IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 59/2018
[2018] NZSC 94

BETWEEN	MARTIN VICTOR LYTTELTON Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, William Young and O'Regan JJ
Counsel:	Applicant in person J E L Carruthers for Respondent
Judgment:	16 October 2018

JUDGMENT OF THE COURT

The application for leave to appeal against both conviction and sentence is dismissed.

REASONS

[1] The applicant was convicted after a jury trial in the High Court of attempted murder of his former business partner, Richard Ord, causing grievous bodily harm with intent to injure to Mr Ord's partner, Colleen Fenton, and aggravated burglary of the home of Mr Ord and Ms Fenton. Asher J sentenced him to imprisonment for a term of seven years.[1] Mr Lyttelton appealed unsuccessfully to the Court of Appeal

[1] *R v Lyttelton* [2016] NZHC 1041 (Asher J). The applicant had earlier pleaded guilty to the offending and then been sentenced to imprisonment for five years and 11 months: *R v Lyttelton* HC Auckland CRI-2008-044-9465, 31 March 2010 (Wylie J). In 2014, the Court of Appeal allowed him to withdraw the guilty pleas, set aside the convictions and ordered a retrial: *Lyttelton v R* [2014] NZCA 638 (Miller, Heath and Clifford JJ).

against both conviction and sentence. The appeal was dismissed.[2] The applicant has served the sentence imposed by Asher J.

[2] The applicant applies for leave to appeal against the Court of Appeal's decision. He wishes to challenge that Court's finding in relation to both conviction and sentence. The applicant filed extensive submissions in support of his application for leave to appeal (almost four times the 10 page limit set out in r 20 of the Supreme Court Rules 2004).

[3] In relation to his conviction, the applicant argues that the appeal involves matters of general or public importance in that the judgment of the Court of Appeal overturned established precedents and established new precedents. He also argues that a miscarriage of justice will occur unless leave is given, because there were errors of fact and law contained both in the Court of Appeal's judgment and in the conduct of his High Court trial.

[4] The applicant seeks to advance again the points he raised in the Court of Appeal about the trial Judge's summing up, all of which were rejected by that Court. In particular, he wishes to argue that the trial Judge ought to have given a detailed direction explaining how intoxication may have affected the mental elements required by the charges he faced.

[5] At the trial, after the summing up had ended, the prosecutor requested that the jury be recalled and that such a direction be given. The prosecutor argued that, without it, the jury was left with an impression that was adverse to the Crown's case.[3] Both the applicant and the amicus appointed to assist him opposed this.

[6] The background to the applicant's submission about intoxication is that the applicant had consumed both sleeping tablets and antidepressant tablets two days before the incident leading to the charges, in an attempt to commit suicide. His

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2 *Lyttelton v R* [2018] NZCA 243 (Miller, Ellis and Woolford JJ) [*Lyttelton* (CA)].

3 The prosecutor argued that the standard direction to the effect that an intoxicated intent is still an intent was required to balance the direction on intent, so the jury did not form the impression that an intoxicated person cannot have the necessary intent.

argument is that a residual effect of this ingestion of drugs remained with him at the time of the incident. His defence at trial was lack of intent.

[7] The trial Judge reminded the jury that the applicant's case was that a combination of his depressive illness and the drugs he had taken rendered him incapable of forming the necessary intent. He directed the jury that it was for the Crown to prove that the applicant did, in fact, have the necessary intent. Thus, the jury was directed that, if the Crown had not proved that the applicant had the intent to commit crimes of assault, murder or unlawful discharge of a firearm or kidnapping when he entered the victims' house (in relation to the aggravated burglary charge), the intent to kill Mr Ord (in relation to the attempted murder charge) and the intent to injure Ms Fenton (in relation to the charge of causing grievous bodily harm with intent to injure) then the applicant should be acquitted of the relevant charge.

[8] The trial Judge refused the prosecutor's request that he give an additional intoxication direction. He did not consider the absence of such a direction was unfair to the Crown and he was concerned that, if he gave such a direction, it might appear as if he was trying to indicate to the jury that the use of drugs and Mr Lyttelton's depression were not matters of particular significance to the defence.

[9] The Court of Appeal said that in directing the jury this way, the Judge achieved simplicity at the Crown's expense, because the resulting direction was favourable to the defence.[4]

[10] We do not consider that the direction given by the trial Judge or the Court of Appeal's analysis of it calls into question the well-established principles relating to intoxication. The direction the trial Judge gave was tailored to the facts of the case. Nor do we see any risk of a miscarriage arising from the way in which the trial Judge dealt with the issue.

[11] The applicant also seeks to raise the lack of a specific automatism direction, the nature of the directions given on intent and mens rea and the failure by the trial

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4 At [41].

Judge to highlight the applicant's criticisms of the evidence of Mr Ord. None of these points raise any issue of public importance and we see no appearance of a miscarriage in the way they have been dealt with in the Courts below.

[12] Accordingly, we decline leave to appeal against conviction.

[13] The applicant also seeks to appeal against the Court of Appeal's decision to uphold the sentence of seven years' imprisonment imposed by Asher J in the High Court. Again he seeks to advance afresh the arguments he made in the Court of Appeal that were rejected by that Court.

[14] The applicant's principal argument is that the refusal by Asher J to hold a disputed facts hearing meant that the Judge proceeded on a wrong factual basis in the sentencing exercise.[5] The Judge rejected the request for a disputed facts hearing on the basis that he was able to reach definite conclusions on all of the matters that were material to sentence from the evidence that was given at trial and was therefore able to assess the applicant's culpability for his offending without the need for a disputed facts hearing.[6]

[15] Having summarised the law in relation to s 24 of the Sentencing Act, the Court of Appeal rejected the applicant's submission that a s 24 hearing was required.[7] The Court reiterated the well-established principle that a sentencing Judge is not required to order a disputed facts hearing for facts disclosed by evidence at trial and proved there, in his or her opinion, to the required standard. The Court was satisfied that that was the case in relation to the sentencing process for the applicant. No issue of public importance arises in relation to this issue and we see no appearance of a miscarriage in the way the issue was dealt with in both the High Court and the Court of Appeal.

[16] The applicant also wishes to argue that Asher J was influenced by the sentencing notes of Wylie J, who sentenced the applicant when he had earlier pleaded guilty to the offending. The Court of Appeal rejected this argument, noting

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5 Sentencing Act 2002, s 24.
6 *R v Lyttelton* [2016] NZHC 1042 (Asher J).
7 *Lyttelton* (CA), above n 2, at [73]–[75].

that Asher J had specifically stated that he was sentencing independently of Wylie J.[8] We see no appearance of a miscarriage in the way this issue was dealt with below.

[17] We therefore decline leave to appeal against sentence.

[18] The application for leave to appeal against both conviction and sentence is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

8 At [76].