NOTE: PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF COMPLAINANT PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 35/2021
[2021] NZSC 89

BETWEEN	RIHARI CHANCE MATTHEW BIDDLE Applicant
AND	THE QUEEN Respondent

SC 36/2021

BETWEEN	JORDAN MATHEW THACKER Applicant
AND	THE QUEEN Respondent

Court: O'Regan, Ellen France and Williams JJ

Counsel: N P Chisnall for Applicant in SC 35/2021
N M Dutch for Applicant in SC 36/2021
M R L Davie for Respondent

Judgment: 19 July 2021

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] Mr Biddle and Mr Thacker were convicted on rape charges after a District Court jury trial. A third offender was also convicted, but is not party to the present applications.

[2] The incident involving all three offenders occurred on the 18th birthday of the complainant. The Crown case was as follows. Mr Biddle contacted the complainant and said he had a present for her. They arranged to meet. When they met, she got into the car, in which the other two offenders were present. She was taken to a beach where Mr Biddle raped her and then directed the other two offenders to also rape her.

[3] During the course of an earlier trial that was aborted, it became apparent that Mr Biddle had raped the complainant on an earlier occasion as well. He was then charged with that rape, and was convicted of that charge too. Mr Thacker was not involved in the earlier incident.

[4] Both Mr Biddle and Mr Thacker appealed to the Court of Appeal against conviction and sentence. The conviction appeals were dismissed and Mr Biddle's sentence appeal was also dismissed.[1] Mr Thacker's sentence appeal was allowed.

[5] Both now seek leave to appeal to this Court against the Court of Appeal's decision to dismiss their appeals against conviction.

[6] The applicants have identified two issues on which they say leave should be given. The first concerns an incident involving a juror and the second concerns expert evidence about the conduct of gangs.[2]

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1 *Biddle v R* [2021] NZCA 57 (Goddard, Lang and Hinton JJ) [CA judgment].

2 The Crown case was that Mr Biddle was, at the relevant time, a member of the Tribesmen gang and the two other offenders were prospects for membership of that gang. See the discussion below at [18].

The juror

[7] After the jury had been selected on the first day of the trial, the Judge received communications from two jurors. The focus of the present applications is on one of these. The relevant communication came from a male juror who said he may know Mr Biddle's family. The juror said that if Mr Biddle was from the Ōpōtiki area, then the juror was a close friend to many of his family members. He asked "[w]ould being in this trial affect me after the trial ends because of this reason?".

[8] The Judge did not tell counsel about this communication before responding to the juror and simply answered the question "No".

[9] The next day, the Judge issued a minute in which he recorded the communication from the juror and the answer.

[10] On the fifth day of the trial, the prosecutor asked the Judge to revisit the decision not to discharge the juror. This occurred after Mr Biddle had been cross-examined about his involvement with the Tribesmen gang. The Judge dismissed the application. Neither Mr Biddle nor Mr Thacker supported the prosecutor's application.

[11] The Court of Appeal said that the nature of the communication raised "obvious questions about the partiality of the juror".[3] It said there were implications for the Crown (possible reluctance to find guilt for fear of retribution) and also for the defence (possible inference of guilt on Mr Biddle's part more readily if the juror knew Mr Biddle's family background and had an adverse view).

[12] The Court said it considered that the Judge ought to have made inquiries of the juror in the presence of counsel and the defendants as soon as he received the communication from the juror. However, it considered that the failure to do this did not mean that the trial became unfair for Mr Biddle once the Judge did not take that step. This was because the Judge had emphatically told the juror he did not need to have concerns, no concern was raised by Mr Biddle or his counsel during the trial

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3 CA judgment, above n 1, at [18].

(which the Court thought was probably because Mr Biddle viewed it as to his advantage for the juror to remain on the panel) and nor did Mr Biddle support the Crown's application to have the juror discharged.[4]

[13] The Court applied an earlier decision of that Court, *Turner v R*, and other decisions to like effect.[5] It concluded that Mr Biddle was fully informed about the risks the juror posed to both the Crown and the defence, and acted in that knowledge. He made an informed decision that it was in his interests for the juror to remain on the panel, leading to his election not to support the Crown's application to have the juror discharged. There was therefore no basis for a post-trial complaint based on apparent juror bias.

[14] Mr Thacker did not advance the juror ground in the Court of Appeal but seeks leave on that ground in this Court, on the basis that the trial was unfair and this affected him as well as Mr Biddle.

[15] The applicants argue that leave should be given because a point of general and public importance arises and that a miscarriage of justice may arise if leave is not given.[6] They seek to challenge what they say was the Court of Appeal's conclusion that the waiver principle has application in the criminal context and to challenge the correctness of *Turner*.

[16] We accept that the point the applicants seek to raise about the correctness and scope of *Turner* may be a point of general and public importance. But we do not see the resolution of that point as being likely to resolve the proposed appeal in the applicants' favour. That is because of the generalised nature of the juror's expressed concern. The juror did not know the applicant. Instead his inquiry was about a whānau name from a particular district. It suggested local knowledge and relationships of a kind routinely found on juries in provincial New Zealand.[7] We do not see the concern as of sufficient moment to found a convincing argument of apparent bias in relation to

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4 At [33]–[35].
5 *Turner v R* CA439/95, 25 July 1996.
6 Senior Courts Act 2016, s 74(2)(a) and (b).
7 *Rolleston v R* [2020] NZSC 113 at [29] and [43].

Mr Biddle (there is obviously no issue in relation to Mr Thacker). In those circumstances, we do not consider it is appropriate to grant leave on this point.

Evidence about gangs

[17] The second point that the applicants seek to raise on appeal relates to expert evidence about gang behaviour that was led at the trial. This evidence was ruled to be provisionally admissible in a pre-trial appeal.[8] As the Court of Appeal noted in the decision against which the applicants wish to appeal, the pre-trial judgment anticipated that the relevance and scope of the expert evidence would be the subject of review before the evidence was given at trial. However, no such review occurred and no counsel asked the Judge to reconsider the relevance and scope of the evidence that was about to be given.

[18] The Court of Appeal considered that there was a proper evidential basis for the Crown theory that the rape of the complainant by the three defendants was committed in a gang context. That was because it had been established that Mr Biddle was a member of the Tribesmen gang at the relevant time and that the other two offenders were prospects. It held that the evidence was admissible under s 25 of the Evidence Act 2006.[9] It noted that the Judge had given comprehensive directions to the jury on the subject of gangs and there had also been comprehensive submissions from defence counsel.[10]

[19] We do not consider the criteria for the grant of leave are met in relation to this point. The question of the applicability of s 25 of the Evidence Act is essentially a factual assessment, and does not give rise to any matter of general or public importance.[11] Nor do we see any appearance of a miscarriage of justice, given the robust direction that the Judge gave to the jury on the gang question.[12]

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8 *Thacker v R* [2019] NZCA 182.
9 CA judgment, above n 1, at [41].
10 In the Judge's comprehensive direction on this point, he said to the jury: "You might find this gang theory pretty thin" and later said "I looked at the evidence and found little to support the gang theory as advanced by the Crown". See the quoted excerpt in the CA judgment, above n 1, at [48].
11 Senior Courts Act, s 74(2)(a).
12 Section 74(2)(b).

[20] The applications for leave to appeal are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent