IN THE SUPREME COURT OF NEW ZEALAND

SC 14/2010
[2010] NZSC 93

JASON MARK FERGUSON

v

THE QUEEN

Court: Blanchard, Tipping and McGrath JJ

Counsel: T Ellis for Applicant
N P Chisnall for Crown

Judgment: 29 July 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted of murder in 2002. His appeal against conviction was not brought until more than six years afterwards. The Court of Appeal granted leave to appeal out of time but dismissed the appeal, giving careful and extensive reasons.[1]

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1 *R v Ferguson* [2010] NZCA 2.

[2] The primary issue sought to be raised in the application to this Court concerns the applicant's fitness to stand trial, which was determined in 2002 under Part 7 of the Criminal Justice Act 1985. It was the subject of two reports to the High Court from Dr Majeed. The second, and fuller, report is dated 4 July 2002 and, inter alia, details what Mr Ferguson told him about the incident in which the deceased was killed. Dr Majeed recognised that Mr Ferguson suffered an intellectual disability (although not at a level or degree which would interfere with his ability to enter a plea, instruct counsel or follow the court process). He also recognised that Mr Ferguson was suffering from post traumatic stress disorder. Nevertheless, he considered that he was fit to plead and stand trial.

[3] The defence was in the hands of the late Mr Ryan, a Queen's Counsel of great experience in criminal matters. He had obviously formed the same view and would certainly have been aware of the fact that Mr Ferguson's condition had deteriorated somewhat since he was seen by Dr Majeed. There was nothing to suggest that it had done so to an extent which required a further exploration of fitness to stand trial. The applicant has now obtained a new report from a registered psychologist. It is mostly related to the confession made by Mr Ferguson to the police. In so far as it addresses lack of fitness to stand trial it is necessarily speculative and we are not persuaded that it provides a basis for argument that the assessment made in 2002 was unsound.

[4] The Court of Appeal examined the issue of whether Mr Ferguson's video statement to the police should have been admitted. After viewing the videotape it was satisfied that his statement was properly admitted. The argument that it should not have been, because of his intellectual disability and mental disorder, suffers from the difficulty that, without his statement, there was simply no basis for a defence of provocation unless he were to give evidence. The argument that the statement was unreliable is also compromised by the fact that Mr Ferguson appears to have later told Dr Majeed essentially a similar story. The Court of Appeal was not persuaded that the statement was, in its essentials, unreliable. Nothing put before this Court indicates that the Court of Appeal's assessment was flawed.

[5] It is further submitted that evidence of the applicant's intellectual disability and mental disorder was relevant to the defence of provocation and should have been adduced by the defence. However, as the Court of Appeal observed, the claimed special characteristic was extreme sensitivity to homosexual advances; expert evidence on why that was so would have added little because the issue was whether, and not why, the applicant had that characteristic. A defence of lack of murderous intent, to which such evidence is also said to be relevant, was not run. That was obviously a tactical decision on the part of defence counsel who, rightly, must have taken the view that it would never succeed and would conflict with the defence of provocation.

[6] The last proposed ground is that Mr Ferguson should have had an interpreter. This is patently untenable. All the international material to which Mr Ellis has referred is directed to situations in which a trial is being conducted in a language which the accused does not speak at all or with which he has difficulty. An accused must be fit to instruct counsel, as was found to be the case. The idea that an accused should have, as well as counsel, assistance during the trial from a medically trained person to explain the trial to him is quite novel, nor does Mr Ellis explain how this might be able to work satisfactorily in practice. This ground too is unarguable.

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