IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 25/2024
[2024] NZSC 115

BETWEEN	SAINEY MARONG Applicant
AND	THE KING Respondent

Court:	Ellen France, Williams and Kós JJ
Counsel:	Applicant in person M J R Blaschke and M J Lillico for Respondent
Judgment:	13 September 2024

JUDGMENT OF THE COURT

A The application to set aside the earlier abandonment of the appeal against conviction is declined.

B The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Sainey Marong was convicted after trial in 2018 of the murder of Renee Duckmanton. He was sentenced to life imprisonment with a minimum period of imprisonment of 18 years.[1] He has filed an application for leave to appeal against conviction. His appeal against conviction was dismissed by the Court of Appeal in a judgment delivered on 28 November 2018.[2] He was subsequently given leave by the

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1 *R v Marong* [2018] NZHC 748 (Mander J).
2 *Marong v R* [2018] NZCA 531 (Miller, Woolford and Collins JJ) [CA judgment].

Court of Appeal to appeal, out of time, against sentence but that appeal was also dismissed.[3]

Background

[2] The key facts were set out by the Court of Appeal in its judgment on the conviction appeal. As the Court explained, the victim was a sex worker. Mr Marong picked her up from a central Christchurch street, took her to the outskirts of the city and strangled her. He dumped her body on a roadside the following day, dousing it and setting it on fire. His semen was found inside the victim's body. His internet browsing history indicated that he had planned the offence. He had been researching the following: kidnapping; information about local sex workers; how to make someone unconscious; necrophilia; and destroying DNA traces by burning a body.

[3] At trial, Mr Marong was represented by senior counsel. Mr Marong gave evidence. He admitted killing the victim. The main focus of his defence was insanity. He argued, first, that he did not appreciate what he was doing. In this respect, although he accepted he had assaulted Ms Duckmanton, he said he just wanted to stop the noise. Second, he argued he had no intention to kill and that he did not understand the risk attached to what he was doing. Finally, he said that he had a disease of the mind. This part of the defence was advanced on the basis that Mr Marong was a diabetic and he was not taking his insulin. That combination can lead to a hypoglycaemic state, which meant Mr Marong did not understand the nature and quality of what he had done. Nor did he understand its moral wrongfulness. In this regard, the defence relied on evidence of his strange behaviour over a number of weeks prior to the killing. In addition to his internet searches, there was evidence that he was having trouble sleeping and was obsessed with obtaining a sheep for slaughter on the day Ms Duckmanton was killed.

[4] As the Court of Appeal explained, the trial Judge left insanity to the jury, over some Crown resistance. The Crown said there was no foundation for the defence. Mander J, in agreeing to leave insanity with the jury, noted that while there had been

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3 *Marong v R* [2020] NZCA 179. The notice of appeal also included an appeal against conviction, which was abandoned.

no expert evidence for the defence, there was some evidence from the pathologist, Dr Katherine White, that diabetes could affect mental functioning and that such uncontrolled diabetes could cause mental impairment to such a degree as to be capable of constituting a disease of the mind. The Court of Appeal considered that the Judge's directions on disease of the mind were orthodox.

[5] The expert evidence of insanity came from expert witnesses called by the Crown, Ghazi Metoui, a forensic psychologist, and Dr Eric Monasterio, a medical doctor and consultant psychiatrist. The evidence of both was that Mr Marong was not insane.

The proposed appeal

[6] Mr Marong is representing himself. A number of grounds are advanced in the notice of application for leave to appeal and in the various submissions. We group the key grounds in the same way as the respondent has done in its submissions.

Insanity

[7] There is some shift in the emphasis as between the sets of submissions filed by Mr Marong but essentially his case is that there was a factual basis to conclude he was insane because he had not been taking his insulin and had been acting strangely in the lead-up period to Ms Duckmanton's murder. He now also says that the reports of the two Crown witnesses on the issue of insanity were flawed because, when the information incorporated into those reports was acquired, Mr Marong was subjected to oppression. This is a reference to his treatment whilst on remand in the At-Risk Unit (ARU) at Christchurch Men's Prison. His treatment there has been the subject of civil proceedings and a complaint to the Ombudsman.[4] Finally, he says that this Court should review the test for disease of the mind.

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[4] See *Marong v Attorney-General* [2022] NZHC 1489 (Associate Judge Paulsen); and see generally Office of the Ombudsman | Tari o te Kaitiaki Mana Tangata *Report on an Unannounced Inspection of Christchurch Men's Prison Under the Crimes of Torture Act 1989* (5 December 2017).

Intent

[8] Mr Marong also wishes to argue that his conviction should be set aside as he did not have the necessary intent for murder.

Admission of evidence

[9] Mr Marong challenges the evidence admitted at trial from three prison officers who gave an account of comments he made to them early on in his remand in custody about how and why he killed the victim. Again he relies in this context on the conditions in which was being held at the time for the submission that this evidence was either oppressively or unfairly obtained. He also challenges the admission of the DNA evidence against him on the grounds of what he says was an initial illegal search by the police to obtain items with his DNA on it. In relation to these and other grounds, he says there has been a breach of his rights under the New Zealand Bill of Rights Act 1990 including his right to a fair trial under s 25(a).[5]

Treatment on remand and trial process

[10] Various matters are raised under this head including, for example, difficulties Mr Marong says arose in terms of access to documents caused by his return to the Christchurch ARU over the course of the trial and the impact of his remand in custody on his physical and mental well-being. In relation to the trial, Mr Marong also seeks to challenge whether the evidence of the pathologist at trial proved the cause of death beyond reasonable doubt. We add that Mr Marong's submissions touch on other proposed grounds but we are satisfied none of those require discussion. They would not provide a basis for the grant of leave.

Our assessment

[11] We agree with the respondent that the application for leave should be dealt with as an application to set aside the earlier abandonment of his appeal against conviction to this Court. That is because Mr Marong filed an application for leave to appeal against conviction and sentence in this Court but, subsequently, his counsel advised

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[5] For example, various complaints are made about trial counsel conduct.

the Court that the proposed appeal against conviction was abandoned. While it appears there was no formal notice of abandonment from the Registry, plainly the matter was treated by the Court as having been abandoned. The Court went ahead and dealt only with Mr Marong's application for leave to appeal against sentence, which was dismissed.[6] Nothing raised by Mr Marong suggests there is a basis for setting aside the earlier abandonment in this case.[7] In any event, the criteria for leave to appeal are not met, as we now explain.

[12] The main arguments Mr Marong wishes to advance on insanity were addressed by the Court of Appeal. The Court noted that the question whether Mr Marong was in fact insane was for the jury to answer. Accordingly, to succeed on his appeal on this aspect, the Court of Appeal said that Mr Marong had to show that the jury's response was unreasonable. The Court considered this was "an insuperable task on the facts of this case".[8] While Mr Marong's calculated behaviour was plainly abnormal in the extreme, the only expert evidence about his state of mind "was unequivocal; he suffered from no disease of the mind, and was able to understand the nature and quality of his acts and to distinguish right from wrong".[9] The Court rejected the submission that Mr Marong was insane because he was suicidal. The Court did not consider there was any established connection between Mr Marong's diabetes and the killing of Ms Duckmanton.

[13] Nothing raised by Mr Marong gives rise to an appearance of a miscarriage of justice in the approach adopted by the Court of Appeal. As the Court noted, the evidence of the two expert witnesses on insanity was as follows:[10]

> . . . both were firmly of the opinion that Mr Marong was sane. On the contrary, Mr Metoui opined that Mr Marong was prone to exaggerate symptoms, was histrionic and had a strong propensity to manipulate and deceive, and Dr Monasterio opined that Mr Marong's symptoms were likely malingered or fabricated. Nothing about the evidence of his behaviour about the time of the killing suggested that he was in a state of delirium.

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6 *Marong v R* [2020] NZSC 133. Mr Marong's subsequent application to Te Kāhui Tātari Ture | the Criminal Cases Review Commission was assessed by the Commission but the Commission decided not to proceed with the application.

7 The respondent relies in this respect on *Taylor v R* [2022] NZCA 626 at [6] citing *Cramp v R* [2009] NZCA 90 and *R v Bridgeman* CA87/04, 10 November 2005.

8 CA judgment, above n 2, at [26].

9 At [26].

10 At [5].

[14] We add that the respondent in its submissions refers to material which suggests that defence counsel had sought advice from an expert on the question of insanity prior to trial but that the advice obtained did not support the view Mr Marong was insane. That material does not appear to be on the Court file so we say no more about it. However, there is material before the Court setting out advice from a pathologist which was obtained by assigned counsel on the earlier application to this Court for leave to appeal against Mr Marong's conviction. The notice of abandonment of that application filed by counsel said it was abandoned on the basis Mr Marong accepted his counsel's advice that there were no grounds for an appeal against conviction.[11] In relation to the grounds based on insanity, the material from the pathologist, albeit untested, supports counsel's advice.

[15] Given the evidence at trial, we do not see this as a case in which this Court could usefully look at the test for disease of the mind. No question of general or public importance accordingly arises.[12] Nor, given the nature of the expert evidence at trial, are there sufficient prospects of success in Mr Marong's proposed ground relating to the impact of his conditions whilst in prison on the interaction he had with the experts.

[16] Turning then to intent, as the respondent notes, the issue of whether, apart from insanity, Mr Marong was so out of his mind that he lacked the requisite subjective appreciation of the risk of death when strangling the victim, was plainly before the jury. On the appeal, the Court of Appeal recorded this issue had not been pursued on appeal but the Court considered it anyway. The Court concluded it was "impossible to say that the jury were wrong to reject Mr Marong's evidence that he was only trying to quieten Ms Duckmanton".[13] Nothing raised by Mr Marong gives rise to any appearance of a miscarriage of justice on this issue.[14]

[17] On the proposed grounds relating to the admission of evidence, we accept the submissions for the respondent that it is too late for us to consider these matters now, effectively as a court of first instance. We add that it is not surprising that there was

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11 We note that Mr Marong now challenges various aspects of the process relating to the conduct of the earlier application.
12 Senior Courts Act 2016, s 74(2)(a).
13 CA judgment, above n 2, at [31].
14 Senior Courts Act, s 74(2)(b).

no challenge to admission of the DNA evidence given there was no real contest about the narrative of events. The admission of that evidence was not inconsistent with Mr Marong's defence.

[18] As to Mr Marong's proposed grounds relating to his treatment on remand, the trial process, and the evidence on cause of death, again, this Court would be considering these matters effectively as a court of first instance. There is nothing before us to indicate this is an occasion on which we should do that.

Result

[19] The application to set aside abandonment of the appeal is declined.

[20] The application for leave to appeal is dismissed.[15]

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

[15] An application for leave would require an extension of time which, in the circumstances, we would not grant.