COURT OF APPEAL OF NEW ZEALAND

TE KŌTI PĪRA O AOTEAROA

18 December 2020

MEDIA RELEASE — FOR IMMEDIATE PUBLICATION

K (CA106/2020) v THE QUEEN [2020] NZCA 656

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at www.courtsofnz.govt.nz.

1. The Court of Appeal today released a judgment dismissing the appellant's appeals against conviction and sentence for the murder of Grace Millane.

2. Suppression orders were made in this Court and the High Court prohibiting publication of the appellant's identity because of other charges faced by the appellant. Those charges have now been heard and determined in Judge-alone trials. Unless extended by the Supreme Court, all suppression orders in relation to the appellant's identity were to lapse with this judgment. However, an extension of suppression has been granted by the Supreme Court.

Background

3. Ms Millane was 21 years of age, a young Englishwoman who travelled to New Zealand in November 2018 as part of her postgraduate gap year. On 30 November 2018 she matched with the appellant on Tinder. The following day, on Saturday 1 December, the appellant messaged Ms Millane. They agreed to meet for a drink. It was the eve of Ms Millane's 22nd birthday. After visiting several bars and restaurants together, the appellant and

Ms Millane went to the appellant's apartment. Either late that evening or early the following morning, the appellant killed Ms Millane in his apartment.

4. In the following days, the appellant took various steps to conceal what had occurred. However, by Wednesday 5 December the police had begun a missing persons investigation in relation to Ms Millane and by the following Saturday, 8 December, the appellant had been charged with her murder.

5. The appellant pleaded not guilty and his trial commenced on 4 November 2019. Much of the factual background was not in contention, and the defence accepted that the appellant had caused Ms Millane's death by manual strangulation during sexual intercourse. The key issue was whether the appellant had the mental state required for either intentional murder pursuant to s 167(a) of the Crimes Act 1961 or reckless murder pursuant to s 167(b).

6. The Crown relied on a number of strands of circumstantial evidence, including propensity evidence, pathology evidence, the appellant's actions immediately after Ms Millane's death and the appellant's subsequent lies to the police, to support its contention that the appellant had either intended to kill Ms Millane or had intended to cause her the sort of bodily injury likely to cause her death and was reckless as to whether she died or not. By contrast, the defence case was that this was a consensual sexual encounter involving consensual erotic asphyxiation that had gone horribly wrong.

7. The jury returned a guilty verdict to the charge of murder on 22 November 2019. On 21 February 2020, Moore J sentenced the appellant to life imprisonment with a minimum period of 17 years' imprisonment, finding that s 104(1) of the Sentencing Act 2002 was engaged on the facts of this case, on the basis that Ms Millane was particularly vulnerable (s 104(1)(g)) and the murder was committed with a high degree of callousness (s 104(1)(e)).

8. The appellant appealed both his conviction and sentence to the Court of Appeal. The primary ground of appeal against conviction was that the Crown had to disprove consent (or an honest belief in it) to obtain a conviction for reckless murder under s 167(b). Other conviction appeal grounds related to the admission of probability evidence and the Judge's directions on expert and propensity evidence. In terms of the sentence appeal, it was said that the Judge should not have found s 104(1) of the Sentencing Act was engaged, compelling a minimum term of 17 years, and the minimum term was therefore manifestly excessive.

Judgment

9. The judgment is delivered by the President of the Court of Appeal, Justice Stephen Kós, joined by Justices Mark Cooper and Patricia Courtney.

10. On the primary issue the Court holds the Crown was not required to disprove consent (or an honest belief in it) as part of the s 167(b) charge. Consent is not available as a matter of law where there is an intent to cause injury known to be likely to cause death, that risk is run, and death ensues. It followed that the Judge did not err in the pre-trial ruling he made, removing consent from the jury (except in relation to manslaughter), and the question trail he posed to the jury was entirely correct. The Court also finds no credible narrative of consent, or honest belief in consent, established on the evidence. (Paragraphs [62] to [93] of the judgment.)

11. Secondly, the Court holds the Judge's summing-up directed the jury appropriately on propensity evidence. This ground of appeal concerned the evidence of three witnesses who gave evidence as to the appellant's interest and/or experience with erotic asphyxiation during sexual intercourse. Two had had sexual intercourse with the appellant in the weeks before he met Ms Millane. One of these, Ms J, had been terrified by the appellant's suffocation of her and thought she was about to die. A second, Ms M, had the opposite experience and considered the appellant behaved appropriately in restricting her breath, by consent, to enhance her pleasure. The Court did not consider the Judge was required to give what is known as a negative propensity direction in respect of Ms M's evidence, or that a failure to do so in the context of this trial gave rise to a miscarriage of justice. The jury would have had no difficulty weighing that evidence, and each party gained support from it: the Crown, in that the appellant was an experienced practitioner of erotic asphyxiation; the defence, that he behaved entirely appropriately with Ms M. (Paragraphs [106] to [109] of the judgment.)

12. Thirdly, the Judge's summing-up also directed the jury appropriately on the pathology evidence. Three experts were called in relation to this evidence, four potential mechanisms resulting in death were canvassed and force and time required to effect each were explained and then tested in cross-examination. The summing-up provided a clear summary of the competing expert opinions on cause and time without offering detailed evaluation, analysis or endorsement, given no issue as to admissibility of the competing views had arisen. That was the proper course for the Judge to have taken. (Paragraphs [127] to [132] of the judgment.)

13. Fourthly, evidence of a short study of death arising from erotic asphyxiation in Poland was put before the jury. The Court considered the study neither reliable nor relevant to a fact in issue. It ought not to have been put before the jury or have been used in cross-examination of the expert witnesses. No objection was taken to its introduction or use at trial. It would have been preferable if a clear direction had been given that it could not be used to deduce guilt on the basis of probabilistic reasoning. However, its admission and the failure to provide a direction did not give rise to a material risk of a miscarriage of justice. The proposition that death resulting from erotic asphyxiation is very rare was an accepted fact. The jury was not invited to use statistical probability reasoning to reach a finding of guilt, and it was extremely unlikely in this context the jury would have done so. (Paragraphs [144] to [152] of the judgment.)

14. Fifthly, as to sentence, the Court finds the judge was correct to find that s 104(1) of the Sentencing Act was engaged here. The provision was engaged in two respects. First, Ms Millane was particularly vulnerable, being intoxicated, in a strange apartment, naked, in the arms of a complete stranger with whom she thought she had "clicked" (and could therefore trust), and with his hands about her throat. Secondly, the Judge was correct in finding the murder of Ms Millane was committed with a high degree of callousness, having regard to the appellant's attitude to the likely struggles of Ms Millane (and certain lapsing into unconsciousness), disregard for her condition when he went then to take a shower, failure to call for assistance when appreciating her condition, and then searching on the internet for methods of body disposal, looking at pornography online, taking intimate photographic images of Ms Millane's naked body, looking again at pornography online, taking steps preparatory to disposing of the body, and going on another date while Ms Millane's body remained in his room. This behaviour was indicative of a wholly self-regarding wickedness throughout the incident and its aftermath, i.e. callousness, that called for the punitive response provided for in s 104(1). Nor, in these circumstances, was the minimum term of 17 years manifestly unjust. (Paragraphs [161] to [168] of the judgment.)

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