

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 127/2022
[2023] NZSC 10

BETWEEN JAYSON WIREMU POIHIPI
Applicant
AND THE KING
Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: C G Tuck for Applicant
M J Lillico for Respondent

Judgment: 28 February 2023

JUDGMENT OF THE COURT

- A The application for an extension of time for leave to appeal is granted.**
- B The application for leave to appeal is dismissed.**
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REASONS

[1] Mr Poihipi seeks leave to appeal against a decision of the Court of Appeal dismissing his appeal against conviction.¹

Background

[2] Mr Poihipi was convicted in the High Court of the murder of his girlfriend, Lynace Parakuka. Mr Poihipi has some level of cognitive difficulty. He has not been formally diagnosed but it is suspected he has foetal alcohol syndrome. He has poor comprehension and struggles to read and write.

¹ *Poihipi v R* [2022] NZCA 421 (Miller, Duffy and Ellis JJ) [CA judgment].

[3] At trial it was common ground that Mr Poihipi had assaulted Ms Parakuka by punching and kicking her. The issue in dispute was whether he knew that death was likely.

[4] Mr Poihipi gave two police evidential video interviews (EVIs). In the first, he denied the assault. In the second, he accepted the assault but said he did not intend to kill Ms Parakuka and did not realise the assault would cause death. Mr Poihipi said he was drunk at the time of the assault but did not disclose any drug use. Mr Poihipi now says that he was under the influence of psychedelic mushrooms and had used methamphetamine a few days prior.

[5] Mr Poihipi did not tell his trial counsel, Mr Gowing, about the methamphetamine use. He did tell him that he had ingested mushrooms. Mr Gowing interviewed Mr Poihipi's sister about that claim. Mr Gowing did not consider her to be a reliable witness.

[6] Mr Gowing's evidence before the Court of Appeal was that he gave Mr Poihipi advice to the effect that if he (or his sister) were to give evidence to introduce the mushroom use this would undermine the credibility of his second EVI. Mr Gowing told Mr Poihipi that the second EVI put the defence case at its best. Mr Poihipi elected not to give evidence and signed a written acknowledgment of this.

Court of Appeal judgment

[7] Mr Poihipi appealed to the Court of Appeal on the basis that trial counsel failed to prepare, investigate and advance key elements of the defence case and had erred by giving advice to Mr Poihipi not to give evidence.² It was also submitted that Mr Gowing failed to communicate with Mr Poihipi appropriately and was under a duty to do so given Mr Poihipi's cognitive difficulties and mental state.³

[8] The Court of Appeal rejected the arguments about the failure to investigate and advance key elements of the defence case, in particular the elements that related to the

² At [12]–[13].

³ At [14]. Mr Poihipi was suffering from suicidal ideation and possibly PTSD as a result of the murder.

magic mushrooms. This was on the basis that the evidence of both ingestion and its effect was weak.⁴ Further, the Court of Appeal stated that the expert evidence predominantly pointed to the drug use affecting the motivation to assault rather than Mr Poihipi's understanding of the consequences.⁵ Additionally, had the evidence of mushroom use been introduced, the credibility of the second EVI would have been weakened because Mr Poihipi did not disclose this use, which would have called into question what else he had kept from police.⁶

[9] In relation to counsel failing to properly advise Mr Poihipi, the Court of Appeal noted that this ground of appeal is closely linked to the issue of not introducing the evidence of mushroom use. In addition, giving evidence would have exposed Mr Poihipi to cross-examination, where he would have been questioned on the inconsistencies of the defence case, highlighting them and likely undermining his credibility.⁷

[10] The Court of Appeal considered that Mr Poihipi was properly informed as to the risks and benefits of giving evidence and accepted this advice in making his decision not to give evidence. Additionally, it was satisfied that Mr Gowing did not err in advising Mr Poihipi to not give evidence. Accordingly, there was no error.⁸

[11] The Court of Appeal accepted that counsel's communications when taking instructions should be appropriate to the client's age and capacity. Where there are concerns about a defendant's ability to understand the proceeding and instruct counsel, communication assistance pursuant to s 80 of the Evidence Act 2006 can be made available. The objective must be that of full participation in the trial.⁹

[12] The Court of Appeal held that there was nothing to indicate to trial counsel that Mr Poihipi was unfit to plead or participate in his trial. The Court noted that Mr Gowing knew from working for Mr Poihipi previously that he had some difficulty

⁴ At [22].

⁵ At [25].

⁶ At [26].

⁷ At [33].

⁸ At [38].

⁹ At [42].

with comprehension, reading and writing. Mr Gowing had adjusted his approach to account for this.¹⁰

The application for leave in this Court

[13] Mr Poihipi applies for leave to appeal in this Court on the grounds that trial counsel failed to tailor his approach to accommodate a vulnerable defendant and failed to provide adequate advice on giving or calling evidence.

[14] The application for leave to appeal was out of time. Given the period is relatively short, it is appropriate to grant an extension of time. The Crown did not oppose an extension being granted.

Our assessment of the leave application

[15] The Court of Appeal rightly recognised that counsel have a duty to tailor their communications to account for any vulnerabilities of their client. The issues raised relate to the application of that requirement to the particular circumstances of the case and therefore the proposed appeal raises no matter of general or public importance.¹¹

[16] Further, nothing raised indicates that the Court of Appeal was wrong in its assessment that trial counsel had appropriately adjusted his approach to account for Mr Poihipi's impairment, that the advice was appropriate and that Mr Poihipi understood and accepted the advice given. Therefore, there is no risk of a miscarriage of justice.¹²

Result

[17] The application for an extension of time for leave to appeal is granted.

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

Solicitors:
Crown Law Office, Wellington for Respondent

¹⁰ At [44].

¹¹ Senior Courts Act 2016, s 74(2)(a).

¹² Section 74(2)(b).