IN THE SUPREME COURT OF NEW ZEALAND

SC 64/2016
[2016] NZSC 92

BETWEEN	DEAN JOHN DREVER Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, Arnold and O'Regan JJ
Counsel:	Applicant in person A J Ewing for Respondent
Judgment:	27 July 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Drever seeks leave to appeal against a Court of Appeal decision dismissing his appeal against conviction and sentence for arson.[1]

Background

[2] In November 2011 Mr Marsh woke to the sound of glass breaking. His evidence was that, after going to investigate, he saw Mr Drever setting a fire on his doorstop. The fire spread to the inside of the unit.

[3] Mr Drever was charged with arson under s 267(1)(a) of the Crimes Act 1961. It was alleged that he intentionally or recklessly damaged Mr Marsh's unit by fire and that he knew or ought to have known that danger to life was likely to ensue.

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1 *Drever v R* [2016] NZCA 249 (Randerson, Woodhouse and Wylie JJ).

[4] Mr Drever was convicted and sentenced to five years' imprisonment with a three year minimum non-parole period. This was his second trial. The jury in the first trial had failed to reach a verdict.

[5] The issues at trial were identity (Mr Drever said he was at the casino at the relevant time) and mens rea (whether the arsonist ought to have realised that the fire outside the unit was likely to cause danger to life).

[6] The Crown called evidence from the victim, Mr Marsh, that there was a long history of hostility between him and Mr Drever and that Mr Drever had threatened on a number of occasions to kill him. There was evidence from another witness (Mr Devich) as to one instance of Mr Drever threatening to kill Mr Marsh.

[7] The propensity evidence of Mr Devich had been ruled inadmissible at the first trial but was admitted at the retrial after a subsequent Court of Appeal decision had clarified that evidence related to motive (such as a defendant's hostility towards the victim) could be relevant, particularly where (as here) identity was disputed.[2]

[8] There was also conflicting evidence at trial by experts for the Crown and the defence as to whether the window had been broken before the fire or during and because of the fire.

Court of Appeal decision

[9] Mr Drever was represented in the Court of Appeal but had also been given permission to file his own submissions (and he filed some 300 pages). His counsel in the Court of Appeal told the Court that he had isolated the points in his written submissions that he considered had merit and had dealt with them in argument. The Court was not persuaded that there was anything in Mr Drever's personal submissions meriting the Court's attention. The Court said:[3]

> Our willingness on this occasion to receive personal submissions from Mr Drever should not be treated as a precedent. In hindsight, our generosity in departing from usual practice was misplaced.

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2 *R v Martin* [2013] NZCA 486 at [22]–[24].
3 *Drever v R*, above n 1, at [34].

[10] The grounds of appeal examined by the Court of Appeal were that:

(a) The evidence of Mr Devich should not have been admitted.

(b) The defence expert was not permitted to visit the scene of the fire before giving his opinion.

[11] As to the first ground, the Court held that Mr Devich's evidence had significant probative value[4] and that it was not unfairly prejudicial.[5] Further, the trial judge had appropriately warned the jury not to engage in illegitimate reasoning.[6] This therefore had not led to a miscarriage of justice.[7]

[12] As to the second ground, the Court held that there was no basis for appellate intervention in the absence of affidavit evidence supporting the assertion that the defence expert was denied access to the site and in the absence of evidence indicating what difference a site visit would have made. The Court said that it is reasonable to infer that, by the time the defence expert was retained, the glass would have been repaired. It is therefore unlikely a site visit would have assisted.[8]

[13] The Court also considered[9] the defence's expert's answer to the following question from the Judge to be telling:

> Q. Mr McKay you agree that this isn't a sophisticated effort to set fire to this building is it?
>
> A. No Your Honour.
>
> Q. And if the jury accept that the fire's been deliberately lit whether or not the person who tried to [light] the fire has tried to pour petrol inside or only pour it on the outside really only goes to just how the determined the efforts were to set a fire doesn't it?
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> A. Indeed, yes.

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4 At [14].
5 At [16].
6 At [16].
7 At [17].
8 At [25].
9 At [23] and [26].

Grounds for leave application

[14] Mr Drever submits that the Court of Appeal did not address his true complaints about the trial:

(a) that s 178(2) of the Criminal Procedure Act 2011 meant that the judge in his retrial was bound by the ruling in the first trial not to admit the propensity evidence; and

(b) the fact that his expert was not able to visit the scene was in breach of an earlier undertaking by the Crown to allow him to do so. In Mr Drever's submission "physical examination is essential" and it is wrong to speculate what such inspection may have unearthed. The breach of the undertaking "perverted the course of justice" and suffices to require the appeal to be allowed.

[15] Mr Drever also submits that, at the hearing of his appeal, Crown counsel "spoke summarizing and adding the personal perspective of the respondent as to the events and extents that occurred". In Mr Drever's submission "this is wrong and risked predisposing the judiciary". The argument on appeal should have been limited only to whether the propensity evidence was properly admitted and the fact that the defence expert was not permitted to visit the scene.

[16] As to sentence Mr Drever says that the Court of Appeal failed to consider his submission that a custodial sentence posed "disproportionally severe and undue risks", such as risk of disease, violence and emotional harm. He also says that the sentence was wrongly influenced by the propensity evidence.

Our assessment

[17] We accept the Crown's submission that the earlier propensity ruling did not bind the trial judge in the retrial because there had been a change in circumstances since the first trial, given the decision in *R v Martin*.[10] Further, the Criminal

[10] *R v Martin*, above n 2.

Procedure Act did not apply at Mr Drever's trial,[11] although we doubt there would have been a different result if it had applied. We also accept the Crown's submission that the Court of Appeal was correct to consider that Mr Drever's malice towards Mr Marsh had significant probative value to both of the issues in dispute at the trial.

[18] Moving to the second ground of appeal, as the Court of Appeal pointed out, Mr Drever's assertions relating to the defence expert are without any evidential foundation. In any event, on an appeal the issue is whether there has been a miscarriage of justice. Nothing raised by Mr Drever suggests the Court of Appeal's reasoning on this issue was in error.

[19] With regard to Crown counsel's conduct of the appeal, we accept the Crown's submission that Mr Drever's allegations lack specificity. If the suggestion by Mr Drever is that Crown counsel was not entitled to outline the background to the offending in order to place the grounds of appeal in context, then this is rejected.

[20] As to sentence, the risks identified by Mr Drever are generic and cannot provide grounds to displace a sentence that is appropriate and within range. Mr Drever has not pointed to anything that would make imprisonment disproportionately severe for him as compared to other similar offenders.[12] We also accept the Crown's submission that the sentencing judge was entitled to treat the fact that Mr Drever was motivated by malice as aggravating his offending.[13]

Result

[21] The proposed appeal raises no issues of general principle. Nor is there a risk of a miscarriage of justice. The threshold for leave to appeal is not met.

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

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11 As the proceedings commenced before the commencement date of that Act, 1 July 2013, the proceedings must continue in accordance with the law as it was before the commencement date: Criminal Procedure Act 2011, s 397.

12 This case is not like, for example, *R v Verschaffelt* [2002] 3 NZLR 772 (CA), where the sentence of the appellant was reduced as he suffered from an unusual medical condition known as delayed cold induced angioedema.

13 Sentencing Act 2002, s 24(1)(a).

Solicitors:
Crown Law Office, Wellington for Respondent