IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 8/2020
[2020] NZSC 58

BETWEEN	DARRELL EDWARD JAMES DUNN Applicant
AND	THE QUEEN Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: Applicant in person
S K Barr for Respondent

Judgment: 22 June 2020

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant, Mr Dunn, was convicted by a jury of manslaughter and sentenced to seven years and six months' imprisonment.[1] His appeal against conviction was dismissed by the Court of Appeal.[2] The applicant seeks leave to appeal that decision.

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1 *R v Dunn* [2016] NZHC 2552.
2 *Dunn v R* [2019] NZCA 608 (Kós P, Venning and Thomas JJ) [CA judgment].

Extension of time

[2] The notice of application for leave was filed two weeks out of time.[3] The applicant is self-represented and has given an explanation for the delay. The Crown does not oppose an extension. We grant the application.

Background

[3] Mr Dunn and the victim, Mr Wharawhara, were homeless. On the evening of 10 November 2015, they and three others were listening to music and drinking alcohol at a picnic table in a park near the Auckland Domain. An argument broke out between Mr Dunn and Mr Wharawhara, which became a fight. It was contested at trial whether Mr Wharawhara tried to attack Mr Dunn with a knife and whether Mr Dunn subsequently kicked Mr Wharawhara in the head, but it is common ground that Mr Dunn hit Mr Wharawhara several times. Mr Dunn and the other members of the group then left the park. It was about 10 pm.

[4] Shortly after, Mr Topia (another homeless man in the park) found Mr Wharawhara lying on his back by the picnic table and attempted to resuscitate him, but without success. Mr Topia ran to alert the nearby hospital's emergency department, and was told to wait there for the ambulance so he could show them Mr Wharawhara's location. A police car was despatched to the hospital. But by the time police arrived at 10.37 pm, Mr Topia had gone.

[5] In the meantime, other homeless people in the park had checked on Mr Wharawhara and made a second call for an ambulance and the police. Another police car was despatched at 10.58 pm to investigate this report. When it arrived at the park, Mr Wharawhara could not be found. In fact, Mr Topia had returned and carried Mr Wharawhara to hospital. In the absence of a victim, Sergeant Kirtlan, who responded to the second call, stood the ambulance down at 11.14 pm.

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[3] Supreme Court Rules 2004, r 11.

[6] When Mr Wharawhara arrived at the emergency department, he was already clinically dead. Efforts to revive him were unsuccessful, and he was declared deceased at 11.19 pm.

Court of Appeal judgment

[7] At trial, the forensic pathologists (Dr Garavan called by the Crown and Dr Hamilton called by the defence) agreed that if not for Mr Dunn's attack, Mr Wharawhara would still be alive. Their views differed only as to how the attack caused Mr Wharawhara's death.

[8] For the appeal to the Court of Appeal, the defence obtained a third opinion, which was admitted by consent. Professor Duflou, another forensic pathologist, raised the possibility that death was caused by acute alcohol intoxication. This was based on research he had jointly undertaken. It showed that a blood alcohol level of 300 mg per 100 ml could be fatal, even for alcohol-tolerant individuals. This raised the reasonable possibility of an intervening cause of death unrelated to Mr Dunn's actions. Dr Garavan and Dr Hamilton disagreed with this assessment. Both had come to the view by that stage that the assault and the intoxication combined had caused Mr Wharawhara to inhale blood and stomach contents, which in turn had caused his death.

[9] The Court of Appeal did not find Professor Duflou's alternative theory cogent.[4] The overwhelming medical evidence was that there had been an assault, and Mr Wharawhara was rendered unconscious. He then inhaled blood and stomach contents, which directly caused his death.[5] Professor Duflou's evidence did not demonstrate a real possibility that death was caused independently and solely by acute alcohol intoxication.[6]

[10] The Court also dismissed arguments made by Mr Dunn personally that death could have been averted if the police or ambulance service had responded more

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4 CA judgment, above n 2, at [33].
5 At [35].
6 At [37]–[39].

promptly, and that Dr Garavan had breached the code of conduct for expert witnesses when giving evidence.[7]

The proposed appeal

[11] Mr Dunn advances multiple arguments in favour of granting leave. First, he continues to pursue the argument that the experts breached the code of conduct for expert witnesses. Second, he also continues to pursue the argument that the delay in the ambulance service, and specifically Sergeant Kirtlan's decision to stand the ambulance down, constituted an intervening cause of death. He further submits that Mr Topia carrying Mr Wharawhara could also have been an intervening cause. Third, Mr Dunn argues that the force he used was reasonable as self-defence, and alternatively that he committed the assault involuntarily under a state of automatism. Finally, Mr Dunn says that the trial Judge should have warned the jury about the reliability of the Crown's lay witnesses because they were affected by alcohol.

[12] The Crown submits, first, that the issue of intervening cause was dealt with by the Court of Appeal, which found that the assault remained an operative cause of death. There is also no basis to suggest that either Dr Garavan or Sergeant Kirtlan acted inappropriately. Second, the question of reasonable force was confronted at trial, and the Court of Appeal did not question the jury's conclusion that it was unreasonable. The question of automatism was not raised in the Court of Appeal, and Mr Dunn does not provide any medical evidence supporting it. Finally, the issue of a reliability warning was also not raised in the Court of Appeal. But in any event, the trial Judge gave the jury a general reliability warning, and it is unlikely the defence would have wished the Judge to go further given the defence also relied on witnesses who had been affected by alcohol.

Our assessment

[13] This application raises no issue of general or public importance.[8] Mr Dunn does not challenge any of the legal principles applied to his case.

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7 At [45] and [48].
8 Senior Courts Act 2016, s 74(2)(a).

[14] Nor do we consider there is an appearance of a miscarriage of justice arising out of the Court of Appeal's treatment of the arguments Mr Dunn raised in that Court.[9]

[15] The arguments relating to automatism and a reliability direction were not raised in the Court of Appeal. This Court does not permit an appeal on a ground not raised in the Court of Appeal unless there is a real possibility the ground could reveal a miscarriage of justice.[10] Neither argument suggests such a possibility in this case.

Result

[16] The application for an extension of time is granted.

[17] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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9 Section 74(2)(b).
10 *Pavitt v R* [2005] NZSC 24 at [4].