IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA120/2014
[2019] NZCA 619

BETWEEN	HELEN ELIZABETH MILNER Applicant
AND	THE QUEEN Respondent

Hearing:	2 October 2019
Court:	Kós P, Miller and Cooper JJ
Counsel:	R G Glover for Applicant F R J Sinclair and B F Fenton for Respondent N M Pender and A C Dartnall for Lee-Anne Cartier as Interested Party
Judgment:	5 December 2019 at 9 am

JUDGMENT OF KