

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 107/2013  
[2013] NZSC 145**

BETWEEN                      JOAN MARY GILFEDDER  
Applicant  
  
AND                              THE QUEEN  
Respondent

**SC 109/2013**

BETWEEN                      NGAWATI HEEMI  
Applicant  
  
AND                              THE QUEEN  
Respondent

Court:                          McGrath, William Young and Glazebrook JJ  
  
Counsel:                      P L Borich for the Applicant Gilfedder  
                                     M Wilkinson-Smith for the Applicant Heemi  
                                     M J Inwood for the Respondent  
  
Judgment:                      13 December 2013

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**JUDGMENT OF THE COURT**

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**The applications for leave to appeal are dismissed.**

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**REASONS**

**Background**

[1] Ms Gilfedder and Mr Heemi seek leave to appeal against a decision of the Court of Appeal<sup>1</sup> dismissing their appeals against conviction.

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<sup>1</sup> *Gilfedder v R* [2013] NZCA 426.

[2] Ms Gilfedder and Mr Heemi were three of seven accused who were convicted after a jury trial before Woolford J in the High Court at Auckland. The indictment contained some 85 counts relating to the manufacture and distribution of methamphetamine. Guilty verdicts were returned on all but one count which did not involve either of the applicants.

[3] The Crown case was that the most significant of the offenders, a Mr Van de Ven, arranged for acquisition of pre-cursor materials and supervised the manufacture of the methamphetamine with the participation of three others, on various of the occasions on which methamphetamine was manufactured. Mr Van de Ven then supplied the methamphetamine to four re-sellers of methamphetamine, each of whom was alleged to have a pattern of supplying methamphetamine to their own customers.

[4] Mr Van de Ven's activities occurred at a residential property in Jupiter Street, Papakura and at another property at Hunua. The Crown case was that the re-sellers were supplied with methamphetamine at Jupiter Street.

[5] Mr Heemi was one of those charged with participation in the manufacturing processes. It was alleged that this participation occurred on three occasions, two where he was present physically and one where he provided advice. He was convicted on all three counts. Ms Gilfedder was alleged to be one of the re-sellers. She was convicted on 12 counts of possession of methamphetamine for supply.

### **Propensity direction**

[6] At trial, physical evidence was adduced, including pre-cursor materials, chemicals, equipment and cash found at the two properties involved. In Mr Heemi's case, the Crown also contended that he was linked to the equipment used in the manufacture of methamphetamine by a fingerprint that was identified on a steam distiller at the Hunua property. The main evidence the Crown relied on, however, was the record of intercepted text and call data between the various accused, together with a log of the frequent visitors to the Jupiter Street property.

[7] The evidence in relation to both Ms Gilfedder and Mr Heemi included calls, texts or visits on occasions other than those on the particular days on which the Crown alleged their offending occurred. Both Ms Gilfedder and Mr Heemi submit this evidence was propensity evidence and that a direction should have been given on the proper use of that evidence.

[8] The general issue of when a propensity direction should be given and the contents of any such direction may be a matter of general or public importance. However, in this case, the Court of Appeal undertook an extensive analysis of the nature and content of the directions actually given and whether they should have been supplemented in the particular circumstances of this case. Nothing that has been raised by the appellants throws doubt on that analysis or suggests that there is a risk of a substantial miscarriage of justice arising from the absence of specific propensity directions in this case.

### **Proviso**

[9] The Court of Appeal commented that it would have been prudent for the Judge to have given further directions relating to the propensity evidence.<sup>2</sup> Both Ms Gilfedder and Mr Heemi rely on these comments to argue that the Court of Appeal applied the proviso to s 385(1) of the Crimes Act 1961 (but without hearing submissions on that issue).

[10] This submission is misconceived. To say it would have been prudent to give a direction is quite different from saying that the trial judge was in error for not giving the suggested direction. However, even assuming the Court of Appeal considered there to have been an error, it was quite clear that it did not consider any such error to be capable of affecting the verdict in the particular circumstances of this case. Any question of whether the proviso should be applied was therefore never reached.

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<sup>2</sup> At [104] for example with regard to Mr Heemi and at [34] with regard to Ms Gilfedder where it was said that arguably a direction could have been given.

### **Ms Gilfedder's other grounds**

[11] Ms Gilfedder also complains that there was a discrepancy between the oral directions of the Judge and the question trail given to the jury. Each of the charges against Ms Gilfedder appeared in the question trail in sequence after a count alleging supply of methamphetamine by Mr Van de Ven to Ms Gilfedder and the questions relating to Ms Gilfedder identified Mr Van de Ven as her supplier.

[12] In his summing-up, the Judge stated that the identity of the supplier to Ms Gilfedder did not have to be proved beyond reasonable doubt. The Judge went on to say that this was only a technical issue in the circumstances since the Crown had never suggested that anyone other than Mr Van de Ven was the supplier.

[13] The Court of Appeal commented that, as a matter of law, the Judge was correct in his oral directions that the identity of the person who supplied the methamphetamine was not an element of the charges.<sup>3</sup> Further, in circumstances where Mr Van de Ven was convicted on each of the relevant counts and where no realistic prospect was introduced at any stage that anyone else supplied Ms Gilfedder, the Judge's directions on this point did not compromise her rights to a fair trial.<sup>4</sup>

[14] Ms Gilfedder also renews her submission made in the Court of Appeal that the Judge ought to have directed the jury that, in order to convict, it had to be satisfied that she was in possession of methamphetamine she had obtained that day (and not in possession of the remainder of methamphetamine supplied on another day).

[15] On this point the Court of Appeal observed:<sup>5</sup>

... [t]here was no realistic prospect of confusion by the jury in attributing "remainder" methamphetamine to Ms Gilfedder, as the basis for finding any of the charges proven against her. The Judge did not need to direct them to exclude the prospect of any methamphetamine in her possession that was acquired at an earlier date. That conclusion follows inevitably

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<sup>3</sup> At [48].

<sup>4</sup> At [50].

<sup>5</sup> At [61].

from Mr Van de Ven's convictions on the companion charges of supply to Ms Gilfedder on the days in question.

[16] Neither of these points raise a matter of general or public importance, being confined to the particular facts in this case. Nor has Ms Gilfedder pointed to anything that suggests the Court of Appeal analysis was wrong on those issues.

## **Result**

[17] The applications for leave to appeal are dismissed.

Solicitors:  
Rice Craig Barristers and Solicitors for applicant Gilfedder  
Crown Law Office for respondent