IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 144/2021
[2022] NZSC 22

BETWEEN		PASILIKA NAUFAHU Applicant
AND		THE QUEEN Respondent

Court: William Young, Glazebrook and Williams JJ

Counsel: R M Mansfield QC for Applicant
M L Wong and S K Barr for Respondent

Judgment: 17 March 2022

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant seeks leave to appeal a decision of the Court of Appeal dismissing his conviction appeal.[1] The Court applied s 22A of the Evidence Act 2006 and admitted hearsay evidence of his participation in a conspiracy to supply pseudoephedrine. The applicant's challenge is to this finding.

The facts

[2] Intercepts between Samuel Vaisevuraki and a Mr Sha demonstrated they planned to supply pseudoephedrine valued at one million dollars to an unnamed third party. Mr Naufahu was alleged to be that party. He was the President of the

1 *Naufahu v R* [2021] NZCA 508 (Collins, Duffy and Peters JJ) [CA judgment].

Comancheros Motorcycle Club (the Comancheros) at that time. Samuel's brother Donald also participated in a broader (Comancheros) criminal enterprise which included money laundering via the trust account of lawyer Andrew Simpson. Interestingly, Donald, Samuel and Mr Sha were not tried for their role in the alleged conspiracy. Charges were laid but were later withdrawn. They were, however, convicted on other drug charges.

[3] Donald gave evidence at Mr Naufahu's trial for the conspiracy charge. His evidence was that in August 2018 he had approached Mr Naufahu on behalf of his brother Samuel to ascertain whether Mr Naufahu would be prepared to assist their distribution enterprise. He said Mr Naufahu agreed and would pay one hundred and twenty dollars a gram. The nature of the drugs appears not to have been identified.

[4] In September 2018, the month during which events occurred giving rise to the conspiracy charge, Donald was in Fiji. Samuel arrived in Auckland from Sydney on 18 September 2018 and met with Mr Naufahu the next morning, first at a café and then at a park in Bucklands Beach. They were observed by Police to be in discussion with one another and at the same time speaking on their respective cell phones. It is believed that both phones were protected by encryption devices. Later that evening Samuel met with Mr Sha and they drove around in Samuel's car for two and a half hours. The next day they repeated the same process for three hours and twenty minutes. Overnight an interception device had been installed in Samuel's car so that discussions between Samuel and Mr Sha could be monitored. The pair were heard to discuss a deal involving pseudoephedrine valued at one million dollars. Samuel referred to his "partner" and "the biggest gang in New Zealand".[2] It was understood that the transaction would be completed the next day (20 September).

[5] For reasons that are unclear, the transaction was not completed on 20 September. Mr Naufahu and Samuel met the next morning. After the meeting, Samuel, now driving alone in his car, spoke to an unidentified person. He said:[3]

> *I'm just driving behind Lika [Mr Naufahu] at the moment. We're going to have breakfast okay. Now these guys are ready to go.* They want all the work.

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2 CA judgment, above n 1, at [24].
3 At [28] (emphasis added).

> You've seen all the texts right. So, the next thing is, right. We're gonna go pick the money up right. We're gonna pick up the money, alright. And then your guys can come alright. Pick up the fifty-five grand, and then check the money. They can go with the fifty-five grand and go get their pseudo ready, and their once their pseudo's ready, then they come back. Pick up the rest of the money, and we'll take the pseudo. It's simple. So get their money first. While they get to check the rest of the money's there, then they go and grab the pseudo, and then come back, and then give them the money. It's nice and simple, get the money first
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> …
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> This is how it will go. *Lika's driver will pick up the cash, and come to my place. I will take out fifty-five thousand from the bag and then I'll get Su-an to come, or we'll go and drop it off at him. After that point … Su-an [alleged to be Mr Sha] can see the fifty-five as well as see the rest of the money in the bag, right. Then he can bring the rest of the pseudo …*

[6] It is the admissibility of these comments under s 22A of the Evidence Act that is the focus of the present application. That section provides:

> In a criminal proceeding, a hearsay statement is admissible against a defendant if—
>
> (a) there is reasonable evidence of a conspiracy or joint enterprise; and
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> (b) there is reasonable evidence that the defendant was a member of the conspiracy or joint enterprise; and
>
> (c) the hearsay statement was made in furtherance of the conspiracy or joint enterprise.

Court of Appeal decision

[7] It was common ground that there was reasonable evidence of a conspiracy and that the hearsay statements were in furtherance of it pursuant to s 22A(a) and (c). The only question was whether there was also reasonable evidence of Mr Naufahu's participation in that conspiracy.

[8] The Court of Appeal upheld the High Court's finding that these statements were admissible. The Court of Appeal applied the approach adopted in *R v Messenger*; non hearsay evidence to support admission would be "reasonable" if, while it would not sustain a verdict of guilt, it is nonetheless "of such a nature that the Judge considers

it safe to admit the evidence of a co-conspirator".[4] The Court of Appeal found that the following evidence established that the above standard was met:

(a) Donald had acted as a "go-between" between Samuel and Mr Naufahu in relation to separate plans to import and distribute methamphetamine and cocaine in New Zealand. It could be inferred that Samuel believed Mr Naufahu had the capacity to distribute illicit drugs, including pseudoephedrine.[5]

(b) Samuel met with Mr Naufahu shortly after the former arrived in New Zealand and their meeting took place shortly before Samuel met with Mr Sha. It was clear that the latter meeting was to further the conspiracy. After the failure of the transaction on 20 September, Samuel and Mr Naufahu met again. It could be inferred that all meetings were linked to the same transaction.[6]

(c) the 19 September meeting involved the use of encrypted phones to connect with others while Samuel and Mr Naufahu also talked.[7]

(d) the meeting and discussion in the park suggested they did not want to be overheard.[8]

(e) the three-way conversations had the hallmarks of the organisation of an imminent transaction.[9]

(f) as the transaction was attempted the next day, it can be inferred that on 19 September, Samuel and Mr Naufahu were arranging, with others, the "operational details" of the transaction.[10]

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4 *R v Messenger* [2018] NZCA 13, [2011] 3 NZLR 779 at [12], as cited in CA judgment, above n 1, at [44].
5 CA judgment, above n 1, at [46].
6 At [47].
7 At [49](a).
8 At [49](b).
9 At [49](c).
10 At [49](d).

