IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 37/2024
[2024] NZSC 101

BETWEEN	TYSON SHANE BROWN Applicant
AND	THE KING Respondent

Court: Glazebrook, Ellen France and Kós JJ

Counsel: S T L Teppett for Applicant
J E L Carruthers for Respondent

Judgment: 19 August 2024

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] On 21 March 2023, Mr Brown was convicted, after a jury trial, of the murder of A, a two-year-old child. His appeal against conviction was dismissed by the Court of Appeal on 4 April 2024.[1]

[2] Mr Brown now applies for leave to appeal to this Court against that decision. His proposed ground of appeal is that a miscarriage of justice has resulted from the failure of the trial Judge to give a reliability warning under s 122 of the Evidence Act 2006 with regard to the evidence of A's mother, Ms T. This is the same ground as he raised in the Court of Appeal.

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1 *Brown v R* [2024] NZCA 95 (Gilbert, Whata and Churchman JJ) [CA judgment].

Background

[3] A full outline of the factual background is set out in the Court of Appeal judgment.[2] It suffices for the purposes of this application to record that, in early February 2021, Ms T separated from A's father. In mid-2021, Ms T moved into a house in South Auckland. Friends of hers occupied a sleepout at the back of the property. Mr Brown began spending time with Ms T, occasionally staying overnight.

[4] On 29 October 2021, Mr Brown tested positive for COVID-19, which meant he had to isolate at the South Auckland address with Ms T and A. Between 3.51 pm and 4.21 pm on 31 October, Ms T was speaking by telephone to a COVID-19 public health service. Mr Brown was sentenced on the basis that, during that time, he assaulted A, leading to her death shortly after midnight.[3]

The trial

[5] The Crown case at trial was that Mr Brown had murdered A. Mr Brown's defence was that Ms T was the murderer.

[6] Ms T was to have been tried for manslaughter at the same time as Mr Brown. This was on the basis that she had failed to protect A from Mr Brown. However, Ms T pleaded guilty just before trial.

[7] Ms T was called as a witness at Mr Brown's trial. It is common ground that the evidence she gave was unreliable and, the Crown submits, designed to assist Mr Brown. Ms T was denied a discount for cooperation when sentenced after Mr Brown's trial.[4]

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2 At [3]–[12].

3 *R v Brown* [2023] NZHC 1267 (Johnstone J) at [11]–[12].

4 *R v [T]* [2024] NZHC 332 at [35]. While she was denied a discount for cooperation, she was granted a ten per cent discount because giving evidence for the Crown "amounted to a form of punishment".

The Court of Appeal decision

[8] The Court of Appeal said that an objective assessment of Ms T's trial evidence was that it did not:[5]

> … materially advance the Crown case [against Mr Brown] but rather, in a number of respects contradicted not only that case but the basis of which Ms T had pleaded guilty to the manslaughter charge.

The Court noted that the Crown in closing "disavowed relying on any aspect of Ms T's evidence".[6] This was acknowledged by the trial Judge when summarising the Crown case.[7]

[9] The Court rejected Mr Brown's submission that the Crown had relied on some of Ms T's evidence during the critical time when it was asserted that the fatal injuries were inflicted; the Crown only relied on the parts of Ms T's evidence that were verified by independent evidence, including telephone records.[8] The Crown in closing did refer to Ms T's unchallenged evidence that, while Ms T was on the telephone to the COVID-19 health service, Mr Brown was in A's bedroom with A.[9]

[10] The Court also noted that a number of aspects of Ms T's evidence were favourable to Mr Brown.[10] Defence counsel in closing asked the jury to accept those aspects of Ms T's evidence.[11] The trial Judge referred, in summarising the defence case, to those aspects of Ms T's evidence that were favourable to Mr Brown, although noting a degree of inconsistency with the general thrust of the defence case that Ms T's evidence should not be accepted.[12]

[11] The Court pointed out that neither of the parties had requested the Judge to give a reliability warning, despite a number of bench notes being issued in the course of the trial, some of which related to possible directions.[13]

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5 CA judgment, above n 1, at [29].
6 At [24].
7 At [32].
8 At [25]–[26].
9 At [27].
10 At [28].
11 At [28].
12 At [33].
13 At [34].

[12] The Court said:

> [35] It is unsurprising that the Judge chose not to give a reliability direction. It may well have distracted the jury and also may well have undermined the defence case by affecting the willingness of the jury to accept those parts of Ms T's evidence that supported the defence.
>
> [36] The Judge has a discretion under s 122. There are a number of factors in this case that justify not giving such a direction. These include the fact that Ms T's evidence did not advance the Crown's case but, if anything, assisted in aspects of the defence case; that the Crown, in closing, had accepted the unreliability of her evidence and, unless it was undisputed did not rely on it; and neither the prosecution nor defence had sought a reliability warning. Accordingly, we are satisfied that no miscarriage of justice arose from the Judge not giving such a warning.

Proposed appeal

[13] Mr Brown advances two reasons why the trial Judge should have given a reliability warning under s 122 of the Evidence Act:

(a) Ms T had a motive to give false evidence, both to receive a sentencing discount and also to distance herself from the time period during which A sustained injuries.

(b) The Crown relied on points of Ms T's evidence and in particular that Mr Brown was with A when Ms T was on the COVID-19 call.

[14] Mr Brown also points out that there is no record of the trial Judge considering whether or not to give a reliability warning.

Crown submissions

[15] The Crown submits that Ms T was not motivated by the prospect of a reduced sentence. Had she been, she would have given credible and reliable evidence, rather than evidence designed to undermine the Crown case against Mr Brown. For example, Ms T said that, after ending the phone call, she checked on A and found her happy and talkative, and added that A was still talkative while she and Mr Brown were searching how to wake up unconscious children. In terms of Mr Brown's whereabouts at the time Ms T was on the call to the COVID-19 health service, the Crown submits that

both parties relied on this. The Crown submits that it is difficult in these circumstances to see how the absence of a warning could cause a miscarriage of justice.

Our assessment

[16] This appeal relates to the particular circumstances of Mr Brown's case. There is no issue of general or public importance.[14] Nor does anything raised by Mr Brown suggest that the Court of Appeal was wrong in its assessment. There is therefore no apparent risk of a miscarriage of justice.[15]

Result

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

Solicitors:
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Respondent

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14 Senior Courts Act 2016, s 74(2)(a).
15 Section 74(2)(b).