IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 137/2021
[2022] NZSC 20

BETWEEN	CHANTELLE ELAINE ANDERSON Applicant
AND	THE QUEEN Respondent

Court:	William Young, Ellen France and Williams JJ
Counsel:	A J McKenzie for Applicant M L Wong for Respondent
Judgment:	9 March 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] After a jury trial, Ms Anderson was convicted of wounding with intent to cause grievous bodily harm, kidnapping, and theft (under $500).[1] Her co-defendant was also found guilty of assault and theft. Ms Anderson's appeal against conviction to the Court of Appeal on the basis a miscarriage of justice occurred was unsuccessful.[2] She now seeks leave to appeal to this Court.

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1 She was acquitted of a charge of assault with a weapon.
2 *Anderson v R* [2021] NZCA 513 (Gilbert, Duffy and Peters JJ) [CA judgment].

Background

[2] Ms Anderson lent her car to the complainant. She forgot she had left her wallet with something in the order of $300–$600 in it. While the complainant had the car the money was stolen from the vehicle. As the Court of Appeal explained, the alleged offending occurred in the context of unsuccessful attempts by Ms Anderson to recover this money from the complainant.[3] When the complainant eventually returned the car he was accompanied by a woman, AS. The applicant and the co-offender then began assaulting the complainant including with an air rifle. The applicant took photographs of the injured complainant and sent text messages saying, for example, "Got home over shot him 20 times".

[3] There was then some discussion about how the complainant would repay the money. Eventually, the complainant's father paid $600 into a specified bank account. The applicant arranged for the complainant to be dropped off at the local surf club where he was then located by his father who called the emergency services.

[4] What happened at the trial is summarised in the Court of Appeal judgment.[4] It is sufficient to note, first, that AS did not give evidence at trial but the officer in charge in his evidence explained the steps taken to locate and obtain a statement from her. Second, the defence case was that Ms Anderson had shot the complainant once but the remainder of the shots were fired by AS. AS was therefore responsible for wounding him. In her evidence at trial Ms Anderson said that the text messages were either in fact sent by AS or just reflected a show of bravado on her part.

[5] After the Crown closed its case, defence counsel asked the trial Judge to direct the jury that they were entitled to infer that AS, if called, would not have assisted the Crown case. The Judge declined to give this direction. In summing up, the Judge's direction in relation to AS was to the effect that the jury should decide the case on the evidence they had and not speculate about what AS might have said.[5]

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3 At [10]–[16].

4 At [17]–[24].

5 During the trial, the jury had asked why AS was not on the list of witnesses and whether, given the importance of her [and two others'] testimony, she would be called. The Judge, Judge Brian Callaghan, told the jury to "deal with the case on the basis of the evidence that is called".

The proposed appeal

[6] The sole issue on the proposed appeal would be whether the Court of Appeal was right to conclude that the trial Judge did not err in refusing to give the direction sought. The applicant says this question gives rise to an issue of general and public importance about the application to criminal cases of authorities such as *Jones v Dunkel*[6] which deal with the inferences that may be drawn from the absence of a witness in civil proceedings. The applicant notes the Crown accepted in this case that such a direction could be given "in an appropriate case".[7] The submission is that there is an important question about what constitutes "an appropriate case".

[7] Further, in support of the argument the failure to give a direction has given rise to a miscarriage of justice, the applicant notes, amongst other things, that there was a need for some caution over the complainant's evidence, the Crown having declared him hostile in the course of the trial. The applicant also challenges the sufficiency of the efforts made by the police to interview and locate AS.

[8] We are not satisfied that the criteria for leave are met in this case.[8] The proposed appeal would have this Court reprise the argument made before the Court of Appeal. The Court of Appeal in dismissing the ground of appeal based on this point was not persuaded there was a factual basis for giving the direction sought and noted the refusal to do so was appropriately restrained. The Court said that it would have been expected "in the usual course of events" that the Crown would call AS but here the prosecution did not know the gist of what AS might have said and her absence was explained.[9] In any event, the absence of a direction could not have given rise to a miscarriage of justice where the case against Ms Anderson was "compelling".[10]

[9] The Court also noted that s 113 of the Criminal Procedure Act 2011 allowed the Court to make an order that the parties should call a particular witness at trial. The Court recorded the Crown submission that the failure of the defence to make an

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6 *Jones v Dunkel* (1959) 101 CLR 298 at 308; and see *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA).
7 CA judgment, above n 2, at [26].
8 Senior Courts Act 2016, s 74(2)(a) and (b).
9 CA judgment, above n 2, at [38]–[39].
10 At [44].

application under s 113 was fatal. The Court did not address that point noting that the absence of such an application had not been seen as critical to the appellant in *J (CA89/2016) v R*.[11]

[10] The Court in this case referred to authorities to the effect that the principle in *Jones v Dunkel* as discussed in *Ithaca (Custodians) Ltd v Perry Corporation* applies "although, in practice, with greater caution" in the criminal context.[12] The question of whether a direction along the lines of the discussion in those cases, as sought here, should have been given would turn on an assessment of the particular facts. No question of general or public importance arises. We see no error in the Court of Appeal's assessment of those facts. Nothing raised by the applicant gives rise to the appearance of a miscarriage of justice.

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent

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11 *J (CA89/2016) v R* [2016] NZCA 528.
12 For example, see *R v Nobakht* [2007] NZCA 488 at [91].