IN THE SUPREME COURT OF NEW ZEALAND

SC 40/2016
[2016] NZSC 124

BETWEEN	WAYNE JAMES BRACKEN Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, Arnold and O'Regan JJ
Counsel:	W C Pyke for Applicant J C Pike QC for Respondent
Judgment:	13 September 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] The applicant, Mr Wayne Bracken, was convicted on 28 September 2012 of murder and kidnapping.

[2] The Crown case was that the applicant's two brothers (Kenneth and Frederick) and the victim (Mr Davis) had been helping the applicant to move to a farm belonging to Mr Dangen. Afterwards they[1] stayed on to drink alcohol and consume both methamphetamine and cannabis.

[3] At some stage, the applicant began threatening Mr Davis. The Crown alleged that the applicant forced his brother, Kenneth, to tie Mr Davis up. He was then left

[1] Apart from Frederick, who had left to go back to Whangarei.

"hog tied" in the shearing shed, secured to a rail or board. The following afternoon the applicant returned to the property. He and Mr Dangen loaded Mr Davis into the car, took him to a secluded area of bush where, it was alleged, the applicant killed him with a thistle grubber.

[4] The applicant and Mr Dangen were jointly charged with the kidnapping and murder of Mr Davis. Each also faced additional charges.[2] Kenneth Bracken was originally charged with kidnapping but was granted immunity from prosecution and gave evidence for the Crown.[3]

[5] The applicant's position was that he was not involved in the kidnapping and murder of Mr Davis and he maintained his denial in evidence. A mixture of direct and circumstantial evidence[4] was employed to link him to the killing, although there was no physical or forensic evidence linking him to the scene.[5]

[6] Propensity evidence that the applicant had been involved in a similar non-fatal kidnapping and of violence, intimidation and threats was also called. In relation to the prior kidnapping, the evidence was that the applicant had tied and gagged the victim, struck him across the back of the head with a gun and threatened him with knives before leaving him in the boot of a car overnight. The next day the applicant returned and, after striking the victim with a gun and throwing him into the bushes, the victim managed to free himself and flee the scene. Other evidence of violent conduct of the applicant included threats involving both knives and guns.

[7] Mr Dangen admitted his involvement but said, in his police statement and through counsel at trial,[6] that he was an unwilling accomplice who had been intimidated into participating. He was acquitted.

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2 The applicant was also charged with aggravated robbery, assault with intent to injure and burglary. Mr Dangen was also charged with receiving.

3 Mr Dangen applied for immunity but was declined.

4 As set out in *Bracken v R* [2016] NZCA 79 (Miller, Fogarty and Toogood JJ) at [20] [*Bracken* (CA)].

5 It was, however, alleged by the Crown that Mr Dangen's footprint was found at the murder scene. This was not accepted by Mr Dangen's counsel at trial.

6 He did not give evidence.

Trial ruling

[8] Mr Frederick Bracken gave a formal written statement to the police in April 2011. In that statement, he made various assertions about his half-brother. Among other things he said:

(a) that in or about November 2010, the applicant "started acting crazy";

(b) that the applicant threatened to kill him and generally tried to intimidate him;

(c) that the applicant on a few different occasions told him that he was "the chosen one" and that he had a thousand spirits coming to look after him;

(d) that the applicant claimed to be the devil and told him that their deceased father had instructed him to cut off his brother-in-law's, Manu Warmington's, head;

(e) that the applicant told him that he would cut off Manu Warmington's head and put it on a stake;

(f) that the applicant named several other people that he wanted to paralyse by sticking a knife in their spine and twisting it;

(g) that when he and the applicant were living together in Otangaroa Side Road immediately prior to the events at issue in the trial, he thought the applicant was going to hit him from behind and that he was in a strange mood; and

(h) that the applicant can be crazy, violent and aggressive.

[9] In adducing Mr Frederick Bracken's evidence-in-chief, the Crown did not lead evidence of any of these statements. In cross-examination, Mr Krebs, acting for the applicant, had, however, put Mr Frederick Bracken's credibility directly in issue.

The trial judge, Wylie J, ruled that the Crown could re-examine on the matters set out at [8](a), (b), (g) and (h) above.[7]

[10] Wylie J held that Mr Dangen's counsel, Mr Dodds, could cross-examine on all matters (but neither the Crown nor Mr Dodds could elicit opinion evidence as to the applicant's mental state).[8] That Mr Dodds was able to cross-examine on all matters set out at [8] was on the basis of the Court of Appeal's decision in *Moffatt v R*.[9] In that case the Court of Appeal held that the discretion to exclude propensity evidence offered by a co-defendant, under s 42(1)(b) of the Evidence Act 2006, could not be exercised where the evidence was relevant as to propensity in the context of the crime charged.[10] Otherwise a co-defendant could have his or her right to a fair trial compromised.[11] Evidence could only be excluded under s 8 in such a case.[12]

[11] Mr Dodds did cross-examine the applicant on all the matters set out at [8]. It was also put to the applicant that he had told Mr Dangen he was the devil and that he had threatened to kill Mr Dangen (but the applicant submits that there was no evidence from Mr Dangen on either of these points). Mr Dodd's closing address to the jury also emphasised those matters.

The application

[12] The applicant seeks leave to appeal with regard to two aspects of the trial:

(a) Evidence of Mr Kenneth Bracken as to the effect of drugs on the applicant (said by the Crown and counsel for Mr Dangen to be plausible because of general expert evidence on the effect of methamphetamine), coupled with a lack of directions on this issue from the Judge.

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7 *R v Bracken* HC Whangarei CRI-2011-027-666, 17 August 2012 at [22].
8 At [20].
9 *Moffatt v R* [2009] NZCA 437, [2010] 1 NZLR 701 (William Young P, Baragwanath and MacKenzie JJ all delivered separate concurring judgments).
10 At [21] per Baragwanath J.
11 At [42] per William Young P.
12 At [43] per William Young P.

(b) Evidence from Mr Frederick Bracken about the applicant's description of himself as evil, that he was the "chosen one", the devil and that he had a thousand spirits looking after him.

[13] The first ground was not really developed further in submissions. As to the second ground, Mr Pyke argued that "character blackening" shows no meaningful propensity and should be excluded under s 42(1)(b) and/or controlled under s 85 of the Evidence Act,[13] as well as being addressed explicitly in the summing up.

The first ground

[14] On the first ground, the Court of Appeal noted in its judgment the evidence of Ms Coward, a forensic toxicologist with the Institute of Environmental Science and Research (ESR). Her evidence was that high doses or chronic usage of methamphetamine could give rise to delusions, psychotic episodes and paranoia. It was put to her by counsel for Mr Dangen that heavy methamphetamine usage could result in "random serious violence" and she agreed with that proposition.[14]

[15] In evidence-in-chief, the applicant accepted that he regularly used methamphetamine in 2010 and 2011, including in the period leading up to the alleged offending. He said taking the drug made him "quite happy", but he then added he could later "get a little bit grumpy but never really violent".

[16] As to Mr Kenneth Bracken's evidence on this point, the Court of Appeal said that, to the extent any of his evidence was opinion evidence, it was allowed by s 24 of the Evidence Act.[15]

[17] This first ground of appeal does not raise an issue of general or public importance. It relates to the particular circumstances of this case. There was clearly an evidential foundation for the Crown submissions at trial. Nothing raised on behalf of the applicant suggests a risk of a miscarriage of justice on this ground.

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[13] Section 85 provides that the Judge may disallow or direct that a witness is not obliged to answer questions the Judge considers to be improper, unfair, misleading, needlessly repetitive, or expressed in language that is too complicated for the witness to understand.

[14] *Bracken* (CA), above n 4, at [52].

[15] At [54].

The second ground

[18] As to the second ground, the extent of the discretion under s 42(1)(b) of the Evidence Act could be regarded as a matter of general and public importance. However, even if the cross-examination by Mr Dodds and the closing submissions on behalf of Mr Dangen went too far, we do not consider there is any risk of a miscarriage of justice. This is because of the extent and content of the propensity evidence already before the jury and the strength (albeit largely circumstantial) of the Crown case. As this is the case, it is not in the interests of justice[16] to grant the application for leave to appeal on this ground.

Result

[19] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[16] As required by s 13 of the Supreme Court Act 2003.