IN THE SUPREME COURT OF NEW ZEALAND

SC 43/2017
[2017] NZSC 101

BETWEEN		TONY DOUGLAS ROBERTSON Applicant
AND		THE QUEEN Respondent

Court: Elias CJ, Glazebrook and Ellen France JJ

Counsel: S N B Wimsett for Applicant
M L Wong for Respondent

Judgment: 4 July 2017

JUDGMENT OF THE COURT

A The application for an extension of time to file the application for leave is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] Mr Robertson was convicted after trial of the rape and murder of Blesilda Gotingco. Mr Robertson hit Mrs Gotingco with his car. He took her to his home where she was raped and then stabbed. Mr Robertson appealed unsuccessfully against his conviction and sentence to the Court of Appeal.[1] He now seeks leave to appeal against conviction to this Court out of time on a ground not raised in the Court of Appeal, namely, that manslaughter should have been left to the jury.

[1] *Robertson v R* [2016] NZCA 99 (Harrison, Miller and Cooper JJ).

Background

[2] The essential features of the Crown case for these purposes were as follows: Mr Robertson deliberately ran down Mrs Gotingco; he wanted to "pinion" her to take her home and rape her; she was alive when she was raped and then stabbed (and had to be subdued); and the knife wounds resulted in her death.

[3] Mr Robertson gave evidence at trial. He said the running down was accidental. His evidence was that he thought that the car accident had killed Mrs Gotingco. He panicked because he was concerned about breaching the curfew conditions on his electronically monitored bail and he was high on methamphetamine. He said he stabbed Mrs Gotingco to make it look like a random killing and he never raped her. He gave as the explanation for his semen being found in Mrs Gotingco's vagina that either evidence had been mishandled or planted.

The proposed appeal

[4] The application for leave is advanced on two bases. First, that the proposed appeal raises a question of general or public importance about when directions on manslaughter must be given in murder cases. Second, it is submitted that a substantial miscarriage of justice may occur because there was no direction as to the availability of a manslaughter verdict.

[5] In relation to the latter point, the applicant says the jury could reasonably be satisfied he was guilty of manslaughter and not murder on the basis that he committed an unlawful act without murderous intent either by hitting Mrs Gotingco with his car and/or by stabbing her. He submits either or both events may have been found by the jury to be significant and operating causes of death. On the second possibility, the unlawful act relied on is an attempt to improperly interfere with human remains.[2]

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[2] An offence under s 150 of the Crimes Act 1961.

Assessment

[6] In assessing whether the criteria for leave[3] are met it is relevant to note, first, that the effect of the authorities is that, where there is a credible or plausible narrative in the evidence for a manslaughter verdict, that possibility should be left to the jury.[4] Second, nothing raised by the applicant suggests such a narrative was present in this case. As to the latter aspect, the following points can be made.

[7] The first situation advanced by the applicant relies on the running down as a substantial and operative cause of death. However, as matters transpired at trial it was not relevant whether the injuries caused by the car might also have been an operative cause of death.[5] The Crown case was that the stabbing killed Mrs Gotingco. The evidence at trial on this aspect was carefully reviewed by the Court of Appeal in the context of considering whether the directions of the trial Judge, Brewer J, were correct in treating the knife wounds as the only possible immediate cause of death. The Court found this was correct. The Court said that the evidence of the pathologist, Dr Wigren, taken as a whole was that the knife wounds were the immediate cause of death.[6] The injuries caused by the car were, as the Court of Appeal said, "severe".[7] But Dr Wigren said those injuries would not have killed Mrs Gotingco immediately and she could even have recovered.

[8] It is also relevant that the jury were directed to first decide if the stabbing was a cause of death.[8] The verdict means that they answered this question affirmatively.

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3 This Court has indicated previously that leave for a second appeal will not usually be permitted on grounds not raised before the Court of Appeal: *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643 at [2].

4 *R v Malcolm* [1951] NZLR 470 (CA); *Clark v R* [1971] NZLR 589 (CA); and *R v Ji* CA381/03, 15 December 2004. See also *Mancini v Director of Public Prosecutions* [1942] AC 1 (HL) at 8; and *R v Coutts* [2006] UKHL 39, [2006] 1 WLR 2154.

5 In the context of the sentence appeal, the Court said it was not satisfied beyond reasonable doubt that the running down was deliberate: *Robertson*, above n 1, at [78].

6 At [36]. This evidence also confirmed Mrs Gotingco was alive when she was stabbed; for example, there was evidence the inhaled blood came from the knife wounds to her neck, not from her facial injuries, and there was other evidence indicating her heart was still working. She had also been strangled, indicating she had had to be subdued.

7 At [36].

8 On the cause of death, the questionnaire asked whether the jury was "sure that Mr Robertson killed Mrs Gotingco by inflicting knife wounds on her".

[9] In these circumstances Mr Robertson, who accepted that the stabbing was deliberate, would be guilty of murder unless he lacked the necessary mens rea. That would be the case if the jury accepted as a reasonable possibility Mr Robertson's evidence that he believed Mrs Gotingco was dead when he stabbed her. This is essentially the second of the situations advanced by the applicant. The jury by their verdict must have rejected that contention as a reasonable possibility.

[10] This issue was put to the jury in the following terms:

> Are you sure that when Mr Robertson inflicted the knife wounds which killed Mrs Gotingco he meant to kill Mrs Gotingco?
>
> - If your answer to this question is "yes", then you have found the charge of murder proved and you must return a verdict of "Guilty of Murder".

[11] If the jury were not sure, a verdict of manslaughter would normally follow. In this case, for reasons not relevant here, the jury were advised that the verdict, if they were not sure, was not guilty. This direction explains the absence of a manslaughter verdict. But this operated in favour of Mr Robertson – if the jury had considered it a reasonable possibility he thought he was stabbing a dead body then he would have been acquitted.

[12] Importantly, the jury verdict shows that the jury were satisfied that Mr Robertson knew Mrs Gotingco was alive because they were directed to decide whether or not they were sure he meant to kill her. That assessment is necessarily also inherent in the guilty verdict on the rape charge. This analysis is not affected by the argument that the unlawful act is interfering with a dead body. That is because the interference relied on would be the stabbing, so the same analysis applies.

[13] Mr Robertson's account put in issue two key questions on the murder charge, that is, whether the stabbing killed Mrs Gotingco[9] and, whether, at the time he stabbed her, Mr Robertson believed Mrs Gotingco was dead. The questions asked of the jury required answers that excluded to the requisite criminal standard both of these propositions. For this reason there is no risk of a miscarriage of justice.

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[9] Mr Robertson did accept at one point in his evidence in cross-examination that if Mrs Gotingco was alive then the knife wounds killed her.

Result

[14] The application for leave is well out of time but the delay is largely explained.[10] In the circumstances, an extension of time to file the application for leave is granted. The application for leave is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[10] We note also that Mr Robertson had earlier filed what would have been a second appeal in the Court of Appeal. Miller J in a minute of 5 April 2017 noted he could file an application for leave to bring a further appeal to the Court of Appeal. The Judge also noted this Court has jurisdiction to hear an appeal on a new ground (citing *Kanhai v R* [2005] NZSC 25 at [6]).