IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 71/2018
[2018] NZSC 100

BETWEEN	QUINTON PAUL WINDERS Applicant
AND	THE QUEEN Respondent

Court:	William Young, Glazebrook and O'Regan JJ
Counsel:	J P Temm for Applicant A Markham for Respondent
Judgment:	30 October 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted after a jury trial of the murder of George Taiaroa. He was sentenced to life imprisonment with a minimum period of imprisonment of 17 years.[1]

[2] He appealed against both conviction and sentence to the Court of Appeal.[2] The Court dismissed the appeal. He now seeks leave to appeal to this Court against the Court of Appeal's decision, again challenging his conviction and sentence.

[3] Prior to the applicant's trial, the High Court ruled that certain evidence was admissible at his trial, notwithstanding that some of this evidence had been obtained

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1 *R v Winders* [2016] NZHC 2964 (Toogood J) [HC judgment].
2 *Winders v R* [2018] NZCA 277 (Asher, Clifford and Gilbert JJ) [CA 2018 judgment].

by actions of the police that were in breach of the New Zealand Bill of Rights Act 1990.[3] An appeal against the decision that such evidence was admissible was dismissed by the Court of Appeal.[4]

[4] Leave to appeal is sought in relation to four issues.

[5] The first issue concerns evidence obtained by the police in an interview with the applicant after he was arrested for reckless driving. Toogood J found that the sole reason for the arrest was to question the applicant about the alleged murder, and that his arrest and subsequent detention were in breach of s 22 of the Bill of Rights Act.[5] During the interview the applicant answered questions about the alleged murder, but made no confession. He did, however, make statements about his movements on the day of the murder, which the Crown relied on at trial to show that he had lied about those movements.

[6] Toogood J found there was no causative link between the improper police conduct and the making of the statements by the applicant. In the absence of such a causative link, he found the evidence was admissible.[6] He also found that, even if he were wrong on that point, the evidence would be admissible under the balancing process set out in s 30 of the Evidence Act 2006.[7] Those findings were upheld by the Court of Appeal in the pre-trial appeal[8] and the Court of Appeal declined to revisit that finding when considering the applicant's conviction appeal.[9]

[7] We do not think there is any proper basis to grant leave on this point. No point of public importance arises, given that the point at issue was addressed by this Court in 2016.[10] There may be room for debate as to whether there was, in fact, a causative link in the present case. But, even if it were established that there was such a link, the applicant would also need to establish that the concurrent findings of the Courts below

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3 *R v Winders* [2016] NZHC 1147 (Toogood J) [HC pre-trial judgment].
4 *Winders v R* [2016] NZCA 350 (French, Collins and Fogarty JJ) [CA 2016 judgment].
5 HC pre-trial judgment, above n 3, at [109] and [111].
6 At [130].
7 At [136].
8 CA 2016 judgment, above n 4, at [53]–[58], citing *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [46]–[47].
9 CA 2018 judgment, above n 2, at [57].
10 *R v Chetty*, above n 8.

that the evidence was admissible under the s 30 balancing test were wrong. The issue that the applicant wishes to raise is essentially factual and we do not see sufficient prospects of success on the s 30 issue to justify the grant of leave. Accordingly, we see no risk of a miscarriage if leave is not granted on this ground.

[8] The second issue relates to propensity evidence admitted at the trial in accordance with a pre-trial ruling. The applicant wishes to argue that, as things transpired at the trial, the probative value of the propensity evidence was nil or low and that this meant that the basis on which the High Court had allowed the admission of the propensity evidence was removed.[11] On the other hand, the prejudicial effect of the evidence remained high. In those circumstances, it is argued that the Judge ought to have directed the jury to disregard the propensity evidence. The Court of Appeal rejected this submission.[12] It concluded that the Crown had not placed significant weight on the propensity evidence and that the Judge's summing-up on the issue was careful and balanced.[13]

[9] The applicant seeks to challenge these conclusions on appeal. As with the proposed first ground, we see the issues arising in relation to this matter as raising no point of public importance, and as essentially factual challenges. And we see no appearance of miscarriage in the way the Court of Appeal dealt with this issue.

[10] The third issue relates to an incident that arose during the trial. The High Court Judge received a jury communication in which two jurors expressed concern about the manner in which the foreperson was conducting proceedings and her reluctance to listen to other jurors. The Judge did not draw this to the attention of counsel and did not make a record of the way in which he dealt with the issue.

