NOTE: HIGH COURT ORDER GRANTING PERMANENT NAME SUPPRESSION TO THE WITNESS REFERRED TO AS W29 REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

SC 104/2013
[2013] NZSC 135

BETWEEN	MIKHAIL RAFAEL PANDEY-JOHNSON Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, McGrath and William Young JJ

Counsel: M M Wilkinson-Smith for Applicant
D J Boldt for Respondent

Judgment: 2 December 2013

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was found guilty of murder and seeks to challenge the dismissal of his conviction appeal by the Court of Appeal.[1] Two broad grounds of appeal have been identified, one as to causation and the other as to the admissibility of the evidence of a witness referred to as W29.

[2] On the Crown case at trial, the applicant had ordered the murder of the deceased. Acting on his instructions, two of his associates – one of whom was found guilty and the other acquitted – struck the deceased on the head at least six times with a hammer. After the attack but before his death, W29 injected 20 milligrams of

1 *Pandey-Johnson v R* [2012] NZCA 595.

morphine into the deceased. At trial, there was no challenge to the Crown contention that the hammer blows to the deceased's head were a substantial and operating cause of death. Instead, the defence case was that these hammer blows had been delivered by W29 and that she then injected the deceased with morphine to finish him off.

[3] On appeal to the Court of Appeal, however, the applicant wished to put causation in issue, arguing that the Crown had not proved causation. There was also an allegation that the applicant's counsel had been in error in failing to contest causation at trial. In the submissions in support of the application for leave to appeal to this Court, the applicant further contends that the trial Judge's direction to the jury as to causation was inadequate, albeit that the alleged errors in the direction are not particularised in the submissions. From the material before us, it is clear that counsel for the co-defendant who was acquitted had obtained a report from a pathologist before trial as to causation and, although we have not seen the report, it is apparent that it was not inconsistent with the Crown case. As well, no evidence inconsistent with the Crown case as to causation was put before the Court of Appeal in support of the counsel error argument.[2]

[4] The Judge left it to the jury to determine whether the hammer blows were a substantial and operative cause of death, a very orthodox approach.[3] The absence of a defence challenge to causation made it practically inevitable that the jury would conclude that causation was established. The evidence as to causation was carefully reviewed by the Court of Appeal.[4] The submissions for the applicant in support of

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2 Counsel for the applicant explained that she was of the view that the Crown evidence at trial had not excluded morphine as the cause of death. Three weeks before the Court of Appeal hearing the Crown filed an affidavit from the pathologist who gave evidence for the Crown at trial. Counsel for the applicant says that in the time remaining before the hearing in the Court of Appeal, it was not possible to obtain a report from another pathologist and that the Court of Appeal had misinterpreted her explanation to that effect as a concession that she had tried and failed to obtain an expert report which supported the applicant's case. As it turned out, the Court of Appeal declined the Crown's application to lead additional evidence from the Crown pathologist.

3 The applicant counsel's position seems to be that causation was not established if it was reasonably possible "that the morphine killed the deceased before the head injuries became fatal". This is not a correct analytical approach. On the Crown pathologist's explanation to the jury, the deceased's injuries affected his respiration and the adverse impact of this may have been exacerbated by the injection of morphine (because it also depresses respiration). In this way the morphine may have accelerated his death. There is, however, nothing to suggest that the morphine injection could have had an effect which was sufficiently independent of the head injuries to exclude them as a substantial and operative cause of death.

4 *Pandey-Johnson v R*, above n 1, at [12]–[28].

the application for leave only focussed on two comments made by the Crown pathologist, one at the preliminary hearing and the other at trial, as to the possible causal significance of the morphine injection. These submissions did not directly engage with the pathologist's evidence as reviewed in the Court of Appeal judgment. And the position remains that there is no expert evidence to suggest that there was a credible basis for challenging the Crown case as to causation.[5] We, therefore, see no appearance of a substantial miscarriage of justice.

[5] The second issue relates to the admissibility of the evidence of W29. Her first statement to the police had been untrue and the second statement was incomplete as it did not deal with the administration of morphine. She was closely involved in the events associated with the murder.[6] As well, she was a user and supplier of Class A drugs. Although the police had requested immunity for her, the Solicitor-General had declined to provide it.[7] For these reasons, it was argued both in the High Court[8] and on appeal that her evidence should have been excluded on the basis of the principles discussed in *R v Condren*[9] and *R v M*.[10]

[6] The admissibility challenge was fully reviewed in the Court of Appeal judgment.[11] Once W29 abandoned her initial dishonest denials (which occurred early in the piece) the accounts of events which she gave were broadly consistent. Key aspects of her evidence were supported by independent evidence. Moreover, the Judge gave the jury appropriate directions under s 122 of the Evidence Act 2006 which deals with evidence which may be unreliable. Again, we see no appearance of a substantial miscarriage of justice.

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5 Counsel for the applicant has explained that legal aid is currently dependent on leave to appeal being granted and that if leave is granted, she will seek "for the first time to obtain expert evidence on the cause of death". While we understand the practical difficulties, the leave criteria do not operate on the basis that we should grant leave for such a purpose.

6 There was evidence which suggested that she had been party to a plan to incapacitate and kidnap the deceased. She supplied cable ties which could have been associated with this plan and were used to tie up the deceased after the attack. Her actions in the aftermath of the murder exposed her to the possibility of prosecution for being an accessory after the fact.

7 The police, however, did undertake not to prosecute her for drug offences or with being an accessory after the fact to murder.

8 Woolford J ruled that the evidence was admissible in a pre-trial ruling under s 344A of the Crimes Act 1961, see *Pandey-Johnson v R* HC New Plymouth CRI-2011-443-13, 18 May 2011.

9 *R v Condren* [2003] 3 NZLR 702 (CA).

10 *R v M* (2003) 20 CRNZ 215 (CA).

11 *Pandey-Johnson v R*, above n 1, at [29]–[38].

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

Solicitors:
Crown Law Office, Wellington for Respondent