IN THE SUPREME COURT OF NEW ZEALAND

SC 17/05
[2005] NZSC 59

	BETWEEN	EDWIN CHRISTOPHER BROWN Applicant
	AND	ATTORNEY-GENERAL Respondent

Hearing: 17 August 2005

Court: Elias CJ and Gault J

Counsel: C R Carruthers QC and A Shaw for Applicant
A Butler and V Sim for Respondent

Judgment: 29 August 2005

JUDGMENT OF THE COURT

A. The application for leave to appeal is dismissed.

B. Any question of costs is reserved.

REASONS FOR DECLINING LEAVE TO APPEAL

[1] The applicant served 17 months of a 9 year sentence for aggravated robbery and wounding with intent imposed in December 1995. In June 1997 his convictions were set aside on appeal and a new trial ordered. The basis on which the convictions were set aside was new evidence which cast doubt on the identification of the applicant at trial as the offender. The new evidence included new "facial mapping" and DNA analysis not available at trial. The new DNA analysis at the appeal detected no DNA from Mr Brown in sweat on a T-shirt which, on the Crown case, had been worn by the offender. That did not exclude Mr Brown, because the expert evidence was that a significant proportion of the population does not excrete DNA in sweat. After Mr Brown's conviction was overturned, further DNA analysis was undertaken by the police of the sweat on the T-shirt and compared with blood samples obtained from two other men. The post-appeal testing suggested (to a low probability) the presence of the DNA of a flatmate of the applicant. On the basis of

the further DNA analysis and the additional evidence available at the appeal, the Crown did not oppose Mr Brown's application for discharge under s 347 of the Crimes Act 1961.

[2] In proceedings filed in 1998 but not served until 2002, Mr Brown claimed a declaration that his "trial, conviction, and sentence took place in breach of the provisions of the New Zealand Bill of Rights Act 1990" and sought compensation of $3 million against the Attorney General. The basis of the claim was the fact that before his trial the applicant had been declined legal aid funding to obtain DNA testing of the T-shirt from Australian forensic science consultants. The claim for compensation was dismissed by Glazebrook J in the High Court, in a judgment reported at [2003] NZLR 335. The Judge considered that the declaration of breach of the Bill of Rights Act was inappropriate. Mr Brown's further appeal to the Court of Appeal was dismissed in a judgment of 3 March 2005 in CA 39/03. He applies to this Court for leave to bring a second appeal.

[3] We are satisfied that no point of general or public importance arises on the proposed appeal and that there is no basis for considering that any substantial miscarriage of justice may have occurred. Although denial of funding to obtain access to expert assistance in the preparation of a defence may raise important questions about trial fairness which it would be appropriate for this Court to consider in an appropriate case, those questions do not arise on the present proposed appeal. Here, there are concurrent findings of fact in the High Court and the Court of Appeal that it was not established that the tests for which counsel sought funding before trial would have led to the DNA results partially relied on in the s 347 determination. Nor are we persuaded that the essential factual conclusions reached in the lower courts were wrong and raise any miscarriage of justice.

[4] There was no probative evidence in the High Court that the tests for which funding had been sought by trial counsel were, according to the case for the applicant, capable of obtaining the results which were relevant to his eventual discharge. The tests for which funding was sought by trial counsel were to exclude the presence of Mr Brown's DNA in sweat on the T-shirt (by ABO/Lewis testing and DNA analysis of any cellular material by unspecified means) and to check the

tests carried out by ESR for the Crown as to the victim's blood (a matter which did not inculpate the applicant). The expert evidence before the Court in the compensation claim which is the subject of the proposed appeal made it clear that absence of Mr Brown's DNA in the sweat on the T-shirt did not exclude him as having worn it because a significant proportion of the population does not secrete DNA in sweat. Moreover, the expert witness (who also conducted the DNA analysis before the appeal which found no presence of Mr Brown's DNA) considered that the testing which she conducted (using PCR technology using Short Tandem Repeats) would not have been available at the time of the trial. She doubted whether the ABO/Lewis testing would have been useful. No evidence from the Australian consultants from whom the testing was to be commissioned was provided to the High Court to suggest that view was incorrect or to indicate what DNA testing they would have undertaken. The important comparison with the DNA of the applicant's flatmate (which was available at the time of the successful s 347 application) was not in prospect in the testing for which funding was requested in 1995. No sample from the flatmate was then available for comparative purposes. In those circumstances, the inability to obtain the testing sought at trial was held by the lower courts not to have been causative of any loss to the applicant.

[5] Mr Carruthers, for the applicant, did not argue that any denial of legal aid funding to obtain potential evidence itself gives rise to a breach of the rights to fair trial recognised by ss 25 and 27 of the New Zealand Bill of Rights Act. In those circumstances, questions of interpretation and validity of the Legal Services Regulations 1991 and the Instructions made by the Legal Services Board under ss 96 and 97 of the Legal Services Act 1991 do not arise, even if properly to be regarded as of public importance given the subsequent enactment of the Legal Services Act 2000. The applicant failed on the facts to establish, on the civil standard, that the refusal of the Auckland District Legal Services Sub-Committee to approve the disbursement sought and the consequential trial without the testing being obtained caused unfairness. Questions of consequential arbitrariness in the applicant's detention and the basis upon which the Attorney-General may be liable in damages for breach of the right to fair trial are therefore not reached. Such matters may well require the consideration of this Court in a case where they properly arise. But this is not such a case.

[6] Criticisms were made by the applicant of the reasoning in the Court of Appeal. Those criticisms included the views expressed as to the novelty of the proposed tests, the expense of testing, the failure to deal with a request to check the original DNA testing undertaken by the police, and the knowledge properly to be attributed to the Auckland District Legal Services Subcommittee. But these criticisms, even if accepted (a matter upon which we express no view), do not affect the essential conclusion that the denial of funding for the Australian testing was not shown to be causative of any actual disadvantage to the applicant which affected the fairness of his trial.

[7] These are the reasons for which we indicated, at the hearing of the application, that leave to appeal would be declined. If there is any question of costs, memoranda may be filed.

Solicitors:
Wayne Thompson, Auckland for Applicant
Crown Law Office, Wellington for Respondent