ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDING (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF TRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 54/2019
[2019] NZSC 75

BETWEEN	DAVID OWEN LYTTLE Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook and O'Regan JJ
Counsel:	C W J Stevenson for Applicant K S Grau for Respondent
Judgment:	18 July 2019

JUDGMENT OF THE COURT

A The application for leave to bring a pre-trial appeal is dismissed.

B We make an order prohibiting publication of the judgment and any part of the proceeding (including the result) in the news media or on the internet or on any other publicly available database until final disposition of the trial. Publication in a law report or law digest is permitted.

REASONS

[1] The applicant is charged with murder. The police investigation of the deceased's death led the police to suspect the applicant but did not yield sufficient

evidence to charge him at that stage. The police undertook a "Mr Big" undercover operation.[1] In the course of that operation the applicant made certain admissions. His challenge to the inadmissibility of the admissions failed in the High Court[2] and the Court of Appeal.[3] His application for leave to appeal to this Court against the Court of Appeal's decision on the admissibility of the admissions was unsuccessful, this Court determining that the arguments could fairly be ventilated at trial and on appeal against any conviction, and that it was not therefore necessary in the interests of justice to hear a pre-trial appeal on the admissibility of the admissions.[4]

[2] The applicant's trial commenced in the High Court in October 2018, but was aborted.[5] A new trial is due to commence on 16 September 2019.

[3] During the first week of the October 2018 trial, Simon France J heard argument about the admissibility of expert evidence that the applicant wished to adduce regarding false confessions and the risks inherent in Mr Big operations. The Judge ruled that this evidence was inadmissible.[6] The applicant appealed to the Court of Appeal, but his appeal was dismissed.[7] He now seeks leave to bring a pre-trial appeal to this Court against the Court of Appeal decision.

[4] The case has been subject to a number of delays. The deceased was last seen alive in May 2011 and the Crown alleges he was murdered around that time. The Mr Big operation commenced in March 2014 and terminated in June 2014, after which the applicant was arrested and charged with murder. He was remanded in custody for two years and is now on bail. His counsel says that, despite these delays, the admissibility of the proposed expert evidence is sufficiently important that the applicant would accept any necessary adjournment of the September 2019 trial if leave were granted and the intended appeal could not be dealt with prior to the commencement date of that trial.

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1 The Mr Big technique is described in the judgment of the Court of Appeal to which the present application relates: *Lyttle v R* [2019] NZCA 226 (French, Miller and Williams JJ) [*Lyttle* (CA)] at [6]–[8].
2 *R v Lyttle* [2016] NZHC 774.
3 *Lyttle v R* [2017] NZCA 245.
4 *Lyttle v R* [2017] NZSC 120.
5 See *R v Lyttle* [2018] NZHC 2689.
6 *R v Lyttle* [2018] NZHC 2649.
7 *Lyttle* (CA), above, n 1.

[5] The applicant wishes to argue at his trial that the evidence obtained by the Crown as a result of the Mr Big operation is unreliable, and that the admissions he made are false. The evidence he wishes to call in support of this is from two experts, Dr Richard Leo and Dr Timothy Moore. Dr Leo is a Professor of Law and Psychology at the University of San Francisco and his proposed evidence relates to the psychology of police interrogations and the phenomenon of false confessions. Dr Moore is a registered psychologist and is Chairman of the Department of Psychology at York University's Glendon College in Toronto, Canada. He is an expert in Mr Big operations, which originated in Canada in the 1990s. He is critical of the Mr Big technique. His proposed evidence deals with the nature and structure of Mr Big operations, the dangers associated with it and an analysis of the Mr Big operation as it is applied in the applicant's case.

[6] As the proposed appeal would be a pre-trial appeal, the Court must be satisfied not only that the normal test for the grant of leave applies, but also that it is in the interests of justice for the Court to hear and determine the proposed appeal before the trial takes place.[8] As this Court noted in *Hamed v R* the requirement that entertaining an appeal before a proceeding is concluded is "necessary in the interests of justice" sets a significant threshold.[9] The Court noted in that case that there is a risk in coming to conclusions dependent on a factual assessment without the advantage of the trial context and that the consequences of inadequate context are amplified in the case of a court of final appeal.[10]

[7] Having considered the submissions of the parties and the content of the briefs of evidence of the proposed expert witnesses, we conclude that it is not in the interests of justice to address this issue in advance of the trial. We consider that the same considerations that led the Court to decline leave for a pre-trial appeal on the admissibility of the evidence obtained from the Mr Big operation also apply here. The Court would be in a better position to consider whether the proposed expert evidence meets the substantial helpfulness standard in s 25(1) of the Evidence Act 2006 with the advantage of the trial context. This approach would also allow the Court to

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8 Supreme Court Act 2003, s 13(2) and (4); and Senior Courts Act 2016, s 74(2) and (4).

9 *Hamed v R [Leave]* [2011] NZSC 27, [2011] 3 NZLR 725 at [13]. See also *TK v R* [2012] NZSC 52.

10 At [13].

consider that issue in conjunction with the broader issue of the admissibility of the admission evidence obtained in the course of the Mr Big operation if there is a post-conviction appeal.

[8] We are also conscious of the considerable delay in bringing the matter to trial. Given the imminence of the trial fixture, we see it as inevitable that the trial would have to be further delayed if we granted leave and determined the matter as a pre-trial appeal. We do not consider it would be in the interests of justice to delay the trial further.

[9] As the issues raised by the present application may come before the Court if the applicant is convicted and the Court gives leave for a post-conviction appeal, we make no comment on the arguments raised by the parties as to whether the proposed expert evidence should be admissible at the applicant's trial.

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

[11] For fair trial reasons, we make an order prohibiting publication of the judgment and any part of the proceeding (including the result) in the news media or on the internet or on any other publicly available database until final disposition of the trial. Publication in a law report or law digest is permitted.

Solicitors:
Crown Law Office, Wellington for Respondent