[11] In a report provided to the Court of Appeal under r 17 of the Court of Appeal (Criminal) Rules 2001, Toogood J outlined his recollection of what had occurred. Two jurors had informally raised with the Court Crier a concern about the foreperson and the Crier passed this on to the Judge. This occurred in the middle of the second week

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11 HC pre-trial judgment, above n 3, at [13] and [18].
12 CA 2018 judgment, above n 2, at [36].
13 At [34]–[35].

of the trial. The Judge asked the Crier to tell the jurors that comments had been passed on to him, that he suggested they raise these concerns directly with the foreperson and that, if they continue to have concerns, they should prepare a written communication for the Judge. The Judge heard nothing more about the issue in the course of the trial up to and including the delivery of the verdict.

[12] The Court of Appeal considered that the Judge dealt with the matter appropriately and no risk of miscarriage arose.[14] It considered there was no reason to believe that any juror was incapable of performing their duty as a juror and no grounds upon which the foreperson or the whole jury could have been discharged as suggested by then-counsel for the applicant in the Court of Appeal.

[13] In his submissions supporting the application for leave, counsel for the applicant argues that counsel should have been provided with an opportunity to consider what the appropriate response was and that the failure to raise the matter with counsel was a breach of natural justice.

[14] The Court of Appeal did not consider there was any error made by the Judge in dealing with the matter without discussing it with counsel. There is nothing to indicate that the Judge would have acted in any different manner had counsel been consulted. This point is specific to the circumstances of this trial. It raises no point of public importance and we see no appearance of a miscarriage in the way the Court of Appeal dealt with the issue.

[15] The fourth issue relates to the sentence imposed on the applicant. As mentioned earlier, the minimum period of imprisonment imposed by Toogood J was 17 years. This was because he found that the murder involved calculated planning so, under s 104(1)(b) of the Sentencing Act 2002, a minimum period of imprisonment of 17 years was required unless such a sentence would be manifestly unjust.[15] The Judge considered the manifestly unjust threshold was not met.[16] The Court of Appeal

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14 CA 2018 judgment, above n 2, at [64].
15 HC judgment, above n 1, at [22]–[25].
16 At [26].

rejected a challenge to the Judge's decision to impose the 17 year minimum period of imprisonment.[17]

[16] The applicant argued in the High Court that there should be a reduction in sentence (or, more correctly, in the minimum period of imprisonment) as a remedy for the breach of rights described earlier.[18] Toogood J ruled that the applicant's case was not an appropriate one for the Court to recognise a breach of rights by a reduction in sentence.[19]

[17] In the Court of Appeal the applicant's then-counsel argued that a reduction in sentence was appropriate, given that the applicant had been arrested, physically assaulted, unlawfully searched and then arbitrarily detained for over an hour prior to the commencement of his evidential interview. The Court of Appeal accepted the force of these submissions, but said that the need for the Court to give effect to the legislative policy behind s 104 of the Sentencing Act arose. A Court could not reduce the minimum period of imprisonment of 17 years unless a sentence of that length would be manifestly unjust. The Court of Appeal considered that the "manifestly unjust" requirement was not reached in all of the circumstances.[20]

[18] The applicant submits that leave should be granted on this point so that the Court can consider the issue of sentence reduction as a remedy for a breach of the Bill of Rights Act in the context of serious criminal offending. This issue was addressed by this Court in *Beckham v R*.[21] In that case, the Court said it was clear from this Court's earlier decision in *R v Williams* that a reduction in sentence can be a remedy for a breach of the Bill of Rights Act in appropriate cases.[22] In *Beckham v R*, the Court noted that there had been no general pronouncement on the appropriateness of sentence reduction as a remedy for breaches of the Bill of Rights other than undue delay in bringing an accused to trial in *R v Williams* and the Court in *Beckham v R* declined to make such a general pronouncement as well.[23]

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17 CA 2018 judgment, above n 2, at [69].
18 Above at [5].
19 *R v Winders* CRI-2015-043-1723, Ruling No 6 of Toogood J, 5 December 2016.
20 CA 2018 judgment, above n 2, at [72]–[73].
21 *Beckham v R* [2015] NZSC 98, [2016] 1 NZLR 505.
22 At [154], citing *R v Williams* [2009] NZSC 41, [2009] 2 NZLR 750 at [18].
23 At [154].

[19] We accept that the question of the availability of a reduction in sentence (or in the minimum period of imprisonment imposed in conjunction with a life sentence) as a remedy for the breach of the Bill of Rights Act in circumstances where the Court has determined that exclusion of the evidence is inappropriate is a question that may be worthy of consideration by this Court in an appropriate case. We do not, however, consider this is an appropriate case for consideration of that issue, given the requirements of s 104 of the Sentencing Act, which are an impediment to any such reduction being granted, even if otherwise found to be appropriate. Nor do we see any appearance of a miscarriage in the way the Court of Appeal dealt with this issue.

[20] We therefore dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent