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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 11/2021
[2021] NZSC 74

BETWEEN	JESSE SHANE KEMPSON Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: P J Shamy and S J Bird for Applicant
P D Marshall for Respondent

Judgment: 29 June 2021

JUDGMENT OF THE COURT

A The application for an extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

The application for leave to appeal

[1] Following trial in the High Court at Auckland, the applicant, Jesse Kempson, was found guilty of the murder of Grace Millane. He was later sentenced to life imprisonment with a minimum term of 17 years.[1] The Court of Appeal having

[1] *R v K* [2020] NZHC 233 (Moore J).

dismissed his appeal against conviction and sentence,[2] he now seeks leave to appeal to this Court in respect of his conviction. This application was filed late, but the delay in applying has been adequately explained.

Overview of the facts

[2] On 30 November 2018, Ms Millane matched with the applicant on Tinder. They met the next day at around 5.45 pm. At 9.40 pm, they entered the City Life building and took a lift to the floor of the applicant's apartment. What happened between 5.45 pm and 9.40 pm can be accurately reconstructed from CCTV footage, bar receipts and messages which Ms Millane sent to friends. During this period the applicant and Ms Millane appeared to be getting on well together and CCTV footage shows them kissing.

[3] Between 9.40 pm on 1 December and 1.29 am the next morning, the applicant killed Ms Millane in his apartment. The 1.29 am time can be fixed by an internet search that the applicant made for "Waitakere Ranges" (which is where he later buried Ms Millane's body). Six minutes later, he searched "hotest [sic] fire". There was no occasion for these searches unless Ms Millane was then dead. Between 1.46 and 1.49 am, the applicant took intimate photographs of Ms Millane's body. On 3 December 2018, he buried Ms Millane's body in the Waitakere Ranges.

The issues at trial

[4] It was common ground at trial that the applicant brought about the death of Ms Millane by applying manual pressure to her neck.

[5] Under the Crimes Act 1961, the killing of another person by an unlawful act is culpable homicide (s 160). Culpable homicide is murder if the offender intended either to kill the victim (s 167(a)) or to inflict bodily injury known to be likely to cause death with recklessness as to whether death results (167(b)). These states of mind are compendiously referred to as "murderous intent". Culpable homicide which is not murder is manslaughter.

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2 *Kempson v R* [2020] NZCA 656 (Kós P, Cooper and Courtney JJ) [CA Judgment].

[6] Section 63 of the Crimes Act provides:

> **63 Consent to death**
>
> No one has a right to consent to the infliction of death upon himself or herself; and, if any person is killed, the fact that he or she gave any such consent shall not affect the criminal responsibility of any person who is a party to the killing

[7] At trial, the defence conceded that s 63 precluded consent as a defence to the intentional infliction of death, and thus to murder under s 167(a). But the defence wished the jury to consider a consent defence premised as follows:

(a) Ms Millane had consented to the manual pressure which was applied to her neck (and in any event the applicant believed she consented);

(b) there was therefore no assault and thus no unlawful act with the result that the homicide was not culpable;

(c) there being no culpable homicide, there could not be a conviction for murder under s 167(b).

There was, as well, a denial of murderous intent.

[8] The trial Judge held that if the jury were sure that the applicant had acted with murderous intent, consent was not available as a defence. He reached this conclusion primarily as a matter of public policy. But if the jury were not sure that the applicant had murderous intent, he considered consent could be a defence to manslaughter. He held that there was sufficient evidential basis for this to be left to the jury. His summing up and the written question trail he gave the jury proceeded on this basis.

The Court of Appeal judgment

[9] For reasons which differed from those of the trial Judge and primarily turned on statutory interpretation, the Court of Appeal also concluded that consent was not a defence if murderous intent was established.[3] As well, the Court of Appeal held that

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3 CA judgment, above n 2, at [84].

there was no "credible narrative of consent or honest belief in consent".[4] Although the Court of Appeal suggested that, in this respect, it was differing from the trial Judge, we see the difference as more apparent than real. The trial Judge's view that there was an evidential basis for consent to be left to the jury as to manslaughter was predicated on the assumption that the jury were not sure on murderous intent. In contradistinction, the Court of Appeal was dealing with consent after the verdict and thus on the basis that murderous intent had been established. The way in which that Court expressed itself makes it clear that it accepted the possibility that there may have been consent to manual pressure for reasons of sexual gratification. The essence of the reasoning was that such consent could not sensibly be taken to extend to an application of such pressure with murderous intent.

The factual merits of the defence

[10] When first interviewed by the police, the applicant told a series of lies about his interactions with Ms Millane. On his narrative, he had little engagement with her and no involvement at all in relation to her death. At a second interview, he gave a somewhat more elaborate account in which he conceded that Ms Millane had accompanied him to his apartment. He said that she had told him of engaging in erotic asphyxiation with her former boyfriend and that, at her request, he (the applicant) had held her throat during sex. He acknowledged too that she died in his apartment.

[11] For reasons which we need not go into but are well reviewed in both the trial Judge's ruling excluding consent as a defence if murderous intent was established and the Court of Appeal's judgment, the applicant's claim that Ms Millane told him of having engaged in erotic asphyxiation with an earlier boyfriend could not be discounted. It is also at least reasonably possible that she consented to some manual pressure being applied to her neck. The trial Judge's ruling and the Court of Appeal judgment (at least as we construe it) both proceed on this basis.

[12] That said, the account given by the applicant of the pressure he applied was lacking in any detail. It was accompanied by a denial of having brought about her death. Furthermore, the limited circumstantial detail he provided as to how and when

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4 At [91].

he realised that Ms Millane was dead was shown to be untrue. His actions in the aftermath of her death (in particular the two internet searches and the taking of intimate photographs referred to at [3]) are not easily reconcilable with his innocent accident explanation. Nor are the actions that he later took to dispose of her body. Importantly, his narrative (such as it was) was not particularly congruent with the pathology evidence given at trial.

The applicant's proposed arguments

[13] The applicant's submissions rest on three arguments:

(a) The way the issues were left to the jury meant that the jury did not have to deal with whether the deceased's death was a culpable homicide before considering murderous intent. A culpable homicide is "a necessary predicate" to invoking s 167. The ordering of the issues was therefore a subversion of "the proper sequential operation of ss 160 and 167".

(b) The order of the question trail meant that consent was not to be addressed unless the Crown case on s 167(b) was rejected. This meant that the intent and recklessness inquiry was "to be determined *as if* the deceased did not consent". This is said to have "made it impossible for a jury to determine whether the [a]pplicant subjectively appreciated the risk that deceased could well die".

(c) Consent as a defence to a charge of murder resting on s 167(b) is not precluded by s 63 or otherwise.

Evaluation

Not requiring a determination as to culpable homicide

[14] There is nothing in this point. If the Judge was right to say that a finding of murderous intent excluded consent, there was no need for the jury to separately address the culpability of the homicide.

Was the jury told to assess murderous intent on the assumption that the deceased did not consent?

[15] At [188] of his summing up, the Judge said:

> Consent only comes into your deliberations if you have rejected murder on either of the bases of murderous intent I have described above. It is not relevant to the murderous intent inquiry. … No person under our law may consent to their own death or the infliction of the sort of actual bodily injury which could well cause death. And that is the reason why if you find either of the murderous intentions proved, thus proving murder, the question of consent does not arise.

As is clear, the Judge was saying that it is not legally possible to consent to the infliction of bodily injury likely to cause death. This could not sensibly be taken as suggesting that the jury had to make the murderous intent assessment on the assumption that there had been no consent.

[16] The Judge summarised the factual issues bearing on murderous intent at [128]–[187] of his summing up, that is, just before [188]. He did not, in that part of the summing up, direct the jury to address murderous intent on the assumption that there was no consent. Instead, there are numerous references to the defence arguments as to "consent", "accident", "breath play" or related words. In this way, he put to the jury defence arguments about consent as relevant to whether murderous intent had been established.

Consent as a defence to murder where s 167(b) is in play

[17] The relevant authorities are well reviewed in the Judge's ruling and the Court of Appeal judgment. There was also substantial discussion of the principles in *R v Lee*.[5] There is no definitive decision that consent is not available as a defence in respect of the infliction of bodily injury with an awareness of the likelihood of death. That said, the drift of the cases reviewed by the Judge and the Court of Appeal strongly suggests that consent is not an answer to an assault with the intention of inflicting bodily injury known to be likely to cause death. There is rather more room for debate as to why this is so. The Judge saw the issue as turning on public policy, whereas the Court of Appeal decided the case primarily as turning on statutory interpretation.

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5 *R v Lee* [2006] 3 NZLR 42 (CA).

[18] The conclusion of both Courts is that consent does not, at least in the circumstances of this case, provide a defence to the intentional infliction of bodily injury known to be likely to result in death. There is insufficient doubt as to that conclusion to warrant leave being granted. This is because it is difficult to see how a court could responsibly hold that consent is a defence to violence carried out with murderous intent.

[19] There is another difficulty with this aspect of the applicant's argument. By their verdict, the jury showed that they were sure that if the applicant did not intend to kill the deceased, he at least intended to inflict bodily injury which he knew was likely to result in death. The most that could be taken from the applicant's account is that Ms Millane may have consented to the application of manual pressure to her neck for the purposes of sexual gratification. There is nothing in what the applicant told the police to suggest that she consented (or he believed she consented) to the infliction of bodily injury of a kind likely to kill her. For these reasons, albeit slightly differently expressed, the Court of Appeal was of the view the argument failed "as a matter of *fact*".[6] We see no apparent error in this conclusion.

Disposition

[20] We extend the time for the making of the application for leave to appeal but dismiss the application.

Solicitors:
Crown Law Office, Wellington for Respondent

6 CA judgment, above n 2, at [91].