NOTE: INTERIM ORDER SUPPRESSING THE NAME OF W AND ANY IDENTIFYING PARTICULARS MADE ON 9 JUNE 2023 IS TO CONTINUE UNTIL FURTHER ORDER.

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 60/2023
[2023] NZSC 164

BETWEEN	W (SC 60/2023) Applicant
AND	THE KING Respondent

SC 77/2023

BETWEEN	MARK JOSEPH HOGGART Applicant
AND	THE KING Respondent

Court:	Glazebrook, O'Regan and Kós JJ
Counsel:	C W J Stevenson for Applicant in SC 60/2023 Q Duff for Applicant in SC 77/2023 C A Brook, R K Thomson and T C Didsbury for Respondent in SC 60/2023 and SC 77/2023
Judgment:	12 December 2023
Reissued:	14 December 2023

JUDGMENT OF THE COURT

A **Mr Hoggart's application for an extension of time to apply for leave to appeal is granted.**

B **The applications for leave to appeal are granted in part (*[W] v R* [2023] NZCA 155). The approved questions are:**

1 Whether the Court of Appeal was correct to conclude that a media take down order was not required in the circumstances of this case.

2 Whether the Court of Appeal was correct to conclude that the verdicts were not unreasonable in light of admissible evidence relating to the potential culpability of Lester Hamilton (deceased).

C The applications for leave to appeal are otherwise dismissed.

D Interim order suppressing the name of W and any identifying particulars made on 9 June 2023 is to continue until further order.

REASONS

[1] In 2021, the applicants, W and Mark Joseph Hoggart, were found guilty of the 1987 aggravated robbery of the Red Fox Tavern in Maramarua and the murder of its publican, Mr Bush. Their convictions were upheld by the Court of Appeal.[1] Both W and Mr Hoggart seek leave to appeal their convictions to this Court.

[2] W presents five potential grounds of appeal: (1) the verdicts were unreasonable, there being reasonable doubt about the identity of the offenders; (2) wrongful exclusion of Mr Hartshorne's evidence, and improper warning regarding the evidence of another witness, in each case as to alleged confessions to murder by a Mr Lester Hamilton (deceased); (3) W's police interview statements were improperly obtained and impermissibly used; (4) this Court's pre-trial decision regarding incentivised witnesses was based upon erroneous facts;[2] and (5) the trial Judge should have issued a takedown order.

[3] Mr Hoggart also presents the same first, second and fifth grounds, along with a further one of his own: (6) if no takedown order was made, the defendants names should have been anonymised at trial. Mr Hoggart requires (and sought) an extension of time to apply for leave to appeal. The Crown did not oppose this application and an extension of time to apply for leave to appeal is granted.

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1 *[W] v R* [2023] NZCA 155 (French, Gilbert and Collins JJ) [CA judgment].
2 *W (SC 38/2019) v R* [2020] NZSC 93, [2020] 1 NZLR 382.

[4] We grant leave in respect of the first, second (in part) and fifth grounds of appeal.

[5] Leave is not granted in respect of other grounds of appeal presented. We explain briefly why we have reached that decision.

[6] We grant leave in respect of the first part only of the second ground of appeal.[3] As to the remainder, we do not consider the trial Judge can be said to have erred in the direction given to the jury concerning the other witness's evidence of a confession allegedly made by Mr Hamilton. Both were serving prisoners in the 1990s (this being cellmate confession evidence called by the defence). This ground has now been wholly overtaken by this Court's recent decision on cellmate confession evidence directions.[4]

[7] We do not grant leave in respect of the third ground of appeal, concerning W's police interview statements. This ground has been ventilated at length already in a pre-trial ruling, pre-trial appeal and a first conviction appeal.[5] On the evidence elicited, we do not discern "a causative link between the unfairness and the impugned evidence".[6] There is no realistic prospect of a miscarriage of justice arising.[7] Further, the interview predated the New Zealand Bill of Rights Act 1990; the case is not an appropriate one in which to reconsider the principles expounded in *R v Chetty*. The jury was also appropriately directed on the use of W's "lies".

[8] The fourth ground of appeal, seeking to revisit this Court's reasoning regarding incentivised witnesses in light of later-established facts, lacks substance given the Crown ultimately did not call the witnesses concerned. While the Crown may have opened on a false premise as to an "[effective] confession" by W, we do not see that as potentially and materially harming W. Rather, it would have harmed the Crown

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3 The approved questions on appeal cover whether the Court of Appeal was to correct to conclude that the trial Judge properly excluded the evidence of Mr Hartshorne.

4 *Jetson v R* [2023] NZSC 150.

5 *R v W* [2019] NZHC 927; *W v R* [2019] NZCA 558; and CA judgment, above n 1.

6 *R v Chetty* [2016] NZSC 68, [2018] 1 NZLR 26 at [47] per William Young, Glazebrook, Arnold and O'Regan JJ.

7 Senior Courts Act 2016, s 74(2)(b).

case, if the jury remained focused on a supposed "confession" never in fact presented or proved. There is no realistic prospect of a miscarriage of justice arising.

[9] Finally, the sixth ground of appeal, arguing for anonymisation of the defendants' names at trial, lacks realism. It is one thing perhaps to anonymise the name of a witness; altogether another to anonymise a defendant's name. Besides being wholly impractical in the context of a six-week trial, it is also inconsistent with basic tenets of open justice. The public should normally know who is on trial for serious crime, but the jury should always know the identity of those whose liberty they control.

[10] The interim order suppressing the name of W and any identifying particulars made on 9 June 2023 is to continue until further order. It will be re-evaluated when the appeal is heard and determined.

Solicitors:
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent