injuries. The boy was then kicked again, with even more force, against the wardrobe.

[4] Mr Ngatai-Check accepted at trial that he had kicked the boy twice and that those kicks had caused injuries resulting in the boy's death. The issue at trial was murderous intent. The Crown case was that Mr Ngatai-Check meant to cause bodily injury and that he knew that the second kick could well kill the boy and that he had consciously taken that risk. The defence case was that Mr Ngatai-Check did not have the relevant intent necessary to be convicted of murder.

Grounds of proposed appeal

[5] Mr Ngatai-Check seeks leave to appeal against his conviction on the basis that the Court of Appeal gave insufficient weight to his right to a fair trial[2] when dismissing the appeal. The issue relates to the testimony of Professor Pringle, a paediatric surgeon. Mr Ngatai-Check submits that Williams J erred in declining an application to discharge the jury when Professor Pringle testified that the fatal kick was delivered "with venom". In particular, it is submitted that the Court of Appeal placed insufficient weight on the highly prejudicial effect of Professor Pringle's evidence, which in his submission had no medical basis and spoke to Mr Ngatai-Check's state of mind.

[6] It is submitted further that Mr Ngatai-Check's failure to file the necessary appeal papers within time has arisen in circumstances which ought to be reasonably excused. In an affidavit, Mr Ngatai-Check has said that he was so distraught and "shell shocked" by the Court of Appeal's decision to decline the appeal that he gave

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2 New Zealand Bill of Rights Act 1990, s 25(a).

up hope and turned his attention away from the prospect of an appeal. Furthermore Mr Ngatai-Check faced issues in obtaining legal aid and he submits that he has demonstrated prima facie merit justifying an extension of time.[3]

More background

[7] The evidence objected to was given by Professor Pringle in the following context:

> A. The blow has to have been, the object that hit the pancreas has to have deformed the anterior abdominal wall and the –
>
> Q. The front of the tummy?
>
> A. The front of the tummy, jammed the pancreas and these blood vessels right up against the unmovable object of the spine.
>
> Q. Right.
>
> A. So it's got to have moved all of that distance to do that damage.
>
> Q. And the force required to do that?
>
> A. This is a very severe blow. I, this is a, *a kick with venom* [emphasis added].

[8] Trial counsel objected to the comment and this objection was upheld by the Judge. Professor Pringle's evidence then moved to other topics. Counsel for Mr Ngatai-Check asked the Judge to discharge the jury on the basis that Professor Pringle had provided evidence of Mr Ngatai-Check's state of mind.

[9] Williams J dismissed the application, holding that the risk of prejudice could be adequately met by a firm jury direction. In his summing up the Judge said:

> Now at this point, I want to address something that Dr Kevin Pringle said in his evidence. You will recall him, he was the paediatrician. He explained the nature of Karl's injuries and talked about the force necessary in his experience to cause the injury that caused Karl's death. He said the second kick must have been delivered with venom. I have struck that comment from the record. And I want you to completely disregard it. I have taken that step because what he said was pure speculation on his part. And if you read it as going to the state of Mr Ngatai-Check's mind, it was also well beyond his brief and expertise. His expertise does not extend to what was in Mr Ngatai-Check's mind when he delivered the second kick. All he can say

[3] *Police v Hill* [1990] 6 CRNZ 280 (HC).

> is that the kick was delivered with significant force. That is a factor for you to consider but that is all. Beyond that you are the ones to make the judgment, not him. You, unlike Dr Pringle, have heard all of the evidence in this case and you must take into account all that evidence when you reach your conclusions.

Court of Appeal decision

[10] The Court of Appeal, on the issue of Professor Pringle's evidence, concluded that the trial Judge's decision not to discharge the jury was a discretionary one and that appellate courts will only intervene in limited circumstances.[4] The Court said that Williams J was familiar with the trial dynamics and best placed to decide how to address the inadmissible evidence and his decision on that matter was thus entitled to particular respect.[5]

[11] The Court considered the objectionable phrase "added nothing more than what was obvious from [the expert's] preceding and unobjectionable observation that the blow was delivered with considerable force".[6] The observation was thus largely inconsequential against the background of the evidence. The Court held further that the decision to direct the jury on the point was a course reasonably available to the Judge;[7] that the direction was emphatic; and that the Court proceeds on the premise that juries generally follow directions.[8] The Court was not satisfied that there was any risk of a miscarriage of justice as a result of the course taken by Williams J.

Discussion

[12] The issue for an appellate court in cases of this kind is whether there is a risk of a miscarriage of justice by the admission of the inadmissible evidence. We agree with the Court of Appeal that there is no such risk in this case, given the nature of the evidence and the strong direction by the Judge. Nor does the proposed appeal raise any issue of general or public importance as it is confined to its particular facts.

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4 *Ngatai-Check v R*, above n 1, at [32]. As we note later, however, the real issue for an appellate court is whether there is a risk of a miscarriage of justice.
5 At [32].
6 At [34].
7 At [36].
8 At [35].

Result

[13] In the circumstances, we grant an extension of time to make the application for leave to appeal but that application for leave to appeal is dismissed.

Solicitors:
Lance Lawson, Rotorua for Applicant
Crown Law Office, Wellington for Respondent