SUPREME COURT OF NEW ZEALAND | TE KŌTI MANA NUI O AOTEAROA

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MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

DAVID NOEL ROIGARD v THE QUEEN

(SC 25/2019) [2020] NZSC 94

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 Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

The High Court order prohibiting publication of the names and identifying particulars of Mr F and Mr W remains in force.

The legal issues under consideration in this appeal were fully analysed and determined by the Supreme Court in an earlier appeal concerning the admissibility of evidence of several witnesses in a trial which is yet to take place. The Court's decision on this pre-trial matter has also been released today but cannot be reported until final disposition of the trial. The Court does however refer to its reasoning in that case in explaining its approach in this appeal.

Background and issues

Mr Roigard was convicted after trial for the murder of his son and for theft in a special relationship. He was sentenced to life imprisonment. Mr Roigard appealed unsuccessfully against conviction and sentence to the Court of Appeal. He was granted leave to appeal against conviction in the Supreme Court.

The appeal focussed on the evidence of two Crown witnesses at trial, Mr F and Mr W. Both Mr F and Mr W had been in prison with Mr Roigard and gave evidence as to admissions they said Mr Roigard had made to them in prison. Both witnesses were aware of the potential benefit they might obtain from giving their evidence, had received a sentencing discount for assistance provided and had a history of dishonesty.

The issue before the Supreme Court was whether the evidence of Mr F and Mr W should have been excluded under the Evidence Act 2006. Accordingly, the Court had to consider the approach to the exclusion of evidence from prison informants and particularly to what extent issues of reliability could be considered in determining whether the probative value of the evidence was outweighed by the risk of unfair prejudice under s 8(1) of the Evidence Act.

The issue arose because of concerns regarding the reliability and credibility of prison informants. These concerns have been highlighted by social science studies establishing a linkage between the use of this type of evidence and miscarriages of justice.

Decision

By a majority decision, the Supreme Court has dismissed the appeal.

In dismissing the appeal, the majority (comprising Glazebrook, O'Regan and Ellen France JJ) applied the principles set out in the majority reasons of the other judgment delivered today. In that earlier judgment, the majority confirmed that judges could consider issues of reliability as part of their gatekeeping role when balancing probative value against illegitimate prejudice. And, where evidence of prison informants is involved, careful scrutiny is required because of the problems associated with this type of evidence as established in the social science literature. That scrutiny requires consideration of the common concerns about this type of evidence including whether the witness' credibility in the informant context has previously been doubted, any incentives at play and the likely weight to be attached to the evidence. The exercise is not that of a mini trial and the constitutional role of the jury as fact-finder needs to be respected. Finally, it was noted that the statutory scheme and previous authorities envisage that judges will utilise other trial mechanisms such as clear judicial directions to address the generic risk of unfair prejudice.

Applying these principles, the majority held that the evidence of Mr F and Mr W was properly admitted. While the evidence of both witnesses directly raised the common concerns associated with incentivised prison informant evidence, significant portions of the evidence was not challenged. Further, the evidence of both Mr F and Mr W largely conformed with the evidence of other witnesses at trial. Therefore, the majority held that the probative value of the evidence of both witnesses favoured admission under s 8(1), and issues of credibility and reliability were properly for the jury who had the full picture of the witnesses' incentives and history of dishonesty.

Winkelmann CJ and Williams J dissented. They considered that updates in social science literature suggest incentivised prison informant evidence is particularly problematic and has been linked to cases of miscarriages of justice. Their Honours applied the framework set out in their minority reasons in the other judgment delivered

today referred to above. While agreeing with the majority that careful scrutiny of prison informant evidence is required and that reliability can be taken into account under s 8, the minority proposed a set of non-exhaustive considerations relevant to the judge's task of careful scrutiny to be taken into account when undertaking the s 8 analysis of this kind of evidence. Where the evidence was incentivised, those factors include: the significance of the evidence to a matter at issue; indications the evidence is unreliable or untrue (the extent of independent corroboration is highly relevant to this assessment); whether the witness has other motives to lie; whether the witness has a record of lying; and any collateral or cumulative prejudice.

Applying that framework, the minority considered the evidence of Mr F was properly admitted but that the evidence of Mr W should have been excluded.

All members of the Court dismissed Mr Roigard's other argument that the evidence of Mr F and Mr W was improperly obtained and hence should have been excluded under s 30 of the Evidence Act. This argument was premised on a presumption that prison informant evidence was inadmissible. The Supreme Court in *Hudson v R* had previously rejected such a presumption of inadmissibility, and the Court was not revisiting *Hudson* on this appeal.

All members of the Court also observed that the social science literature suggested there was a need for additional safeguards in respect of prison informant evidence, including further guidance for prosecutors and the maintenance of a central register of prison informants.

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