IN THE SUPREME COURT OF NEW ZEALAND

SC 96/2015
[2016] NZSC 1

BETWEEN	JAMIE DION EDWARD GURRAN Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, Glazebrook and O'Regan JJ
Counsel:	F E Guy-Kidd for Applicant J E L Carruthers for Respondent
Judgment:	1 February 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Gurran was convicted after a District Court jury trial of wounding with intent to cause grievous bodily harm.[1] The victim was a 75 year old man who was a friend of Mr Gurran.

Crown case

[2] The Crown case was that Mr Gurran over-reacted to what he perceived to be a homosexual advance (groping of the groin area) and severely beat the complainant. After the incident leading to the complainant's injuries, Mr Gurran telephoned his mother, who went to the scene. She telephoned for an ambulance. Her evidence was that while she was doing this the applicant kicked the complainant on the floor and smacked him on the side of face three to five times. The ambulance officer arrived

[1] The applicant was sentenced to seven and a half years' imprisonment: *R v Gurran* DC Tauranga CRI-2012-070-208, 27 May 2013 (Judge Wolff).

soon after. The complainant told him that he had been kicked (or punched, the ambulance officer could not remember which) by Mr Gurran.

[3] The police arrived and arrested Mr Gurran. Some hours later they conducted an interview with him. In that interview he referred to the complainant trying to touch him and that he had punched him as a result (he conveyed this by punching his hand and saying "[b]oom, that's what he got"). Later he said "I whacked him in the head, is that alright, that's what I did".

[4] The complainant gave a statement to police approximately two weeks after the event. He described being kicked in the shins, stomach, ribs and around the head, and also being slapped on the face. He denied making a homosexual advance.

The trial

[5] The complainant was unable to give evidence at trial. By the time of the trial he was suffering advanced dementia. As a result of a pre-trial ruling, the complainant's written statement was admitted in evidence at the trial. The complainant died after the trial, apparently of natural causes.

[6] At the trial the applicant gave evidence to the effect that the complainant fell in the toilet (between the toilet bowl and the wall) and got stuck there. The applicant said he rescued him and that the groping occurred while he was taking the complainant back into the living area. The defence case was, then, that the significant injuries suffered by the complainant occurred because of a fall in the toilet, not because of a beating and kicking by the applicant.

[7] After the trial, but before sentencing, the applicant wrote to the sentencing Judge in terms which the Court of Appeal said could only sensibly be read as an admission to the offending.[2] He expressed regret for what happened and apologised.

[8] Mr Gurran's appeal to the Court of Appeal was dismissed. The Court noted the strength of the Crown case and the fact that six different accounts of the incident

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2 *Gurran v R* [2015] NZCA 347 (Cooper, Keane and Kós) at [19].

have now been given by the applicant, including his account to the police, his account at the trial and his letter to the sentencing Judge.[3]

Grounds on which leave sought

[9] Leave to appeal is sought on four grounds.

Section 122 direction

[10] The applicant seeks leave on the ground that a warning under s 122 of the Evidence Act 2006 ought to have been given in respect of the evidence of the complainant. As noted earlier, that evidence was read to the jury and thus the complainant was not subject to cross-examination.[4] Under s 122, a Judge must consider whether to give a warning if evidence may be unreliable. The warning is a warning of the need for caution in deciding whether to accept the evidence and the weight to be given to the evidence.[5]

[11] In the circumstances, the Court of Appeal agreed with the applicant that a reliability warning was required. However, the Court of Appeal was satisfied that the warnings given by the Judge in the course of his summing-up were sufficient for the purposes of s 122 by alerting the jury to the need for caution in accepting the complainant's evidence. The Court of Appeal also considered that any deficiency in the warning could not have given rise to a risk of miscarriage of justice, given the "overwhelming Crown case" against Mr Gurran.

[12] This Court articulated the principles applying to warnings under s 122 in two recent cases, and no clarification of those cases is required.[6] Accordingly no matter of public importance arises. Nor do we see any risk of a miscarriage of justice if we decline leave to appeal on this point: the Court of Appeal carefully analysed the content of the Judge's summing up and there is nothing in the submissions received

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3 At [8]–[19].

4 It was also argued in the Court of Appeal that the intoxication of the complainant and his dementia may have affected the reliability of his account.

5 Evidence Act, s 122(1).

6 *CT (SC 88/2013) v R* [2014] NZSC 155, [2015] 1 NZLR 465 and *L (SC 28/2014) v R* [2015] NZSC 53, [2015] 1 NZLR 658.

from the applicant that gives any indication that the Court of Appeal's assessment was in error.

Fresh evidence

[13] The prosecutor at the trial made something of the fact that the version of events involving a fall in the toilet was not mentioned by the applicant when interviewed by the police.

[14] In the Court of Appeal the applicant sought to adduce evidence from his father and from a friend to the effect that the applicant told them of the injuries being sustained by the complainant when he fell in the toilet a few days after the applicant was arrested. It was argued that if this evidence had been adduced at trial it would have answered the "recent invention" allegation and could have affected the verdict.

[15] The Court of Appeal declined to admit the evidence finding that it was "of very modest probative value".[7] This was because the applicant did not mention the fall in the toilet in his police interview and also because the account given by the proposed witnesses was simply one amongst a number of varying accounts given by the applicant. The Court reiterated that there were now six different versions of the events given by the applicant at different times.[8]

[16] This is a facts-specific point. No point of public importance arises: the test for the admission of new evidence in support of an appeal is well settled. The question therefore is whether there is a risk of a miscarriage of justice if leave is not granted on this point. We do not consider that there is, given the Court of Appeal's careful assessment of the evidence and the application of an established test to the facts before it.

Complainant's mental impairments

[17] The applicant submitted in the Court of Appeal that his trial counsel erred in not adducing evidence of the extent of the mental impairments of the complainant.

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7 *Gurran v R*, above n 2, at [22].
8 At [22].

In this Court he seeks an order for disclosure of the medical records of the complainant, with a view to obtaining evidence from an expert as to the possible effect of those impairments on the complainant's memory.

[18] The Court of Appeal considered that evidence of mental impairments on the part of the complainant would have been unlikely to affect the outcome given the complainant's consistent statements to the applicant's mother, the ambulance officer and the police officer who interviewed him some days after the events.[9] The medical evidence, as well as the account Mr Gurran gave to the police, effectively confirmed the complainant's account.[10] We see no appearance of error in the Court's assessment of these matters and no risk of a miscarriage of justice if leave is not granted on this ground. No point of public importance arises.

Summing up

[19] The applicant seeks leave to argue that the summing up was deficient in a number of specified respects. These matters were all carefully evaluated by the Court of Appeal,[11] which concluded that the Judge's oral summing up put the nature of the defence case adequately and was not unbalanced.[12] It did not consider that the jury materials, which had some deficiencies, would have misled the jury given the nature of the oral summing up.[13] In addition, it considered that any inadequacy in either the summing up or the written jury materials would not have caused a miscarriage given the overwhelming Crown case.[14]

[20] Again, no point of public importance arises and these matters are very case-specific. We see no appearance of a miscarriage of justice arising.

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9 At [30].
10 At [31] and [32].
11 See [52]–[60].
12 At [59].
13 At [59].
14 At [60].

Result

[21] The criteria for the granting of leave to appeal are not met and the application for leave to appeal is therefore dismissed.

Solicitors:
AWS Legal, Invercargill for Applicant
Crown Law Office, Wellington for Respondent