IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 156/2021
[2022] NZSC 19

BETWEEN	JOSEPH DOUGLAS MCGIRR Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: A J Bailey for Applicant
M R L Davie for Respondent

Judgment: 9 March 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] In October 2018 there was a gathering at the applicant's house in Christchurch. Among those present was a young woman, Lauren Biddle, and the applicant's friend, Guy Higginson. Over the course of the evening, the applicant and Ms Biddle consumed alcohol, cannabis and MDMA. The MDMA had belonged to the applicant. Sometime after midnight, while in his spa pool, the applicant realised that Ms Biddle was under water and either unconscious or dead. The evidence of the applicant and Mr Higginson differed as to the detail of what happened next but what is clear is that:

(a) Mr Higginson put Ms Biddle's body in his car, left the property and telephoned emergency services.

(b) After Mr Higginson left with Ms Biddle's body, the applicant tidied up alcohol bottles and cans, put the cover on the spa pool and concealed items of Ms Biddle's clothing and her bag by burying them in a bush area on his property. He also took steps to conceal the fact that he had been growing cannabis.

[2] At the time the applicant was serving a community-based sentence under which he was not permitted to consume alcohol.

[3] The applicant was charged with supplying MDMA to Ms Biddle and Mr Higginson, attempting to pervert the course of justice and cultivating cannabis. He pleaded guilty to the last of the charges and went to trial before a jury on the other three. The jury found the applicant not guilty on the supply charges but guilty of attempting to pervert the course of justice.

[4] The applicant's appeal to the Court of Appeal against conviction was dismissed[1] and he now seeks leave to appeal. His challenge to his conviction arises in this way.

[5] The trial Judge directed the jury that it should find the applicant guilty if sure that:

(a) when the applicant concealed Ms Biddle's clothing, he knew that a police investigation into Ms Biddle's death was underway or inevitable;

(b) concealing Ms Biddle's clothing had a tendency to hinder or obstruct that investigation; and

(c) in concealing the clothing, he was intentionally trying to hinder or obstruct that investigation.

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1 *McGirr v R* [2021] NZCA 635 (Brown, Mallon and Moore JJ) [CA judgment].

[6] The Judge did not require the jury to consider whether the applicant's conduct also had a tendency (and was intended) to affect any prosecution which might arise out of the investigation That this is an element of the offence[2] is apparent from the Court of Appeal judgment in *R* v *Meyrick*.[3] Best practice in New Zealand (as illustrated by cases cited by the Crown in their submissions) is for trial judges to direct accordingly. [4] For this reason, the proposed appeal does not raise a question of general or public importance.[5] The law on the topic is perfectly clear.

[7] The Court of Appeal accepted that "[i]t would have been preferable" for the Judge to have referred to the possibility of prosecution.[6] We would put it more strongly; not referring to possible prosecution meant that there was a misdirection. On this basis, the proposed appeal to this Court would focus on the Court of Appeal's conclusion that there was no miscarriage of justice.[7]

[8] The Court of Appeal saw the trial Judge's focus on hindering or obstructing a police investigation as understandable because that was the conduct by which the applicant could be said to have also tried to hinder or obstruct a possible prosecution.[8] In the view of the Court of Appeal, the corollary of the jury's conclusion that the applicant intended to hinder or obstruct a police investigation was an inevitable inference that the applicant also intended to affect any prosecution which might arise out of the investigation.[9] In this respect, the Court discussed *R v Rafique*, where the Court of Appeal of England and Wales arrived at the same result on what are broadly similar facts.[10]

[9] In the immediate aftermath of Ms Biddle's death, the applicant faced a number of potential legal difficulties. These included his consumption of alcohol in breach of the conditions of his community-based sentence and the cannabis which he

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2 Crimes Act 1961, s 117(e).
3 *R v Meyrick* CA513/04, 14 June 2005, at [42].
4 See *R v Spratt* [2007] 3 NZLR 810 at [15]; and *Field v R* [2010] NZCA 556, [2011] 1 NZLR 784 at [129].
5 Senior Courts Act 2016, s 74(2)(a).
6 CA judgment, above n 1, at [31].
7 At [33].
8 At [29]–[30].
9 At [32].
10 *R v Rafique* [1993] QB 843 (CA) discussed at [15]–[16] of the CA judgment, above n 1.

had been growing. As will be apparent, however, the case against him at trial was not based on the contention that he had set out to hinder or obstruct investigation (or prosecution) in respect of his consumption of alcohol or cultivation of cannabis. Rather, it was confined to his concealment of Ms Biddle's clothing and the contention that this had been intended to hinder or obstruct any investigation in relation to her death. At trial, the applicant denied that he concealed Ms Biddle's clothing to hinder or obstruct such an investigation, evidence which the jury plainly rejected.

[10] The jury concluded that the applicant had, by concealing Ms Biddle's clothing, intended to hinder or obstruct a police investigation into Ms Biddle's death. Interference with that investigation can hardly have been seen by the applicant as an end in itself. Given that a young woman had died in a spa pool having consumed alcohol, cannabis and MDMA, there was a distinct likelihood of some form of court proceedings. It is implausible to think that the applicant did not recognise this (particularly since the MDMA Ms Biddle had consumed was his). Indeed, unless he had recognised this, there was no reason for him to seek to interfere with the anticipated police investigation into her death. It follows that it is well open to inference that his conduct was intended to hinder or obstruct any prosecution which might arise out of the investigation. We see no appearance of a miscarriage of justice[11] in the Court of Appeal's conclusion that this inference was "irresistible".[12]

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

Solicitors:
Hansen Law, Christchurch for Applicant
Crown Law Office, Wellington for Respondent

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11 Senior Courts Act, s 74(2)(b).
12 CA judgment, above n 1, at [32].