IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 140/2019
[2020] NZSC 75

BETWEEN	MIKAERE OKETOPA Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: K H Cook for Applicant
P D Marshall for Respondent

Judgment: 31 July 2020

JUDGMENT OF THE COURT

The application for an extension of time to apply for leave to appeal is dismissed.

REASONS

[1] After a trial in the High Court in Christchurch in October 1995 Mikaere Oketopa[1] was convicted, together with two other men (Richard Genge and Samuel Kirner), of the rape and murder of Anne Marie Ellens. Her body had been found in the grounds of a Christchurch school on the morning of 17 September 1994.

[2] Mr Oketopa was sentenced to life imprisonment. Both Mr Oketopa and Mr Kirner appealed unsuccessfully to the Court of Appeal against conviction.[2]

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1 At the time, Mr Oketopa was known as Michael Wayne October. He has since changed his name.

2 *R v October* CA477/95, 31 July 1996 (Eichelbaum CJ, McKay and Heron JJ) [CA judgment]. Mr Genge abandoned his appeal to the Court of Appeal against conviction for rape and the imposition of a minimum period of imprisonment for murder. The Court of Appeal subsequently declined his applications to withdraw the notice of abandonment and to extend time to appeal against the conviction for murder and the rape sentence: *Genge v R* [2017] NZCA 466 (leave to appeal declined: *Genge v R* [2019] NZSC 35).

Mr Oketopa now applies out of time to this Court for leave to appeal against the decision of the Court of Appeal.[3] He seeks an extension of time to make this application.

The trial

[3] Mr Genge accepted responsibility for the injuries inflicted on the victim and there was forensic evidence linking him with the crime scene. Neither Mr Kirner nor Mr Oketopa made any such concession and, beyond their admissions of having intercourse with the victim,[4] there was no forensic evidence linking them to the scene. The evidence was that Mr Oketopa was not previously known to Mr Genge and Mr Kirner. It was also unclear at what stage Mr Oketopa joined the group.

[4] In the absence of evidence of any direct involvement, the Crown case against Mr Oketopa was on the basis of ss 168 and 66(2) of the Crimes Act 1961. That is, it was contended that the three men had formed a common intention to commit rape and to assist each other in doing so, and that Mr Oketopa knew there was a real and substantial risk that Mr Genge could well inflict some grievous bodily injury for the purpose of committing rape and/or avoiding detection.

[5] As the submissions for the Crown record, there were three main strands to the Crown case. The first of these strands was the evidence of Anne Nicholson. Ms Nicholson said she was walking in the early hours of 17 September 1994 when she met a group of four people (three males and one female) in downtown Christchurch.[5] From her description a computer sketch was constructed, which led to Mr Oketopa becoming a suspect. Ms Nicholson also selected Mr Oketopa's photograph from a photographic montage of eight males.

[6] The second strand of the Crown case comprised Mr Oketopa's admissions. He was arrested the day after the murder for unrelated matters and interviewed the next

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3 The Crown consented to Mr Oketopa filing his application for leave in this Court rather than the Privy Council: Senior Courts Act 2016, sch 5 cls 3(2)(b) and 4(2)(d); and Supreme Court Act 2003, ss 50(2)(b) and 51(2)(d).

4 A DNA match confirmed Mr Kirner's admission of intercourse.

5 Ms Nicholson's initial impression was that there was a domestic argument as she saw one of the men exerting some force on the female and so she kept watching in case it became violent.

morning. He accepted he had met the victim on the street. Mr Oketopa said they had consensual sex at the school where her body was found, while "the other two were behind". But he said he did not know what happened next, saying "I've blocked it out. It's so bad. Why didn't I stop them?" At the scene of the crime later that day, he described having sex with the victim on the grass, walking away and then hearing screams.[6] He also knew the victim was wearing jeans at the time when, on his later account, he could not have known what she was wearing.

[7] On the day he was admitted to prison on remand, Mr Oketopa also made similar, less detailed, admissions to Wendy Hendry, a nurse who had previously given Mr Oketopa counselling.

[8] Mr Oketopa later withdrew these admissions.

[9] The third strand of the Crown case related to Mr Oketopa's movements. This evidence placed Mr Oketopa in the area where, according to Mr Kirner's evidence, he and Mr Genge had walked with the victim.

Court of Appeal

[10] The main ground of appeal in the Court of Appeal was whether there was sufficient evidence to support the verdict against Mr Oketopa, particularly the murder verdict.

[11] In terms of the rape conviction, the Court of Appeal made three points. First, after noting that the Crown case against Mr Oketopa was heavily dependent on Ms Nicholson's evidence, the Court said that her evidence was "detailed, consistent and not shaken in any significant way in cross examination".[7] It was "not … dependent on a fleeting glance, or a longer observation made in difficult conditions".[8] There was also other evidence supporting the correctness of the identification.

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6 The spot Mr Oketopa identified as the place where he had intercourse with the victim was some 10 metres from where her body was found. This location was not supported by the forensic evidence.

7 CA judgment, above n 2, at 12.

8 At 12.

[12] Second, although acknowledging that Mr Oketopa had resiled from his admissions, the Court said he had accepted his involvement on separate occasions to the police and to Ms Hendry. The jury was entitled to reject his claim of consensual intercourse.

[13] Third, the Court said the jury was also entitled to reject Mr Oketopa's alibi. His alibi was that his friends had left him asleep in a car and found him in the same place when they returned some hours later. The Court noted that, "[i]n the meantime[,] another witness had seen the car empty".[9]

[14] In respect of the murder conviction, the Court noted that the Crown had to prove that Mr Oketopa, as a secondary party, consciously appreciated there was a real and substantial risk that Mr Genge would cause grievous bodily injury to the victim for the purpose of facilitating rape and/or avoiding detection. The Court determined there was sufficient evidence "for the jury to treat as negated the possibility that … [Mr] Oketopa raped the victim, without undue violence, and went off, after which [Mr] Genge inflicted all the serious injuries".[10] In this respect, the Court noted the evidence of the violent nature of the rapes.

Grounds of the leave application

[15] In terms of the extension of time, Mr Oketopa's essential submission is that his proposed appeal has merit. In these circumstances, he says that the interests of justice favour an extension of time because the interest in correcting a miscarriage of justice is more important than the interest in finality. Other arguments include the fact that some factors have only become recently known to Mr Oketopa; he has had various mental health issues preventing him from advancing the appeal; and he has been assisted on a pro bono basis with counsel having other time pressures.

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9 At 12.
10 At 14.

[16] In relation to the leave criteria, Mr Oketopa submits that leave to appeal should be granted primarily on the basis that he has suffered a miscarriage of justice.[11] In summary, he says that:

(a) the Crown failed to disclose material witness statements, or if they were disclosed, that trial counsel failed to use them;

(b) trial counsel's cross-examination of Ms Nicholson was inadequate, particularly in failing to put to her material differences between the computer sketch prepared by the police and a photograph of Mr Oketopa taken the day after the murder;

(c) expert evidence called by the defence at trial on the phenomenon in which a witness gives false answers to make up gaps in their memory (confabulation) was not sufficiently linked to Mr Oketopa or to false confessions;

(d) two additional witnesses should have been called by the defence to support Mr Oketopa's alibi that he was asleep in the car; and

(e) the Court of Appeal erred in its approach, and amongst other things, reference is made to the inadequacy of the trial Judge's direction on the problems of identification evidence.

The Crown's position

[17] The Crown opposes the granting of an extension of time and also opposes any grant of leave to appeal. The Crown says that the interests of justice favour finality and emphasises that the delay of more than 23 years is almost entirely unexplained. The Crown submits the delay prejudices the Crown, both in its response to the proposed appeal and, if necessary, in advancing a retrial. The Crown also argues that reopening the convictions is likely to be very distressing to the victim's family.

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[11] Mr Oketopa also submits that his case involves a matter of general or public importance, "namely the disclosure obligations on the prosecution and the safety of a conviction for an infamous crime". This submission was not pursued in any detail.

Finally, the Crown submits that the merits of the proposed appeal are not strong, noting also that a number of the matters now raised were not before the Court of Appeal.

Our assessment

[18] The touchstone for our decision is the interests of justice.[12] Relevant considerations include whether the delay is adequately explained and whether there are compelling reasons to extend time. Further, the Court may also consider the seriousness of the charges, the strength of the proposed appeal, the effect on others and prejudice to the Crown. It is also relevant whether fresh evidence has come to light.[13]

[19] As to these factors, the delay is significant and we accept the Crown's submission that it is largely unexplained. The information before us suggests Mr Oketopa was advised of his appeal rights and had offers of legal assistance in relation to his case on earlier occasions. In addition, the Crown is prejudiced by the delay. That is because of the deaths of Mervyn Glue, defence counsel at trial, and of Dr Leslie Ding, the expert witness on the topic of confabulation at trial. The Crown is also prejudiced by the unavailability of Mr Glue's files and of the original disks which would clarify the scope of disclosure, as well as some missing physical evidence. The interests of the victim's family are also relevant. Finally, this is not a case where scientific research or other evidence specific to Mr Oketopa's psychological position has only recently been completed.[14] We have no expert evidence on that position.

[20] Against this background, on the state of the information before us, the strength of the proposed grounds of appeal is not such as to provide a compelling reason to extend time. We make only very brief comments on the proposed grounds.

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12 *Ellis v R* [2019] NZSC 83 at [15], citing *R v Knight* [1998] 1 NZLR 583 (CA) at 587; and *R v Lee* [2006] 3 NZLR 42 (CA) at [95]–[99].

13 *Ellis*, above n 12, at [15].

14 In contrast to the position in *Ellis*, above n 12, where an extension of time to apply for leave to appeal was granted after a delay of some 20 years in circumstances where there was expert evidence relating to the particular case.

[21] In terms of the disclosure issues, the affidavit evidence from the Crown indicates it was likely that the material in issue from the critical potential witness was disclosed.[15] In any event, there is force in the Crown's submission that calling evidence from that potential witness may not have been of benefit to Mr Oketopa's case.

[22] On the question of cross-examination of Ms Nicholson, it is sufficient to note that trial counsel obtained a partial concession from Ms Nicholson that the person she had identified bore some resemblance to Mr Genge.

[23] On the proposed ground relating to the evidence of confabulation, the difficulty is that there is still nothing before the Court that would link this phenomenon to Mr Oketopa.

[24] As to the failure to call the other two witnesses, this evidence is not fresh.[16] It is possible that a reasonable tactical decision was made at the time not to call that evidence.

[25] In terms of the submissions criticising the Court of Appeal decision, it suffices to state that the identification warning given by the trial Judge included the direction that mistaken identifications have led to "notorious" miscarriages, that "honest and convincing witnesses may be mistaken", and that there was a "special need for caution" in assessing this evidence.

[26] Finally, with respect to the other considerations relevant to the decision to extend time to apply for leave to appeal, we are satisfied that there are alternative remedies that provide a more suitable forum to resolve the factual issues raised by the proposed appeal. Mr Oketopa can seek to have his case investigated by the Criminal Cases Review Commission[17] or an application can be made to the Governor-General to exercise the royal prerogative of mercy.

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15 There are difficulties, on the basis of the information before us, in resolving the question as to what was disclosed.

16 *Lundy v R* [2013] UKPC 28, (2013) 26 CRNZ 699 at [120]. See also *Misa v R* [2019] NZSC 134 at [57], n 55 and [65].

17 Criminal Cases Review Commission Act 2019.

[27] In all these circumstances, the application for an extension of time to apply for leave to appeal is dismissed. We add that, on the basis of the information before us, we are not satisfied that the criteria for granting leave to appeal are met.[18]

Solicitors:
Crown Law Office, Wellington for Respondent

[18] Senior Courts Act, s 74.