



**Supreme Court of New Zealand
Te Kōti Mana Nui**

20 DECEMBER 2019

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MARK EDWARD LUNDY v THE QUEEN

(SC 95/2018) [2019] NZSC 152

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Introduction

Mark Lundy was first convicted of the murders of his wife and daughter in March 2002. His appeal against conviction to the Court of Appeal was dismissed in 2002. However, following a further appeal to the Privy Council in 2013 his convictions were set aside and a retrial was ordered. The retrial was held in early 2015. Mr Lundy was again convicted of both murders.

The murders

The bodies of Mr Lundy’s wife and daughter were discovered on the morning of 30 August 2000 at their family home in Palmerston North. Both had been killed by blows to the head with an axe or tomahawk. The murder weapon was never found.

Mr Lundy worked as salesman and often travelled around the lower North Island. On the night of the murders, he had been staying at a motel in Petone. After being told of the murders, Mr Lundy drove quickly back to Palmerston North. He was stopped by police and his car was seized. The car was later searched. Inside police found a stained polo shirt Mr Lundy admitted wearing on the night of the murders.

The stains on the shirt found in Mr Lundy's car were forensically examined. The Crown case at trial was that the stains on the polo shirt contained brain tissue from one of the victims, Mrs Lundy. It relied on the expert evidence of the scientists who tested the shirt to support this hypothesis.

Mr Lundy's appeal to the Court of Appeal following the retrial

Following his retrial in 2015, Mr Lundy appealed against his convictions to the Court of Appeal. The primary ground of appeal was that scientific evidence relied on by the Crown to link Mr Lundy to the murders should not have been admitted.

Evidence was given at the retrial that the stains contained brain or spinal cord tissue (although not necessarily human brain or spinal cord tissue). This evidence was based on immunohistochemistry (IHC) testing. Mr Lundy argued that IHC analysis was untested as a means of proving the source of tissue in a criminal case. The Court of Appeal held that the IHC evidence was properly admitted at trial.

The Crown also led evidence that the brain/spinal cord tissue found on Mr Lundy's shirt was more likely to be human than animal, although it was not possible to say how much more likely. This evidence was based on messenger RNA analysis (mRNA). Mr Lundy had sought to have this evidence excluded at his retrial, but in a pre-trial decision the Court of Appeal held that the mRNA evidence was admissible. When appealing his convictions, Mr Lundy again argued that this evidence was not scientifically valid and should not have been admitted. This time, the Court of Appeal held that the mRNA evidence should not have been admitted at the retrial.

Mr Lundy's appeal to the Court of Appeal was brought under s 385 of the Crimes Act 1961. Section 385(1) provides that where the Court of Appeal finds evidence was wrongly admitted at trial, it must allow the appeal unless it considers that no substantial miscarriage of justice actually occurred, in which case it may dismiss the appeal. This power to dismiss the appeal is known as the proviso to s 385(1).

Despite concluding that the mRNA evidence should not have been admitted at Mr Lundy's retrial, the Court of Appeal applied the proviso to s 385(1) and dismissed Mr Lundy's appeal. The Court of Appeal was left sure of Mr Lundy's guilt and was satisfied that he received a fair trial despite the wrongful admission of the mRNA evidence.

The Supreme Court granted Mr Lundy leave to appeal. The approved question was whether the Court of Appeal erred in applying the proviso to s 385(1) of the Crimes Act.

The Supreme Court's decision

The Supreme Court has unanimously dismissed Mr Lundy's appeal.

Relying on its earlier decision in *R v Matenga*, the Court held that to apply the proviso, the appellate court must first be satisfied that despite the error, the appellant received a fair trial. If the appellate court concludes that the trial was unfair, the appeal must be allowed no matter how strong the other evidence of guilt. If, however, the appellate court concludes that the trial was fair, it may apply the proviso if satisfied of the appellant's guilt beyond reasonable doubt.

The Court held that the admission of the mRNA was not a fundamental error and did not render Mr Lundy's trial unfair. The Crown case at trial did not depend on the mRNA evidence. The probative value of the mRNA evidence was limited insofar as it showed the brain/spinal cord tissue to be human. It did counter Mr Lundy's defence that the tissue was animal, but that defence had no prospect of success.

The Court was also satisfied of Mr Lundy's guilt beyond reasonable doubt. It found that the central nervous system tissue on Mr Lundy's shirt came from his wife's brain and its presence there was not explained by contamination. Other aspects of the Crown case also supported the conclusion that Mr Lundy was guilty beyond reasonable doubt. Traces of blue and orange paint, the same colours with which Mr Lundy marked his tools, were found on the victims; his daughter's blood was found on his shirt; and there was evidence the murders had been staged to look like a burglary gone wrong.

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