IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 83/2020
[2020] NZSC 159

BETWEEN	MICHAEL JOHN DENNEY Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, Ellen France and Williams JJ
Counsel:	P J Kaye for Applicant A J Ewing for Respondent
Judgment:	22 December 2020

JUDGMENT OF THE COURT

The application for recall of this Court's judgment of 9 June 2017 (*Denney v R* [2017] NZSC 85) is dismissed.

REASONS

Introduction

[1] Following a jury trial, the applicant was convicted of intentionally causing grievous bodily harm by using his vehicle to run over the complainant, Mr Blain. The applicant's appeal to the Court of Appeal against conviction and sentence was unsuccessful.[1] His application for leave to appeal to this Court against conviction was dismissed in a judgment delivered on 9 June 2017.[2] He has now filed a further application for leave to appeal to this Court. The application is brought on the basis that further evidence from the defence expert, Neil Mackay, who gave evidence at trial

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1 *Denney v R* [2017] NZCA 80 (Winkelmann, Woodhouse and Collins JJ) [CA judgment].
2 *Denney v R* [2017] NZSC 85 (Elias CJ, Glazebrook and Ellen France JJ) [SC leave judgment].

that the tyre marks at the scene of the incident could not be attributed to the applicant's vehicle,[3] shows that the verdict of the jury was unreasonable.[4]

Background

[2] The incident giving rise to the charge took place in July 2014. While at a friend's party, there was an argument between the applicant and his colleague, Mr Blain. The applicant left the party in his Suzuki four-wheel drive vehicle (similar in appearance to a small jeep). Others at the party watched while Mr Blain chased after the applicant's vehicle on foot before disappearing out of sight. Some minutes after, Mr Blain was found lying on the road with serious injuries. Sosefina Lepale, who lived nearby, told the jury she saw a person walking down the street and then, moments later, saw a vehicle similar to a jeep reverse down the street. She said that the driver was looking over his shoulder in the direction the vehicle was reversing. She then heard a loud bang, after which she could no longer see the pedestrian. Ms Lepale's evidence was that she heard the driver say "you deserve it", before driving away.

[3] In the Court of Appeal, the applicant challenged his conviction on a number of grounds, including that the jury's verdict was unreasonable. This argument was brought on the basis that the evidence of Mr Mackay at trial had established that tyre marks at the scene could not have come from the applicant's vehicle.[5] The tyre marks at the scene had been measured by a Constable who was a member of the Police Serious Crash Unit. The Constable said one tyre mark was 18.5 cm wide. Mr Mackay had concluded the tyres on the applicant's vehicle were only 14.8 cm wide. Mr Mackay also challenged the Constable's explanations as to matters that might have affected the accuracy of the Constable's measurements.

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3 In his examination-in-chief, Mr Mackay said the evidence at the scene as to the width of the tyre marks did not support the conclusion that these marks were deposited by the tyres on the applicant's vehicle. In cross-examination, Mr Mackay said he did not believe the tyre marks at the scene could be attributed to the applicant's vehicle.

4 Accordingly, the applicant says a miscarriage of justice has occurred: see Senior Courts Act 2016, s 74(2)(b).

5 Mr Mackay is qualified in road accident investigation and reconstruction. He created a mould of one of the tyres from the applicant's vehicle.

[4] The Court of Appeal was satisfied, looking at all of the evidence, that the jury's verdict was not unreasonable.

The proposed appeal

[5] The present application for leave relies on a further report from Mr Mackay dated 7 December 2017, which is a little over two years after his first report. In this second report, Mr Mackay explains that his instructions were to review the findings related to the tyre marks at the scene as outlined in the Court of Appeal judgment. Having examined those findings, Mr Mackay concludes that the tyre deposit marks found at the scene cannot be attributed to the applicant's vehicle.

