IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 52/2020
[2020] NZSC 101

BETWEEN		FRANCHESCA KORORIA BORELL Applicant
AND		THE QUEEN Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: E Huda for Applicant
B F Fenton for Respondent

Judgment: 25 September 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Ms Borell, the applicant, was found guilty by a jury of murdering her partner, Mr Singh. She applies for leave to appeal against the Court of Appeal decision dismissing her appeal against conviction.

Background

[2] On Christmas Day 2016, Ms Borell and Mr Singh got into a series of arguments. The arguments culminated in Ms Borell telling Mr Singh that she was going to leave him. Mr Singh responded by blocking her path to prevent her from leaving. Ms Borell then went to the kitchen, retrieved a large knife, and inflicted a

deep wound in Mr Singh's chest with it. He was admitted to hospital but died of the wound two days later.

[3] Ms Borell accepted she had committed culpable homicide. The issue at trial was whether the jury's verdict should be one of manslaughter or murder. Ms Borell's account was that she had thrown the knife at Mr Singh and inflicted the wound that way. The Crown case was that she deliberately plunged the knife into Mr Singh's chest. The jury convicted Ms Borell of murder.

Court of Appeal judgment

[4] Ms Borell appealed her conviction to the Court of Appeal on two grounds.[1] We need only refer to the single ground still pursued in this Court. That is that the trial was unfair because there were no procedures in place to protect Ms Borell from the prejudicial effects of any racial bias the jury may have harboured. Ms Borell is Māori by descent and appearance, and, it was argued, there is widespread prejudice against Māori defendants in the criminal justice system. The essence of this ground was that allowing the trial to proceed despite the unaddressed risk of prejudice to Ms Borell breached her rights to freedom from discrimination and to a fair hearing before an independent and impartial court.[2] Ms Borell relied particularly on the decision of the Canadian Supreme Court in *R v Williams*,[3] in which that Court considered the potential for juror bias against indigenous Canadians in circumstances where the appellant has sought to examine jurors with a view to challenging for cause should evidence of discriminatory attitudes become apparent. Applying an approach adopted by the Court in an earlier decision,[4] the issue for the Court in *Williams* was whether "the [accepted] evidence of widespread bias against aboriginal people in the community raises a realistic potential of partiality".[5] The Court held that it did and that the appellant should have been permitted to challenge jurors for cause.[6]

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1 *Borell v R* [2020] NZCA 235 (Cooper, Wylie and Muir JJ) [CA judgment].
2 See New Zealand Bill of Rights Act 1990, ss 19 and 25(a).
3 *R v Williams* [1998] 1 SCR 1128.
4 *R v Sherratt* [1991] 1 SCR 509.
5 *Williams*, above n 3, at [15].
6 At [58]–[59].

[5] The Court of Appeal acknowledged that the issue of racial bias against Māori among jurors is "a very large subject",[7] but rejected this ground of appeal for three reasons. First, the decision in *Williams* was distinguishable. It was a case about whether the trial judge should have allowed the appellant's application to challenge for cause based on potential racial prejudice. It did not hold that miscarriage of justice could be established merely because no challenge had been made at all.[8]

[6] Second, the Court did not consider there was an evidential foundation for concluding there might have been an unfair trial in this case due to a failure to challenge for cause, as there had been in *Williams*.[9] Indeed, the Court considered the idea that jurors might decide this was a murder rather than manslaughter because the defendant is Māori was "extremely implausible".[10]

[7] Third, the Court considered that, if successful, Ms Borell's argument would produce a fundamental change in criminal trial practice in New Zealand. The Court considered such a change required "the most careful consideration" and much more in-depth examination than had been provided on appeal in the present case.[11]

This application

[8] Ms Borell submits that the Court of Appeal erred in several respects. She says that this case is in fact no different from *Williams* in principle, because a challenge for cause at trial would have been futile in this country due to the Court of Appeal's decision in *R v Sanders*.[12] She further submits that the Court should not have relied on *R v Rollocks* (an Ontario Court of Appeal decision that cast the onus on the defendant to raise challenges at trial),[13] that it failed to follow the approach outlined in *Williams*, and that it failed to appreciate the "invasive and elusive" nature of racial prejudice as distinct from other forms of prejudice.[14]

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7 CA judgment, above n 1, at [49].
8 At [50].
9 At [53].
10 At [54]. For the sake of clarity, we should not be taken to accept that, in the event a juror or jurors were found to harbour racist attitudes toward Māori, the narrow compass of the issue at trial would have nullified the effect of such attitudes.
11 At [55].
12 *R v Sanders* [1995] 3 NZLR 545 (CA).
13 *R v Rollocks* (1994) 19 OR (3d) 448 (CA).
14 Citing *Williams*, above n 3, at [22].

[9] Ms Borell also submits that other than *Sanders*, which seems to have assumed that a challenge for cause would necessarily involve cross-examination, there is no judicial guidance on the procedure to be followed for challenges for cause. She says that a challenge for cause does not necessarily have to involve cross-examination.

Our assessment

[10] Whether the risk of juror partiality in the form of racism (or in any other form) should be addressed in this country by means of the procedure adopted in Canada is a question of general or public importance. But it cannot be said that it arises squarely in this proposed appeal. The applicant provided general material about discrimination against Māori in the criminal justice system to the Court of Appeal, but there was no evidence of racist attitudes in relation to the case or even more generally in the community from which the jury was drawn. Nor was there evidence about the ethnic make-up of the jury. Crucially, the matter of potentially biased jurors was not raised at trial, either generally or in respect of a particular juror or jurors. The absence of evidence about these matters would render any appeal an abstract exercise substantially uncoupled from the context of the case. And, in any event, it would not have met the test in *Williams* even if that test were adopted.

[11] For the same reasons, there is no basis upon which it may be said that a substantial miscarriage of justice may have occurred in this case.

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

Solicitors:
Shaun Cottrell Law, Christchurch for Applicant
Crown Law Office, Wellington for Respondent