IN THE SUPREME COURT OF NEW ZEALAND

SC 9/2005
[2005] NZSC 33

LESLEY JANE MARTIN

v

THE QUEEN

Hearing: 10 June 2005

Court: Gault J and Blanchard J

Counsel: D L Stevens QC for Applicant
J C Pike for Crown

Judgment: 15 June 2005

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant has sought leave to appeal against the judgment of the Court of Appeal delivered on 14 February 2005 dismissing her appeal against conviction for attempted murder. The Court of Appeal was persuaded that two aspects of the summing up of the trial Judge were open to criticism, but concluded that the directions could not have affected the jury's findings. The Court, therefore, applied the proviso to s 385(1) of the Crimes Act 1961 and dismissed the appeal against

conviction. A sentence appeal also was dismissed but we are not concerned with that.

[2] Mr Stevens QC identified three issues which he submitted warrant leave to appeal. They are:

> 1. Whether the application by the Court of Appeal of the proviso to section 385(1) of the Crimes Act to the applicant's appeal was erroneous in law.
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> 2. Whether the Court of Appeal misapplied the proviso to s 385(1) of the Crimes Act by erroneously concluding the jury would have convicted the applicant notwithstanding the misdirections in the trial judge's summing up to the jury.
>
> 3. Whether the Court of Appeal erred in failing to seek from the parties to the appeal submissions on either the application of the proviso to s 385(1) of the Crimes Act to the case or the particular basis on which the Court proposed to apply the proviso.

[3] In his submissions in support of the application counsel contended that because of the misdirections, the applicant did not receive a fair trial, the right to which is guaranteed by s 25(a) of the New Zealand Bill of Rights Act 1990. He submitted that the proviso, as a matter of law, should not be applied in that situation. This, he said, raises an important question of criminal law.

[4] On the second issue counsel submitted that the line of reasoning followed by the Court of Appeal in determining that the misdirections would not have affected the verdict was flawed. It was said that the Court failed to take account of the possibility that the psychological concept of cognitive dissonance which, on the jury findings, must have been rejected as rendering unreliable admissions of the applicant as to the administration of a lethal dose of morphine to her mother, could, but for the misdirections, have been found to negate her admissions as to her intention when administering the morphine. This, it was contended, was an erroneous approach which of its very nature gave rise to a substantial miscarriage of justice.

[5] The third issue is closely linked to the second. It was submitted that if counsel had been advised that the Court of Appeal was considering applying the proviso, there would have been opportunity to address the Court on the basis on which it would be applied. Counsel's submission did not go so far as to contend that, as a matter of law, this Court should impose a mandatory requirement that the proviso not be applied without first advising counsel and giving an opportunity to make submissions.

[6] Although the Court of Appeal determined the case by application of the proviso, on the reasoning in the judgment that does not seem necessary. If, as the Court found, the misdirections could not have affected the verdict – were not material – there could be no unfair trial, no miscarriage of justice and no need to invoke the proviso. Therefore, the first question logically is whether the Court of Appeal's decision that the misdirections were immaterial is one justifying leave for a second appeal.

[7] One aspect of the summing up was referred to by the Court of Appeal as open to criticism but was not said to constitute misdirection. It appears to have arisen because, although he disavowed a defence of automatism, counsel for the applicant at trial persisted in a submission that, at the material time, the applicant, through stress and exhaustion, was incapable of forming an intention to kill. The Judge directed the jury that stress and exhaustion cannot "in themselves" negate intent. That is unobjectionable. The Judge did not go on to tell the jury expressly that stress and exhaustion could be taken into account in determining whether the Crown had proved the necessary intention to kill (it is of course implicit in what he did say). The Court of Appeal, rightly, said it would have been better if that had been done. But that does not constitute a finding of misdirection.

[8] But in any event, it is necessary to take account of what the jury were told subsequently. At the request of defence counsel, when answering a question from the jury, the Judge reminded them of a defence argument in respect of intention that the potentially lethal dose of morphine might have been administered by mistake because of stress and exhaustion. That clear direction meets the point mentioned by the Court of Appeal and plainly overcame any earlier omission.

[9] The jury direction the Court of Appeal did find to constitute a misstatement of the law, albeit a slip, was a statement to the effect that intention could be presumed from the act of administering the lethal dose if that were found to have occurred. The Judge made the point in the context of the defence case that the accused lacked the capacity to form the necessary intention. The reference to intention instead of capacity to form intention, probably inadvertent, occurred in a summing up which, as a whole, repeatedly emphasised the need to find an intention to kill. Perhaps for that reason the error was not noticed by counsel at the time. But for our present purpose we proceed on the basis that the jury might have been led to the view that intention to kill could be presumed once they found deliberate administration of a dose of morphine likely to be lethal.

[10] The Court of Appeal went on to hold that the jury must have found the administration of such a dose by accepting the admissions of the accused (they being the only evidence). Once those admissions were accepted as reliable they inevitably also established intention to kill. Mr Stevens' distinction is relevant here. The argument he wishes to advance on appeal is that reliability of the admissions as to the dosage of morphine, which the jury must have accepted, should not have been taken as automatically extending to the motive for doing so. It is apparent, however, from the judgment that the Court of Appeal did not overlook the distinction sought to be drawn. It was simply not accepted as realistic. The Court said "if the narrative [of injecting the morphine] should be found reliable, a conclusion as to the relevant criminal intent was, realistically, inevitable".

[11] It is clear from the judgment that the Court of Appeal was alive to the separate issues of whether a lethal dose was administered and whether there was an intention to kill. The Court also reviewed in the judgment the evidence of the admissions and noted that, taken at face value, they left no reasonable room for a suggestion that the injection was to relieve pain rather than to cause death. And we have already noted that the suggestion of mistake was expressly put to the jury and must have been rejected. The applicant seeks to challenge the Court of Appeal's assessment. It is not a case in which it is said that the Court adopted a wrong approach. No point of law is involved nor any point of principle of general or public importance. For the reasons given there is no appearance of a miscarriage of justice.

[12] We are not convinced that what we have called the first question justifies leave to appeal in the interests of justice. The further issues raising points in respect of the application of the proviso therefore do not arise.

[13] This case does not meet the criteria for leave to appeal.

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