

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html>

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF WITNESS/CONNECTED PERSON(S) PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html>

NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF THE INDIVIDUAL WHO WAS FOUND UNFIT FOR TRIAL PURSUANT TO S 200 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE

<http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360346.html>

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 44/2022
[2022] NZSC 106**

**BETWEEN TOKO (ASHLEY) SHANE REI WINTER
Applicant**

**AND THE QUEEN
Respondent**

Court: Ellen France, Williams and Kós JJ

**Counsel: W C Pyke for Applicant
Z R Johnston and F E S F Girgis for Respondent**

Judgment: 6 September 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant and Mr Kerry Te Amo were convicted after trial of murder. Both the applicant and Mr Te Amo pleaded guilty to kidnapping the murder victim. A third person, M, was also charged with murder but was found unfit to stand trial.¹ The applicant appealed unsuccessfully to the Court of Appeal against conviction.² She has applied for leave to appeal to this Court.

Background

[2] The murder involved the torture and hanging of a 17 year old girl. The key Crown eye-witness evidence at trial came from M's younger sibling, R, who was 14 years old at the time. R was present for much of the offending but she did not see the victim being hanged. At that point she had been sent to another room in the house in which these events took place.

[3] R was interviewed by the police and made a number of statements over a period in July to August 2018, all of which were before the jury. She implicated the applicant, Mr Te Amo and M, and ascribed a leading role to the applicant. The jury also heard that, subsequently, R was given Crown immunity on 13 November 2018. The jury heard evidence about the process leading to the issuing of the certificate of immunity including as to the provision of legal advice to R by an independent lawyer (on two occasions). The certificate of immunity was read to the jury.³ There were some additions to her evidence from that in her police statements prior to trial. Trial counsel for the applicant said the new material illustrated the fact that in her evidence R was “overcooking” the applicant’s role.

[4] The applicant made various admissions to the police, accepting that she assaulted the victim. Her defence at trial was that her involvement was limited to her admissions. Those admissions fell short of an intention to kill and she did not know

¹ The Crown advise that the Attorney-General has subsequently directed M be brought back before the Court.

² *Te Amo v R* [2022] NZCA 122 (Cooper, Peters and Palmer JJ) [CA judgment].

³ The certificate notes that the undertaking of immunity would not protect R from the consequences of giving untrue evidence.

the others intended to kill the victim as opposed to giving her a scare. In closing (reflecting the cross-examination) defence counsel said there was room for a reasonable doubt. That doubt was said to come from R's motive to downplay her own role, that of M and that of Mr Te Amo.

[5] The Judge in summing up dealt with the effect of the immunity in this way:

[29] [R] was given immunity from prosecution on condition she tell the truth about what happened. Both defence counsel have criticised her for that. They say she got a "sweetheart deal" and they imply her evidence, in parts, is suspect as a result.

[30] Well, the Solicitor-General has the power to grant an immunity to prosecution in circumstances where the Solicitor-General thinks it appropriate to do so. She did it in this case. Your task is to evaluate [R's] evidence. If you think the immunity has any significance, then give it the significance you find it has. Just do not say, "well, because she has immunity we cannot trust her". The point of immunity is to free a witness to tell the truth. Whether the witness does tell the truth is best assessed by how their evidence stacks up against other evidence you accept.

[6] In the Court of Appeal, the applicant said that a direction should have been given to the jury under s 122(2)(c) of the Evidence Act 2006 (witness who may have motive to give false evidence). The Court of Appeal saw nothing in this or in the challenge to the directions in relation to the immunity. The Court made the point that these issues were all well-ventilated at trial and R's incentives were plain. The Court also noted the Judge's direction on credibility and reliability identified R in particular (noting each defence counsel criticised her evidence when it referred to their clients and the jury would have to assess her credibility and reliability).⁴ Further, there was comprehensive discussion by the Judge of those criticisms of R's evidence. Finally, the Court distinguished this case from that of "an accomplice seeking to deflect blame or a prison informant".⁵ Instead, R's "evidence, which implicated a family member, was consistent with her statements to the police before she had immunity".⁶

⁴ At another point in summing up, in dealing with R's interviews with police, Brewer J referred again to each party's case on R's evidence and the need for the jury to assess this. He said repetition of something did not of itself make something true or more correct than the first time it was said.

⁵ CA judgment, above n 2, at [25].

⁶ At [25].

The proposed appeal

[7] The applicant wishes to argue a warning as to the reliability of R's evidence in terms of s 122(2)(c) should have been given. That is because of R's young age and her involvement in the events. Moreover, she is said to have had an incentive to put herself in a more favourable light and attribute blame to the applicant to deflect it from herself and from the other two, being M and a friend, Mr Te Amo.

[8] The applicant also challenges the directions given by the Judge about the immunity as conveying acceptance of the truth of what R told the police.

Our assessment

[9] We see the ultimate resolution of the proposed appeal as turning principally on the factual matrix. In the circumstances, we are not satisfied the present case is an appropriate one for considering general questions about the approach to warnings about reliability where a witness may have a motive to lie or the approach as to the directions regarding immunity. In terms of that last point, there is also force in the respondent's submissions as to the limited impact of the immunity on the substance of R's evidence. We add that the Court is addressing s 122 warnings further in another appeal.⁷ The proposed appeal does not raise questions of general or public importance.⁸

[10] Nor is there an appearance of a miscarriage of justice.⁹ The arguments on the proposed appeal would in substance reprise those made before the Court of Appeal. Nothing raised by the applicant gives rise to an apparent error in the Court's assessment. R did implicate M; the issues were very well ventilated; and counsel did not seek a s 122 warning. Further, the directions on the immunity were tailored to the facts and circumstances of the case. Finally, the immunity did not prevent R being cross-examined on the basis her involvement was very much greater than she admitted, and that she minimised the part M played. These matters were put to her. It could not, on the other hand, have been suggested R took a leading part.

⁷ *Rippey v R* [2021] NZSC 160.

⁸ Senior Courts Act 2016, s 74(2)(a).

⁹ Section 74(2)(b).

[11] For these reasons, we do not consider the criteria for leave to appeal are met.

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent