IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA242/2018
[2018] NZCA 531

BETWEEN	SAINEY MARONG Appellant
AND	THE QUEEN Respondent

Hearing:	2 October 2018
Court:	Miller, Woolford and Collins JJ
Counsel:	Appellant in person M J Lillico for Respondent F E Guy Kidd as counsel assisting
Judgment:	28 November 2018 at 2.15 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence on appeal is declined.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Miller J)

[1] Mr Marong was convicted after trial of the murder of Renee Duckmanton.[1] He admitted killing her. His defence was insanity. Neither of the experts who gave evidence at trial considered him insane. On appeal, he says that the verdict was wrong.

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1 *R v Marong* [2018] NZHC 748.

The bare facts

[2] Ms Duckmanton was a sex worker. On the evening of 14 May 2016 Mr Marong picked her up from a central Christchurch street. He took her to the outskirts of the city, where he strangled her. He dumped her body on a roadside the following day, dousing it and setting it on fire. His semen was found in her vagina. His internet browsing history indicated that the offence was planned. He had researched kidnapping, information about local sex workers, how to render someone unconscious, necrophilia and destroying DNA traces by burning a body. In conversations with Corrections staff while on remand he admitted to following a different sex worker on a previous occasion because he had a "desire to kill", and he explained that he chose prostitutes because they were "slaves".

The trial

[3] There was very little dispute about the narrative facts at trial. Mr Marong gave evidence, claiming that he argued with Ms Duckmanton after having sex with her and, in an agitated state, he compressed her neck to shut her up. He claimed that he did not know what he was doing. The jury plainly rejected this account, which if true might preclude murderous intent.

[4] The focus of the defence was insanity, which the Judge left to the jury over some resistance from the Crown (which had contended there was no foundation for it). The defence case, advanced by experienced counsel, Mr Krebs, was that Mr Marong, who is diabetic, had not been taking his insulin and was accordingly likely to be hypoglycaemic, with the result that he did not understand the nature and quality of what he was doing. Counsel emphasised evidence of strange behaviour by Mr Marong over a number of weeks preceding the killing; apart from his bizarre internet searches, he was having trouble sleeping and he was obsessed with obtaining a sheep for slaughter on the day of the killing. The Judge observed that there had been no expert evidence for the defence, but there was some evidence (from the pathologist, Dr Katherine White) that diabetes could affect mental functioning. He accordingly ruled that:

> … expert evidence had been given that a lack of insulin required to control an insulin-dependent person's diabetes resulting in a hypoglycaemic state could

> affect a person's mental functioning. Further, that such uncontrolled diabetes can cause mental impairment to such a degree as to be capable of constituting a disease of the mind. Whether the defendant was suffering from such a condition and to such a degree as to impair the reasoning process of his mind to constitute a disease of the mind was a question for the jury.

[5] The only expert evidence of insanity was given by Ghazi Metoui, a forensic psychologist, and Dr Eric Monasterio, a consultant psychiatrist. Both were called for the Crown, and 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.

[6] The Judge instructed the jury in orthodox terms:

> [67] To find the defendant not guilty on the grounds of insanity, you must first be satisfied that it is more probable than not that he was suffering from a disease of the mind.
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> [68] A disease of the mind is an abnormal condition, disorder, or disease of the mental faculties that is primarily internal to the defendant which has the effect of incapacitating or impairing the reasoning process of the mind. It is required to be a disorder or disease that affects the defendant's ability to understand and think rationally. It does not extend to disorders which simply produce disturbed or unusual behaviour. A condition is not considered a disease of the mind if it merely results in moral inhibition, or lack of restraint or conscience, or an irresistible impulse which falls short of a state of suspended reason. It need not be a permanent condition.
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> …
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> [72] If you are satisfied the defendant did suffer from a disease of the mind, you must consider whether that condition rendered him incapable of understanding the nature and quality of his actions.
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> …
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> [75] If you are satisfied Mr Marong suffered from a disease of the mind but you are not satisfied he was incapable at the time of understanding the nature and quality of his act, you must then consider whether he was incapable of knowing that his actions in strangling the complainant were morally wrong, having regard to commonly accepted standards of right and wrong. You would need to be satisfied on the balance of probabilities that Mr Marong was unable to rationally understand the moral quality of the act at the time he committed it or why ordinary people would consider such an act to be wrong.

[7] At sentencing the Judge sentenced Mr Marong on the basis that the murder was premeditated, and likely committed in pursuit of a depraved sexual fantasy.[2] Mr Marong was sentenced to life imprisonment with a minimum period of 18 years.

The appeal

[8] Mr Marong chose to represent himself in this appeal. We appointed Ms Guy-Kidd to assist the Court, with a view to ensuring that we were made aware of any argument available to Mr Marong.[3]

[9] Mr Marong pursued insanity before us, by disputing the legal test of insanity and the evidential standard for proving it, and by saying that insanity was made out on the facts. We develop his grounds of appeal below.

Further evidence

[10] In support of his appeal Mr Marong filed affidavits under rr 12A and 12B of the Court of Appeal (Criminal) Rules 2001. The Crown resisted admissions of this evidence on freshness and cogency grounds. It did not file evidence in response, noting that Mr Marong signed a waiver of privilege but confined it to communications between Mr Krebs and the Crown.

[11] The principal feature of Mr Marong's affidavits is an extract from a draft report which appears to be from a forensic psychiatrist at the Mason Clinic. It states that:

> In my opinion, on balance of probability, Mr Marong met the statutory test for insanity pursuant to section 23 of the Crimes Act, 1961 at the time of the alleged offence.

[12] We do not know who wrote this report or on what basis this diagnosis was reached. It seems that the report was commissioned before trial on the instructions of Mr Marong's then counsel (not Mr Krebs). The Court being without any means of evaluating it, the extract cannot be described as cogent evidence.

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2 At [7] and [9].

3 Counsel was not appointed as standby counsel and she did not take instructions from Mr Marong: *Fahey v R* [2017] NZCA 596, [2018] 2 NZLR 392.

[13] Mr Marong having chosen to exhibit part of the report, the Crown asked for disclosure of the balance. In a telephone conference held before the appeal, he was told that if the Crown and the Court did not see the full report it might be discounted or disregarded. Mr Marong declined to disclose it, saying it was only a draft. He maintained that stance at the hearing. In his written submissions, he said that it was never completed because he was "cast away" by then counsel.

[14] The balance of Mr Marong's evidence is an amalgam of legal submissions and information about his mental state before trial. Much of this material proceeded on an assumption that the test for insanity corresponds to standards for mental impairment and/or intellectual disability under other legislation, notably the Criminal Procedure (Mentally Impaired Persons) Act 2003, the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003 and Mental Health (Compulsory Assessment and Treatment) Act 1992. In support he attached, among other things:

(a) Immigration Service records noting in January 2016 that in connection with a claim for refugee status Mr Marong had threatened suicide; and

(b) a report dated 6 July 2016 from the Canterbury District Health Board recording that while on remand Mr Marong had screened positive on a mental health screening tool for risk of self-harm.

[15] It is evident that Mr Marong had a good deal of contact with mental health services while on remand. The above are mere examples of a significant number of reports or notes dealing with his mental state. He was thought to experience adjustment difficulties and depression. He reported that he was not in control of his thoughts. He was sometimes described as histrionic and agitated, or euphoric. As a result of his suicidal ideation, he was provided with close support during the trial. An adjournment was required at one point because of his mental state, the Judge resuming after receiving advice from a forensic psychiatrist that Mr Marong remained fit to stand trial.

[16] Mr Lillico contended for the Crown that in the absence of a full waiver of privilege the Court should infer that the trial was conducted in accordance with

Mr Marong's instructions and, in particular, that a considered decision was made not to call expert evidence of insanity. This submission is well founded. The trial record shows that counsel endeavoured instead to lay a sufficient foundation through Dr White to leave the issue for the jury. It is a proper inference that experienced counsel took that course because expert evidence that Mr Marong was insane was not available to him.

[17] None of the material produced by Mr Marong is fresh, in the sense that it is either genuinely new or counsel error explains its absence from the record.[4] For reasons we go on to explain, the material is not cogent in the sense that it would support a finding of insanity. It indicates only that Mr Marong was depressed and at risk of self-harm following his arrest.

[18] We accordingly decline to admit Mr Marong's affidavits. We observe the affidavits include material that is already part of the trial record. Our ruling that the affidavits are inadmissible obviously does not extend to that material. It does extend to copies of inadmissible material that he attached to his submissions.

The grounds of appeal

[19] Mr Marong's principal ground of appeal was that the test for insanity is lower than that adopted by the Judge in his summing up. As noted, he referred to tests for impairment under other legislation, notably the test of "mental disorder" under the Mental Health (Compulsory Assessment and Treatment) Act.[5] He argued that a person who is suicidal is by definition insane.

[20] Second, he argued that the evidence established he was insane. He submitted, for example, that the evidence about diabetes established this, and he argued that the evidence of planning also evidenced insanity, citing *R v Clark*.[6]

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4 *Loffley v R* [2013] NZCA 579 at [58].

5 Mental Health (Compulsory Assessment and Treatment) Act 1992, s 2(1), definition of "mental disorder".

6 *R v Clark* (1983) 1 CRNZ 132 (CA).

[21] Third, he argued that he was entitled to call evidence of insanity after the fact, referring to the material we have excluded, and that under s 23(3) of the Crimes Act 1961 the probability of insanity should be 25 per cent or less. The subsection states that:

> (3) Insanity before or after the time when he or she did or omitted the act, and insane delusions, though only partial, may be evidence that the offender was, at the time when he or she did or omitted the act, in such a condition of mind as to render him or her irresponsible for the act or omission.

Mr Marong's argument was that the phrase "though only partial" invites a lower standard of proof than the balance of probabilities. He further argued that all of this material ought to have been disclosed by the Crown.

[22] Finally, Mr Marong argued that his treatment was discriminatory and not in keeping with the dignity to which everyone is entitled.

The test of insanity

[23] We have observed that the Judge directed the jury in orthodox terms. He was right to do so. The short answer to Mr Marong's submission that standards set under other legislation ought to prevail is that for purposes of criminal liability the standard is set by s 23 of the Crimes Act. Other legislation serves different purposes. Notably, the Mental Health (Compulsory Assessment and Treatment) Act creates a civil regime concerned with the care of people who are mentally ill. By way of further illustration, the test for fitness to stand trial is directed not to an accused's state of mind at the time of the offence but to his or her capacity to participate in the trial, gauged as at the time of trial.[7] We note in passing that Mr Marong was found fit to stand trial and he does not take issue with that conclusion on appeal.

[24] The Judge's directions were consistent with *R v Cottle*, in which Gresson P, for this Court, said that disease of the mind "defies precise definition and … can comprehend mental derangement in the widest sense."[8] *Cottle* establishes that the

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7 Criminal Procedure (Mentally Impaired Persons) Act 2003, s 4(1), definition of "unfit to stand trial".

8 *R v Cottle* [1958] NZLR 999 (CA) at 1011.

meaning that "disease of the mind" may bear is a question of law for the Judge.[9] In this case Mander J chose to allow the defence to go to the jury on the basis that the symptoms of untreated diabetes could amount to a disease of the mind.

[25] We reject Mr Marong's submission that a standard of proof lower than the balance of probabilities applies under s 23(3). The phrase "insane delusions, though only partial, may be evidence" is consistent rather with flexibility about what may qualify as a disease of the mind. It is settled law that the onus of proving insanity lies on the accused and the standard is the balance of probabilities.[10]

Not insane in fact

[26] The question whether Mr Marong was in fact insane was for the jury to answer. To succeed on appeal under this ground, he must show that their answer was unreasonable.[11] This is an insuperable task on the facts of this case. Proof of a disease of the mind usually rests on expert evidence.[12] Mr Marong's calculated behaviour was plainly abnormal in the extreme, but 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.

[27] Mr Marong submitted, as noted, that he was insane because he was suicidal. We do not accept this submission. Perhaps suicidal ideation is associated with some diseases of the mind, though there is no evidence of that here, but it does not follow that a suicidal person is by definition insane. It is much more likely that Mr Marong's state of mind while on remand was a result of the hopeless situation in which he found himself.

[28] As noted, Dr White accepted that when badly managed, diabetes can affect mental function. Mr Marong argued that the evidence of his diabetes was misinterpreted. He pointed to his medical records, suggesting they showed he was badly affected, with "off-range" blood readings. There is no evidence to support

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9 At 1011.
10 At 1014.
11 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37.
12 *Police v Bannin* [1991] 2 NZLR 237 (HC) at 241; and *Lyttelton v R* [2018] NZCA 243 at [45].

the submission that the records were misinterpreted. The records were not in dispute; it was common ground that his diabetes was untreated. The evidence showed that over a long period of time untreated diabetes may cause reduced consciousness, and perhaps delirium. Consistent with that evidence, Mr Marong argued that his diabetes was a serious risk to him and seriously diminished his capacity to take care of himself. This does not establish a connection between his diabetes and the killing of Ms Duckmanton.

Not denied the ability to call evidence of insanity

[29] We accept Mr Lillico's submission that Mr Marong was not denied the right to call evidence of his insanity in the months following his arrest. We infer, for reasons given above, that the defence chose not to call such evidence. Absent an expert opinion that Mr Marong's presentation while on remand evidenced insanity, such material could not assist.

Murderous intent established

[30] As noted, Mr Marong did not pursue lack of murderous intent on appeal. We record that sane automatism was disclaimed at trial.

[31] We have nonetheless considered the issue. Having done so, it is impossible to say that the jury were wrong to reject Mr Marong's evidence that he was only trying to quieten Ms Duckmanton. His conduct throughout and after the incident tracked closely his prior pattern of internet searching, justifying an inference that the killing was planned. His admissions to Corrections staff support that inference.

Other grounds of appeal not made out

[32] Mr Marong claimed that he was treated with hostility at trial, and so was the subject of discrimination in the form of racial harassment. This seems to come down to a claim that his evidence ought not to have been treated with scepticism but ought to have been accepted at face value. He also argued that he was discriminated against because medical professionals who dealt with him were state employees. These submissions are untenable.

[33] Mr Marong's submissions touched on other grounds, such as a prisoner's entitlement to medical care. We have considered these grounds but we do not find it necessary to address them. None have any merit.

Result

[34] The application to adduce further evidence on appeal is declined.

[35] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent