

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 29/2018
[2018] NZSC 57**

BETWEEN TIMOTHY JOSEPH FOLEY
 Applicant

AND THE QUEEN
 Respondent

Court: William Young, O'Regan and Ellen France JJ

Counsel: Applicant in person
 M J Lillico for Respondent

Judgment: 21 June 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant had a somewhat turbulent sexual relationship with his next-door neighbour Ms Lawrence. On 4 June 2012, he was issued with a trespass notice by the police at her request. Despite this, five days later on the night of 9 June 2012 he went to her apartment. At 1.08 am the next morning he made a 111 call. In the course of this, he told the operator that he had given Ms Lawrence “a couple of hits over the head” with a metal bar and that she was unconscious and bleeding seriously. The 111 call ended at 1.13 am with ambulance and police officers arriving shortly after at 1.18 am and 1.20 am respectively. When they went into the apartment, they found Ms Lawrence alone in a pool of blood with life-threatening head injuries from which she later died. These injuries were consistent with her assailant having used a metal bar to assault her.

[2] As will be apparent, the applicant had left Ms Lawrence's apartment prior to the arrival of the ambulance officers. He spent the rest of the morning at a friend's house. On the Crown case, the applicant told his friend that he had "banged" Ms Lawrence with a jemmy which he had in his possession and which he showed his friend. Later that morning, the applicant handed himself into the police. He told the police that he had hit Ms Lawrence over the head twice with a garden gnome which he had later disposed of in a river.

[3] The case against the applicant did not come on for trial until February 2015. A contributing factor to the delays was the applicant changing counsel from time to time. By this stage – that is February 2015 – the applicant had it in mind to run a defence along the lines that: (a) he had struck Ms Lawrence with a garden gnome twice sometime prior to 1.08 am (which was when he initiated the 111 call); (b) he then left the flat; and (c) after he had done so, a third person, whom he suspected to be a Mr T (also a neighbour of Ms Lawrence), had entered her apartment and inflicted the fatal injuries using a metal bar and then left prior to the arrival of the ambulance officers at 1.18 am.

[4] This defence involved tight timing and a strange coincidence:

- (a) The applicant made the 111 call on Ms Lawrence's cell phone. When interviewed by the police on 10 June 2012, the applicant said that he was in the apartment after the call had ended. The remarks made by the applicant in the course of the 111 call were consistent with him being in the apartment at the time he was speaking to the 111 operator. All of this suggests that the applicant did not finally leave the apartment until after 1.13 am. If this is so, this left no more than five minutes for a third person to enter the apartment, inflict the fatal injuries on Ms Lawrence and then leave prior to the arrival of the ambulance officers at 1.18 am. In his evidence before Mander J, however, the applicant claimed that he did not make the 111 call until after he left the flat, creating what he described as a "13–15 minute window" within which a third person might have become involved.

(b) In his 111 call the applicant said that he had assaulted Ms Lawrence with a “metal bar”. His proposed defence involved the contention that he had struck her with a garden gnome and thus the coincidence that shortly after his 111 call, the third person who allegedly assaulted Ms Lawrence used a weapon which matched the description he had provided a few minutes earlier to the 111 operator.

[5] In the end, the applicant pleaded guilty to murder on 12 February 2015. Contributing to his decision was a concern that if the case went to trial, he might wind up being sentenced on the basis that the murder followed a home invasion which would have increased the minimum period of imprisonment likely to be imposed. However, before he was sentenced, he expressed a desire to withdraw his plea. His application to this effect was dismissed in the High Court by Mander J before whom the applicant and his trial counsel (along with other witnesses) gave evidence.¹ His later appeal against conviction was dismissed by the Court of Appeal.² The Court concluded that no tenable defence was apparent given, amongst other things, the unlikelihood of a third person inflicting the fatal injuries in such a narrow timeframe.³ It also considered that there was nothing meritorious in the various complaints made about the process which had preceded his guilty plea, including complaints addressed to the conduct of the police and counsel.

[6] The applicant now seeks leave to appeal from that judgment.

[7] The case raises no question of public or general importance. Rather, it involves the application of well-settled principles to the particular facts of the case. Those facts were thoroughly reviewed by Mander J and the Court of Appeal and there is no appearance of a miscarriage of justice.

¹ *Foley v R* [2015] NZHC 829.

² *Foley v R* [2016] NZCA 607 (Kós P, French and Venning JJ).

³ At [40] and [43]. The Court was of the view that the window of time was only five minutes; a conclusion which was open to it. As will be apparent, the timing was still extremely tight even on the applicant’s evidence before Mander J in the High Court.

[8] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent