

**REDACTED VERSION TO ACCORD WITH THE HIGH COURT
SUPPRESSION ORDER; UNREDACTED VERSION WAS RELEASED TO
THE PARTIES AT 2 PM ON 10 APRIL 2024.**

**NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF
CERTAIN DETAILS RELATING TO D REMAINS IN FORCE.**

**NOTE: PUBLICATION OF NAME(S) OR IDENTIFYING PARTICULARS OF
PROPENSITY WITNESSES PROHIBITED BY S 139 OF THE CRIMINAL
JUSTICE ACT 1985.**

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

**SC 137/2023
[2024] NZSC 28**

BETWEEN MALCOLM REWA
Applicant

AND THE KING
Respondent

Court: Winkelmann CJ, Glazebrook and Ellen France JJ

Counsel: Q Duff and S L McColgan for Applicant
R K Thomson for Respondent

Judgment: 10 April 2024

JUDGMENT OF THE COURT

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

Introduction

[1] Mr Rewa was convicted in 2019, after a jury trial before Venning J, of the murder of Ms Susan Gail Burdett. Mr Rewa's appeal against conviction was dismissed by the Court of Appeal on 1 February 2023.¹ He now applies for leave to appeal to this Court. His application was filed some nine months out of time.

Procedural history

[2] Mr Teina Pora had been convicted of Ms Burdett's murder in mid-1994 on the basis of what is now recognised as a false confession. His appeal against that conviction was allowed by the Privy Council in 2015.² He has subsequently proved his innocence on the balance of probabilities.³

[3] In 1996 DNA analysis revealed that semen found in Ms Burdett's vagina was Mr Rewa's. In that year, Mr Rewa stood trial for her rape and murder. At that trial he also faced some 43 charges of sexual offending against 25 other complainants. He was found guilty of most of the charges but the jury was not able to agree on the charges relating to Ms Burdett's rape and murder.

[4] Mr Rewa was tried again in 1998. The jury was not able to agree on the murder charge but did find him guilty of her rape.

[5] The 2019 trial was Mr Rewa's third jury trial for Ms Burdett's murder and, as noted above, resulted in his conviction.

Background facts

[6] On 23 March 1992 Ms Burdett attended a regular tenpin bowling event in Manukau. She left the venue around 11 pm and arrived back at her flat shortly after. The Crown case was that some 20 minutes later Mr Rewa gained entry to her flat and attacked and raped her.⁴ To overcome her resistance, Mr Rewa was alleged to have

¹ *Rewa v R* [2023] NZCA 1 (Cooper P, Miller and Collins JJ) [CA judgment].

² *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277.

³ Rodney Hansen *Report for Minister of Justice on Compensation Claim by Teina Anthony Pora* (23 March 2016).

⁴ Her neighbour had at around that time heard a loud bang, followed by some thuds: CA judgment,

struck Ms Burdett multiple times on the head with a baseball bat which she kept beside her bed for protection. The next day she was found dead from severe head injuries. She was on her bed, naked from the waist down with her upper body covered with a duvet.⁵

The 2019 trial

[7] Mr Rewa's case at trial was that he had been in a secret relationship with Ms Burdett and that he had had consensual sex with her at his house earlier that day (explaining why his semen was found inside her vagina). He denied any involvement in her murder later that night.⁶

[8] Mr Rewa contended instead that D had murdered Ms Burnett, having let himself into her flat using a key.⁷ D's identity and [certain details relating to him] [REDACTED] were, and remain, suppressed.

[9] At the trial Mr Rewa gave evidence in his defence. He also called Ms Winsome Ansty, a friend of Ms Burdett's, who deposed that Ms Burdett had told her that after the breakdown of her marriage she had been seeing a man called "Mike Rewa". Ms Ansty recalled this and other details years after she had been questioned by the Police in connection with the original investigation.⁸

Grounds of proposed appeal

[10] Mr Rewa's application for leave to appeal is made on the basis that a substantial miscarriage of justice occurred, in that:

- (a) [REDACTED] [D's evidence].
- (b) Mr Rewa's conviction for the rape of Ms Burdett was wrongly admitted under s 49 of the Evidence Act 2006.

above n 1, at [4]. The Crown case was that the noises were associated with Mr Rewa's attack.

⁵ CA judgment, above n 1, at [5].

⁶ At [19].

⁷ At [20].

⁸ At [21].

- (c) Propensity evidence relating to Mr Rewa's convictions for sexual offending against 21 other victims was wrongly admitted.
- (d) Mr Rewa was deprived of his right to a fair trial due to a lack of effective representation by his trial counsel.

[11] The decision to allow the propensity evidence was not challenged by Mr Rewa in his appeal against the murder conviction before the Court of Appeal. The other grounds are essentially the same as in the Court of Appeal.

[REDACTED]/[D's evidence]

[12] **[REDACTED]** After D's evidence was completed, an agreed statement of facts was signed by counsel. **[REDACTED]**.⁹

Propensity evidence

[13] In a pre-trial ruling given on 8 November 2018 the trial Judge ruled Mr Rewa's conviction for rape admissible.¹⁰ In the same ruling the Judge also ruled admissible, as propensity evidence, Mr Rewa's convictions for sexual and violent offending against other victims.¹¹ The Judge found the evidence strongly probative of a propensity both to use violence to overcome a victim's resistance and to leave his victims in a state similar to that in which Ms Burdett was found.¹²

[14] The Court of Appeal allowed a pre-trial appeal by the Crown and ruled that propensity evidence relating to Mr Rewa's offending against further victims was also admissible.¹³

[15] An agreed statement of facts dated 11 February 2019 was used to put the propensity evidence before the jury. The statement also recorded Mr Rewa's rape conviction and the fact that Mr Pora had satisfied a judge that he was innocent and had

⁹ **[REDACTED]**.

¹⁰ *R v Rewa* [2018] NZHC 2888 (Venning J) at [17].

¹¹ At [55]; and see at [51].

¹² At [53].

¹³ *R v Rewa* [2018] NZCA 574 (Kós P, French and Gilbert JJ).

not been involved in the attack on Ms Burdett. Mr Rewa signed it. The trial Judge read the statement to the jury. Immediately after doing so, he warned them about the use that may properly be made of propensity evidence.¹⁴

Court of Appeal decision

[REDACTED] [D's evidence]

[16] **[REDACTED]**.¹⁵ The Court held, however, that there was no miscarriage of justice because all relevant information was before the jury in the form of the admission of facts by the Crown.¹⁶

Admissibility of rape conviction

[17] Although Mr Rewa's conviction for the rape of Ms Burdett was admitted under s 49 of the Evidence Act, the trial Judge permitted Mr Rewa, under s 49(2), to offer evidence to show that he did not rape Ms Burdett. He also directed the jury to put the conviction aside when deciding whether Mr Rewa had done so.¹⁷

[18] The Court of Appeal commented that, as the conviction was not permitted evidence of rape in terms of the trial Judge's direction, its significance was very limited. The Court accepted the submission of the Crown that the conviction served the purpose of forestalling jury speculation about what happened at the previous trials and why no charge of rape was before them.¹⁸ In these circumstances the admission of the conviction could not amount to fundamental error.¹⁹ The Court also concluded that no unfair prejudice resulted from the use made of the conviction at trial.²⁰

Propensity evidence of sexual and violent offending against other victims

[19] While the admissibility of the propensity evidence was not challenged in the conviction appeal, the Court of Appeal in its judgment noted that the similarities with

¹⁴ CA judgment, above n 1, at [15].

¹⁵ **[REDACTED]**.

¹⁶ **[REDACTED]**.

¹⁷ CA judgment, above n 1, at [63].

¹⁸ CA judgment, above n 1, at [65].

¹⁹ At [66].

²⁰ At [67].

the other cases were extensive: the attack happened in the victim's home; the attacker gained access through a window; the victim was getting ready for bed at the time; her clothes were used to blindfold her so she could not see the attacker; she was found on her bed naked from the waist down but with the upper part of her body covered by a duvet; her legs were draped over the side of the bed; her credit card and camera were missing; and she had been subjected to a violent assault.²¹

*Trial counsel conduct*²²

[20] The Court of Appeal said that it was not contended that trial counsel failed to advance Mr Rewa's defence.²³ It was accepted that trial counsel advanced his explanation for the semen, challenged the Crown theory that entry to the flat was forced through a window, and sought to show that D had motive and opportunity to commit the crime.²⁴

[21] The Court noted too that Mr Rewa did not complain about his decision to give evidence. The Court of Appeal said that he had no real alternative if he was to explain away the semen.²⁵ The Court did accept that trial counsel did not prepare Mr Rewa to give evidence but observed that Mr Rewa did not point to anything that he would have said, or not said, had he been prepared.²⁶

[22] Nor did Mr Rewa identify the questions he says ought to have been asked of D or others.²⁷ He did not name any other witnesses who ought to have been called.²⁸ In the circumstances, the Court held that any failures by counsel cannot be said to have created a real risk that the outcome was affected, still less amount to fundamental error.²⁹

²¹ At [17].

²² Mr Rewa filed an affidavit on this issue and waived privilege. His trial counsel was, however, by this stage unwell and declined to provide an affidavit. Instead he filed a medical report. The Court of Appeal noted, at [32], that this material did not sustain a conclusion that counsel was impaired at the time of trial. The Court based its assessment of counsel's performance on the trial record.

²³ At [39].

²⁴ At [39].

²⁵ CA judgment, above n 1, at [40].

²⁶ At [41].

²⁷ At [41].

²⁸ At [41].

²⁹ At [41].

[23] The Court also rejected the concerns about trial counsel's closing address. It accepted that the closing address had begun in an unorthodox manner³⁰ but held that it adequately presented the defence case by reference to the evidence and came nowhere near fundamental error.³¹ Counsel had summarised the main points of the defence, including developing a narrative to suggest that there was a window of opportunity during which Ms Burdett could have visited Mr Rewa for sexual intercourse earlier in the evening of the murder,³² stressing the absence of any evidence of Mr Rewa's DNA anywhere in the flat³³ and discussing evidence tending to implicate D.³⁴

Mr Rewa's submissions

D's evidence

[24] [REDACTED].

Rape conviction

[25] It is submitted with regard to the rape conviction that, while the jury was directed to put to one side the evidence of the conviction, it is likely that this evidence weighed considerably in the minds of the jury because the question whether he raped Ms Burdett was central to the determination of the murder charge: the Crown case was that the rape and the murder were part of the same episode. Mr Rewa submits that unfair prejudice arose because the rape conviction contradicted his sole defence: that he was not there. In the circumstances he submits that the introduction of the conviction reversed the onus of proof.

Propensity evidence

[26] Despite admission of the evidence by way of agreed statement of fact and jury directions to the contrary, it is argued that the number of convictions admitted as propensity evidence meant that it would be nearly impossible for the jury not to

³⁰ At [44].

³¹ At [53].

³² At [46].

³³ At [47].

³⁴ At [48].

immediately categorise Mr Rewa as a bad individual deserving of punishment. In his submission this constitutes unfair prejudice.

Trial counsel conduct

[27] It is accepted this is not a case where trial counsel's lack of competence impacted the appellant's decision to enter the witness box, or resulted in the defence case not being put or a witness not being called.

[28] It is, however, submitted that lack of effectiveness of representation can impact the trial in a more nuanced, but nonetheless significant, manner. In Mr Rewa's submission the representation provided by trial counsel in this matter fell significantly below the effectiveness of representation appropriate for a murder trial. It thereby deprived Mr Rewa of the right to a fair trial.

[29] Trial counsel met with Mr Rewa on only one or two occasions in the time before his trial and did not prepare him for giving evidence. Further, the trial Judge had to correct counsel repeatedly on matters of fact and in relation to inappropriate questioning. In addition, the structure and content of the closing did not demonstrate the requisite skill or competence. For instance, the propensity evidence was hardly addressed by trial counsel in closing.

Resolution

[30] The submission is that the Court would have to allow the proposed appeal if it were to find that any of the errors above meant that there was a miscarriage of justice. In Mr Rewa's submission, the Court could not on the basis of the evidence be satisfied beyond reasonable doubt that Mr Rewa murdered Ms Burdett.

Crown submissions

[31] The Crown opposes the extension of time to file the application for leave to appeal. It submits that no satisfactory explanation for the delay in filing has been provided. The fact that there was extensive material to peruse does not explain a delay of such magnitude. In any event, it is submitted that the leave criteria are not met.

D's evidence

[32] [REDACTED].

Rape conviction

[33] With regard to the rape conviction, the trial Judge instructed the jury in both his opening remarks and the summing up to determine the murder charge “without reference” to Mr Rewa’s rape conviction. This went further than required under s 49(2). As the Court of Appeal held, this is not a case where the interplay between ss 8 and 49 could make a difference to the trial outcome.³⁵

Propensity evidence

[34] Mr Rewa had raped a considerable number of women in circumstances similar to his offending against Ms Burdett. As the Court of Appeal held, it would be an unlikely coincidence if Mr Rewa, who had raped over a dozen women in similar circumstances, had consensual sex with Ms Burdett on the same day she was murdered by someone who left her in just the position he had left other victims. This was a case with an unusual quantity of propensity evidence but that is because there was an unusual force to the propensity evidence adduced. In the Crown’s submission, the propensity evidence was properly admitted at trial.

Trial counsel conduct

[35] Mr Rewa accepts that his defence was put to the jury, his instructions on defence witnesses were followed and his election to give evidence was not affected by trial counsel’s conduct. In terms of the matters raised by Mr Rewa’s submissions:

- (a) Mr Rewa has not pointed to any difference which would have arisen in the evidence he gave, any questions which would have been asked in cross-examination, nor any alternative witnesses who would have been called, had his trial counsel met with him more frequently before trial.³⁶

³⁵ CA judgment, above n 1, at [67].

³⁶ At [41].

- (b) The trial Judge's interventions were directed to correcting the mechanics and form of trial counsel's questions. The interventions were not critical of trial counsel in a way that could have prejudiced the jury against him.
- (c) As the Court of Appeal found, the closing address adequately presented the defence case. There were justifiable reasons not to address the propensity evidence in further detail.

[36] It is submitted that Mr Rewa was not denied a fair trial by his counsel's conduct.

Court can be sure of guilt

[37] Should the Court find a miscarriage of justice occurred at trial, it is submitted that the Court can nevertheless be sure of Mr Rewa's guilt. Mr Rewa's alternative explanation for his semen found in Ms Burdett's vaginal swabs was inherently implausible and only lost credibility when he was cross-examined on it. D had no motive to kill Ms Burdett and was [out of Auckland] [REDACTED] on the night she died. The assault on Ms Burdett bore the distinctive features of Mr Rewa's other sexual and violent offending.

Application for extension of time

[38] We grant the application for an extension of time to apply for leave to appeal. We accept that there was extensive material to consider. Although we accept that this may not explain the magnitude of the delay, this is a serious matter, the proposed grounds of appeal are not frivolous and the Crown has not been prejudiced by the length of the delay.

The leave application

[39] Nothing raised by Mr Rewa throws doubt on the conclusion reached by the Court of Appeal with regard to D. We accept that all relevant information was before the jury. Nor does anything raised throw doubt on the conclusion reached by the Court of Appeal in the pre-trial ruling on the propensity evidence. We accept the

Crown submission with regard to this evidence. Further, the manner in which the evidence was introduced at trial removed any possible illegitimate prejudicial effect.

[40] In terms of the rape conviction, as submitted by the Crown, the directions given by the Judge went further than under s 49(2) and no arguable issue on the interplay between ss 8 and 49 is raised. The issue of trial counsel error was thoroughly examined by the Court of Appeal and nothing of substance is identified that could have affected the core aspects of the trial and Mr Rewa's defence.

[41] In these circumstances, no issue of principle arises and there is no risk of a possible miscarriage of justice.³⁷ It is therefore not in the interests of justice to grant Mr Rewa's application for leave to appeal.³⁸

Result

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

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

Solicitors:

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

³⁷ Senior Courts Act 2016, s 74(2)(b).

³⁸ Section 74(1).