[9] Mr Naufahu's claim that the discussion with Samuel could have related to money laundering was rejected because, on the evidence, Donald, not Samuel was the conduit between Mr Naufahu and his lawyer over cash deposits, and Donald was in Fiji. The submission that when Samuel and Mr Naufahu met on the morning of 21 September 2018, there was no mention of the previous day's failed transaction, was also considered immaterial. The Court of Appeal considered that the vehicle-based interceptions were not a complete record of the communications between the two individuals. This could not form the basis of a conclusion that the failure to mention the failed transaction in the intercepts meant Mr Naufahu and Samuel did not meet to further the conspiracy.

Grounds of appeal

[10] The grounds of appeal raise three issues:

(a) whether the "reasonable evidence" standard of participation in the conspiracy (per s 22A(b)) is the balance of probabilities or simply sufficient evidence to satisfy the judge that admission of the hearsay is safe;

(b) whether the reliability test in s 18 of the Evidence Act should apply to the hearsay statement itself where the co-conspirator is not a co-accused or a witness; and

(c) whether the hearsay statements should have been excluded under s 8 of the Evidence Act.

Issue one: reasonable evidence

[11] On the first issue Mr Naufahu relies on the test applied by a majority of the full court of the Court of Appeal in *R v Buckton*, the leading pre-Evidence Act decision on the co-conspirators rule.[11] The majority in that case considered that the non hearsay evidence *must* support the accused's participation in the conspiracy on the balance of

[11] *R v Buckton* [1985] 2 NZLR 257 (CA).

probabilities.[12] Mr Naufahu argued that if the *Buckton* test (codified, he suggests, in s 22A) were applied, the evidence was insufficient to meet that threshold.

[12] The Crown pointed to the subsequent decision of this Court in *Qiu* which expressed a clear preference for the minority view.[13]

[13] While the issue does give rise to a question of principle, the issue does not squarely arise on these facts. As with *Qiu* (and indeed *Buckton*) the theoretical difference between the two standards makes no difference on these facts. The meetings between 19 and 21 September were obviously about something. They closely coincided in time with a flurry of activity by others, including Samuel, in relation to the pseudoephedrine deal. There is on any view, enough to suggest that Mr Naufahu was "probably" involved in the pseudoephedrine deal that others, particularly Samuel, were pursuing at the same time. Certainly not enough to be sure of that, but enough to conclude it was probable on the basis of admissible evidence.

Issue two: unavailable co-conspirator and reliability

[14] Mr Naufahu argued that he was disadvantaged because his apparent co-conspirator, Samuel, was not charged with that offence, nor did the Crown call him to give evidence in relation to the charge against Mr Naufahu. Instead he was separately prosecuted on methamphetamine supply charges which, it transpired, because of the Covid-19 pandemic, were resolved with guilty pleas, only after Mr Naufahu's charges were resolved. Mr Naufahu argued that the prosecution had withdrawn the conspiracy charge against Samuel: –

> …only to justify prosecuting him separately and ahead of the Applicant so that he [Samuel] could be available and called by the Prosecutor as a witness at the Applicant's subsequent High Court trial.

[15] Although, because of Covid, it did not happen that way, it was argued this still meant the s 22A admissibility issue could not be determined before trial and the witness was effectively unavailable. Mr Naufahu was thereby deprived of an

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12 At 262. The minority led by Somers J preferred a less precise standard at 263: "it connotes evidence which of itself would not sustain a verdict of guilt but is of such a nature that the judge considers it safe to admit the evidence of the co-conspirator".

13 *Qiu v R* [2007] NZSC 51 at [28]–[29].

opportunity to challenge the hearsay statements. Mr Naufahu submitted that s 18, in relation to the reliability indicators of the circumstances in which any hearsay statement was made, should also apply to co-conspirators in these circumstances. In other words, s 18 is an effective mechanism for correcting any unfairness arising from the prosecution's trial strategy.

[16] The Crown argued that the s 22A test applies whether the co-conspirator participates in the trial or not, as co-conspirator statements which satisfy the conditions of s 22A inherently contain assurances of reliability. Further, the Crown argued Mr Naufahu could have called Samuel as a defence witness or applied under s 113(3) of the Criminal Procedure Act 2011 for a direction from the court that the prosecution do so. Alternatively, he could have sought adjournment of his trial pending the conclusion of Samuel's. No such steps were taken.

[17] Given that there was already reasonable evidence of Mr Naufahu's participation in the conspiracy for the purposes of s 22A, applying a further reliability filter would add nothing. Accordingly, this ground has insufficient prospects of success to warrant the granting of leave.

Issue three: exclusion under s 8?

[18] Mr Naufahu finally argued, albeit briefly, that the applicant's inability to respond to the hearsay evidence (because of Samuel's absence from the trial) was unfairly prejudicial.

[19] For the reasons identified in issue two, above, there is also insufficient merit in this argument to warrant the granting of leave.

Conclusion

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

Solicitors: Crown Law Office, Wellington for Respondent