NOTE: ORDER MADE IN THE COURT OF APPEAL PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES MR AND MRS C PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.
http://www.legislation.govt.nz/act/public/2011/0081/150.0/DLM3360349.html

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF WITNESSES MR A, MR AND MRS B AND ANOTHER WITNESS REMAINS IN FORCE.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 68/2018
[2018] NZSC 106

BETWEEN	NEIL RAYMOND SWAIN Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, O'Regan and Ellen France JJ
Counsel:	A M Simperingham for Applicant M L Wong for Respondent
Judgment:	9 November 2018

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Swain was convicted after trial of the murder of Whetu Hansen. Mr Hansen was last seen alive at Mr Swain's property on 24 November 2013.

Forensic evidence indicated that was the scene of Mr Hansen's death but his body was never found. There was also evidence of admissions made by Mr Swain to two associates from whom he sought help in disposing of Mr Hansen's body.

[2] Mr Swain appealed unsuccessfully to the Court of Appeal against conviction and sentence.[1] He now seeks leave to appeal to this Court against conviction on the basis that the introduction at trial of prejudicial evidence about his record of convictions caused a miscarriage of justice.

Background

[3] In his evidence at trial Mr Swain said Mr Hansen had been at his property on 24 November. Mr Swain said he saw two men on the property just as Mr Swain was leaving the address. He knew the name of one of the men but would not identify or describe either of the two men. When Mr Swain returned home he said the two men were just leaving. Mr Swain eventually found Mr Hansen's body under the cover of Mr Hansen's vehicle.

[4] Mr Swain's explanation for his failure to call the police when he found Mr Hansen's body was that he was not on good terms with the police. The police would not believe him particularly given his previous conviction for bombing the Sydenham Police Station. The defence decided to reveal this conviction to the jury to explain Mr Swain's reluctance to call the police and to explain why he was nicknamed "Bomber".

[5] It seems to have been agreed the evidence would be given by a police officer. Unfortunately, the brief of evidence the officer read referred to other convictions including a conviction for "kidnapping Crown witnesses at gunpoint". Defence counsel made no objection to the evidence but established in cross-examination that the convictions were well over 20 years old. The trial Judge, Brown J, in summing up directed the jury to ignore the evidence about the prior convictions noting it was important the jury not take them into account in deciding on guilt.

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1 *Swain v R* [2018] NZCA 259 (Asher, Venning and Mander JJ).

[6] Trial counsel in his evidence before the Court of Appeal accepted he had made a mistake in overlooking the reference in the officer's evidence to other convictions. He said that by the time he realised it was happening it was too late.

The proposed appeal

[7] Against this background, the applicant wishes to argue the admission of the evidence gives rise to a miscarriage of justice. The applicant submits that the nature of the challenged evidence was particularly damaging for a number of reasons including its factual inaccuracy and as providing an inadmissible opinion on the applicant's character.[2]

[8] Whether the admission of this evidence gave rise to a miscarriage of justice was considered by the Court of Appeal. The Court of Appeal said that an assessment of the effect of disclosure of prejudicial material was contextual. In that respect the Court noted the case had various "unusual features".[3] The main parties all had backgrounds "of significant criminal activity"; the defence were "open" about Mr Swain's bombing convictions; and, over a lengthy (into a fourth week) trial the "jury would have been well-aware that Mr Swain moved in those circles".[4] Hence, Mr Swain said he would not name the two men he saw on 24 November because he was fearful of his safety and was not a "nark".[5]

[9] The Court considered that, against this background, by the time the officer gave the now challenged evidence, the convictions "would not have stood out as particularly significant to the jury".[6] In these circumstances, a direction was sufficient.

[10] The applicant does not point to any error in principle in this approach. An evaluative assessment was called for and the Court of Appeal considered all of the relevant factors in undertaking that exercise. There is no appearance of a miscarriage of justice arising from that assessment.

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2 The officer also referred in the brief to a history for "extreme violence".
3 At [77].
4 At [77].
5 At [77].
6 At [78].

[11] The applicant emphasises in this respect the officer's description of the offending history was incorrect in referring to one of the earlier convictions as kidnapping. This aspect was also before the Court of Appeal. The Court noted that Mr Swain's previous convictions for which he was sentenced at the same time as the Sydenham Police Station incident included aggravated injury by rendering witnesses incapable of resistance. In any event, that mistake does not materially alter the prejudicial effect of the admission of this evidence all of which was carefully assessed by the Court of Appeal.

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

Solicitors:
Woodward Chrisp, Gisborne for Applicant
Crown Law Office, Wellington for Respondent