ORDER PERMITTING PUBLICATION OF JUDGMENT PURSUANT TO S 19(2)(a) OF THE BAIL ACT 2000

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA450/2020
[2021] NZCA 542

BETWEEN	SCOTT WATSON Applicant
AND	THE QUEEN Respondent

Hearing: 15 October 2021

Counsel: N P Chisnall, K H Cook and H Z L Krebs for Applicant
M F Laracy and T R Simpson for Respondent

Judgment: 18 October 2021 at 4 pm

JUDGMENT OF KÓS P

A The application for bail pending appeal is declined.

B Order permitting publication of judgment pursuant to s 19(2)(a) of the Bail Act 2000.

REASONS

[1] Mr Watson was convicted in September 1999 of the murder of Olivia Hope and Ben Smart in January 1998. Their bodies have never been found. An appeal against conviction to this Court was dismissed in May 2000.[1] Leave to appeal to the

[1] *R v Watson* [2003] NZAR 193 (CA).

Privy Council was declined in November 2003. A first application to the Governor-General for exercise of the prerogative of mercy was declined in July 2013.

[2] In November 2017 Mr Watson made a second application to the Governor-General for exercise of the prerogative of mercy. The Hon Sir Graham Panckhurst QC, a retired Judge of the High Court, was appointed to advise the Minister of Justice on the application. Sir Graham's report to the Minister resulted in a reference by the Governor-General to this Court in these terms:

> **5 Second application for exercise of Royal prerogative of mercy**
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> …
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> (4) Among other matters, the applicant submitted that 2 reports, dated 18 September 2017 and 19 March 2018, by a forensic scientist, Sean Doyle, provide new expert opinion evidence concerning the reliability of the forensic evidence at trial regarding the hairs recovered from the applicant's yacht that were said to be from Olivia Hope.
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> (5) In particular, it was submitted that the reports raise questions concerning—
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> (a) ESR's adherence to relevant quality standards relating to the collection, handling, and forensic examination of those hairs and other bodily material; and
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> (b) the reliability of the results obtained from the DNA testing of the hairs conducted in New Zealand, Australia, and the United Kingdom; and
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> (c) the fairness and accuracy of the evidence given at trial about the DNA testing and the results obtained from it.
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> …
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> **6 Reason [for reference]**
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> (1) The matter referred to in clause 5(4) and (5) indicates that evidence has become available since the applicant's trial and appeal against conviction that may raise doubts about the reliability of an important aspect of the prosecution case, namely the forensic evidence referred to in clause 2(4)(e) and (5)
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> (2) The question of the applicant's convictions is referred to the Court of Appeal so that it may—
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> (a) consider evidence about the matter referred to in clause 5(4) and (5); and

(b) consider whether any of the evidence given at the applicant's trial should be reconsidered in the light of evidence about the matter referred to in clause 5(4) and (5); and

(c) determine, in the light of its consideration, whether a miscarriage of justice may have occurred.

[3] The reference was received by this Court in August 2020. That same month the Court accorded the appeal priority. A provisional fixture date in November 2021 was allocated. The Court has sought to bring the reference on for hearing, but there have been problems. Different versions of some of the ESR file documents were required, other documents had to be obtained from the United Kingdom Forensic Science Service, defence counsel's files had to be obtained and there were issues obtaining legal aid for further expert evidence.

[4] At the hearing of the present application however I reinforced with counsel the need for this appeal to be resolved. Subject to the availability of counsel, a two-and-a-half day fixture will be allocated on either 21 or 28 June, or 5 July 2022. The Registrar is to confer with counsel as to their availability and allocate that fixture accordingly. Counsel are to submit a suggested timetable for evidence and submissions.

Application for bail

[5] Mr Chisnall submits that it is in the interests of justice that bail be granted in this case. He says it is a unique case given Mr Watson's steadfast assertion of innocence and the reference of a further appeal to this Court in the exercise of the Royal prerogative of mercy.

[6] Mr Chisnall puts most weight on the strength of Mr Watson's grounds of appeal — a relevant consideration under s 14(3)(a) of the Bail Act 2000. He starts by submitting that it is inherent in the exercise of the Royal prerogative that reasonable prospects of success must have existed for the reference to occur. In this case the evidence of two hairs found on a blanket in Mr Watson's boat, and said to match that of Ms Hope, was one of two central planks in the Crown case at trial. The Court now has two scientific reports completed by forensic scientist Sean Doyle and which have been peer-reviewed by Professor Peter Gunn. It is said the reports point to two things.

First, a lack of due procedures to prevent sample contamination, thereby undermining the reliability of the evidence. Secondly, that the evidence overstated the strength of the match. Mr Chisnall submits that if that evidence was inadmissible, and should have been excluded, it is likely a miscarriage of justice occurred inasmuch as the jury would have been substantially influenced by it.

[7] I record that Mr Chisnall sought to argue before me another putative ground of appeal relating to the evidence of the boatman, the late Mr Guy Wallace, and the photomontage used to identify Mr Watson. For the Crown, Ms Laracy took objection to the argument. It is not at all apparent to me that this argument falls within the more narrow scope of appeal permitted by the reference, and cl 6(2) in particular. That is not necessarily conclusive, of course. But if the argument is to be pursued, a preliminary hearing as to jurisdiction will need to be convened.

[8] Mr Chisnall also places weight on considerations relating to the personal circumstances of Mr Watson, under s 14(3)(d) of the Bail Act. In particular, he submits the grant of bail would enable the appeal to be more effectively conducted. It would remove an impediment to Mr Watson and his father (who has been intensely involved in preparation for the appeal) being able to discuss the appeal at any time. And it would better enable counsel to speak to them also.

[9] Mr Chisnall submits the Crown's concerns regarding public safety are overstated. Mr Watson has been eligible for parole since June 2015, but three applications have been refused by the Parole Board. Mr Chisnall submits the fundamental reason for refusal has been Mr Watson's refusal to admit the offending, which makes required "treatment options" marginal for him. But if released on bail, Mr Watson would also be very conscious he was under close scrutiny at a time at which he was seeking exoneration. Further, an electronically-monitored bail condition could be imposed if there was a residual concern.

[10] Finally, Mr Chisnall refers to affidavits filed in support of the application from Mr Watson, his father, his partner and other family members and friends. These suggest a safe environment for Mr Watson's reception back into the community and prospects of rehabilitation through work activities.

Discussion

[11] Section 14(1A) and (2) of the Bail Act reverses the ordinary onus: Mr Watson must persuade me that the interests of justice favour bail before the hearing of his appeal against conviction. Section 14(3) provides that the Court may take into account the following considerations: the apparent strength of the grounds of appeal, length of sentence imposed, likely time before the appeal is heard, personal circumstances of the appellant and the appellant's immediate family, and any other relevant consideration.

[12] As this Court observed in *Lock v R*, the reversal of onus, non-application of the presumption of innocence and the undeniable fact of a considered determination of guilt, are all distinct obstacles to a successful application for bail pending appeal.[2]

[13] In the present case, the verdict of the jury must be given greater weight, until overturned, than the professions of innocence by the defendant, however persistent and consistent those may have been.

[14] It is convenient to analyse the application then under three headings:

(a) the apparent strength of the appeal;

(b) the necessity for bail to prepare the appeal; and

(c) other relevant considerations.

Apparent strength of the appeal

[15] In her submissions, Ms Laracy sought to refer to qualifying remarks in the report made by Sir Graham Panckhurst. I decline to have regard to those remarks here. I have not seen the report, and nor would I expect to. It forms advice to the Minister and is not properly before me.

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2 *Lock v R* [2019] NZCA 163 at [10].

[16] It can however be taken from the fact of the reference, and its terms, that the reports from Mr Doyle "may raise doubts about the reliability of an important aspect of the prosecution case".[3] It is also apparent that the forensic evidence relating to the matching of hairs on a blanket found on Mr Watson's yacht with those of Ms Hope was an important aspect of the prosecution case.

[17] But that is as far as the matter goes at the moment. The reports are what they are. They "*may* raise doubts about the reliability of an important aspect of the prosecution case". The ultimate inadmissibility of scientific evidence led before a jury does not necessarily mean a miscarriage of justice has occurred.[4] The requisite enquiry is both broader and more nuanced than that. The forensic reports are not yet in the form of evidence tendered to this Court, and (most significantly) the Crown's response has not been seen. For the time being the Crown resists the suggestion that its case was seriously flawed.[5]

[18] Bail is not an appropriate time at which to prejudge the merits of an appeal. Section 14(3)(a) really comes into play when the case on appeal is "very strong" or "compelling".[6] Absent that threshold being met, the appeal grounds themselves serve a neutral function, and do not displace the presumptive status as correct of a conviction entered following trial by jury.

[19] In May 2000 this Court considered the case against Mr Watson was not at all a finely balanced one.[7] Of course the new evidence may well alter that assessment. But it would be premature to stamp that evidence now as very strong, or compelling, before it is filed and responded to.

Necessity for bail to prepare appeal

[20] This was by way of a secondary argument advanced by Mr Chisnall. As I indicated at the hearing, I am far from persuaded that general bail is required to enable

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3 "Reference to the Court of Appeal of the Question of the Convictions of Scott Watson for Murder" (10 August 2020) *New Zealand Gazette* No 2020-ps3636 at cl 6(1).
4 *Lundy v R* [2019] NZSC 152, [2020] 1 NZLR 1.
5 Compare *Veza v R* [2007] NZCA 409 at [2].
6 *Veza v R*, above n 5, at [5]; *Hosking v R* [2012] NZCA 263 at [5]; and *Mayer v R* [2014] NZCA 216 at [11].
7 *R v Watson*, above n 1, at [11].

due preparation of this appeal. The primary reason for that is because the terms of the reference call for this Court to consider evidence about the reliability of the forensic evidence regarding the two hairs recovered from Mr Watson's yacht and said to be matched to those of Ms Hope. That is in its terms a relatively narrow ground, focusing on reliability of scientific evidence. While understanding Mr Watson's desire to contribute to the process of analysis, this is not a case in which it is readily apparent that bail is necessary in order to enable the appeal to be properly advanced.

[21] That consideration is reinforced by steps the Crown are willing to take to facilitate participation by Mr Watson in the preparation of his appeal while still in custody. In particular use of a computer with access to all documentation can be provided, along with a meeting space or video links between Mr Watson and counsel for extended periods of time within operational hours of 7 am to 7 pm "including if necessary for full days". These are commendable, and relatively unusual, proposals.

[22] In addition, I raised with Ms Laracy the possibility of Mr Watson being able to meet with counsel for extended periods while on temporary release.[8] Mr Watson is eligible to apply for temporary release, but has not yet done so. Ms Laracy has confirmed in a memorandum filed 15 October 2021 that meeting with his legal team to prepare his appeal is, in principle, an appropriate reason for the grant of temporary release.

Other factors advanced

[23] Other factors raised by Mr Chisnall were in my view of very modest significance only.

[24] The length of Mr Watson's sentence and time before the appeal is heard do not assist him. This is not a case where bail might be compelled because the appeal would be rendered nugatory due to a short remaining sentence of imprisonment.[9]

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8 Corrections Act 2004, s 64; Corrections Regulations 2005, r 26.
9 Compare *W (CA294/2021) v R* [2021] NZCA 388.

[25] The fact that Mr Watson has a suitable bail address and good family support, with rehabilitative prospects in terms of work in the area of the bail address, are matters more relevant to a parole hearing than a bail hearing.[10]

[26] For reasons given by Mr Chisnall at [9] above, I am disposed to regard the risk to the public from Mr Watson's release on pre-appeal bail as modest, rather than high. If there were concerns on that score, then electronically-monitored bail should be considered. But the likely good behaviour of Mr Watson does not mean, absent other compelling considerations, that he should be released on bail ahead of a fully-considered parole hearing or the successful conclusion of his appeal.

Victims' families' views

[27] The views of victims' families must also be taken into account on a bail application.[11] The Crown advises that the victims' families are strongly opposed to bail unless and until the conviction is overturned. The families accept, however, the parole process may result in release from custody ahead of the appeal.

Conclusion

[28] Mr Watson has not discharged the onus of showing it would be in the interests of justice for him to be granted bail pending appeal.

Result

[29] The application for bail pending appeal is declined.

[30] Because of the public interest in the application, the degree and detail of prior publicity concerning the application and the fact that it concerns bail pending appeal rather than trial, permission was given to report the hearing under s 19(2)(a) of the Bail Act. For the same reasons an order permitting the reporting of this judgment is also made.

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10 *Whichman v R* [2018] NZCA 85 at [6]. See also *McQuillan v R* [2014] NZCA 256 at [4].
11 Bail Act 2004, s 8(4); Victims' Rights Act 2002, s 29.

[31] Counsel are to consider the matters raised at [4] and [7] of this judgment. They are to liaise with the Registrar as to the appeal fixture and any preliminary jurisdiction hearing required, and propose timetables therefor.

Solicitors:
K3 Legal Limited, Auckland for Applicant
Crown Law Office, Wellington for Respondent