[6] The applicant says that this report, which it is accepted would need to be placed in affidavit form, contains "a much more definite opinion than what [Mr Mackay] had given [at] trial" and it "effectively discounts" the possibility that the factors referred to by the Constable could have been responsible for inaccuracies in the Constable's measurements. The applicant's case is that this evidence, albeit untested, "casts a real doubt on this part [of] the chain of circumstantial evidence".[6] The applicant also says that the other evidence relied on by the Court of Appeal to support the reasonableness of the verdict leaves gaps such that the jury should have had reasonable doubt about guilt.

[7] In opposing the application, the respondent first makes the point that this application must be treated as an application for recall of this Court's earlier decision declining leave because there is no jurisdiction to entertain successive applications for leave.[7] Second, the respondent says that of the possible grounds for recall the only ground that could apply here is that for some "very special reason" justice requires that the judgment should be recalled.[8] The respondent submits that ground is not met

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6 The second report refers not only to the width of the tyres, but also deals with the presence of mud at the scene and on the applicant's tyres when photographed a few days later, the distance between the two sets of tyre marks at the scene, and the tyre patterns.

7 This Court in *Uhrle v R* [2020] NZSC 62 at [20] noted that successive applications for leave to appeal are not permitted. But, where there are proper grounds, a court may recall its earlier decision to decline leave to appeal and then consider a second subsequent application for leave.

8 Citing *Uhrle*, above n 7, at [29]. The other two grounds for recall identified in *Uhrle* were where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority; and where counsel have failed to direct the court's attention to a legislative provision or authoritative decision of plain relevance: at [29].

here where the applicant's application simply repeats the arguments considered and rejected in this Court's earlier decision.[9]

Our assessment

[8] We agree with the submissions for the respondent that the present application must be treated as an application to recall this Court's earlier judgment declining leave to appeal and that the only applicable ground for recall here is whether for some "very special reason" justice requires recall.

[9] We are satisfied that test is not met here. In the earlier decision declining to grant leave to appeal, this Court considered that there was no appearance of a miscarriage of justice arising from the Court of Appeal's assessment that, looking at all of the evidence, the jury's verdict was reasonable.[10] There is no issue about the principles applicable to that decision and nothing raised by the applicant warrants a reconsideration of that conclusion. The proposed evidence is not fresh and reflects in large part, as the applicant's submissions observe, further exploration of issues raised in Mr Mackay's earlier evidence.[11]

[10] To the extent that the second report does contain new material, there is no explanation as to why that evidence could not have been called at trial and nor, as the respondent says, is there an adequate explanation for the delay in making the present application. In any event, the evidence about the tyre marks formed only part of the Crown case.[12] Nothing raised by the applicant ultimately calls into question the reliance on that other evidence, namely, the evidence of the acrimonious argument between the two men; Ms Lepale's evidence as to what she saw and heard;[13] and that

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[9] The respondent says that this is an abuse of the appellate process, citing *Suckling v R* [2016] NZSC 133, (2016) 27 NZTC 22-071 at [4]. It also submits that the applicant's further evidence is best considered by the Criminal Cases Review Commission.

[10] SC leave judgment, above n 2, at [5].

[11] The test for the admission of fresh evidence was set out in *Lundy v R* [2013] UKPC 28, (2013) 26 CRNZ 699 at [120]. See also *Misa v R* [2019] NZSC 134 at [57], n 55.

[12] See CA judgment, above n 1, at [18]–[19].

[13] In his present application, the applicant annexes photographs of his vehicle which he says shows distinctive markings. The applicant says Ms Lepale's evidence lacks reference to "obvious striking detail", including these markings. The issue for the applicant is that the evidence of the photographs is not fresh and that similar arguments were made at trial.

of the other party-goers who found Mr Blain just minutes after the applicant left the party.

[11] In all these circumstances, this is not a case in which for some very special reason justice requires recall.

Result

[12] The application for recall of this Court's judgment of 9 June 2017 (*Denney v R* [2017] NZSC 85) is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent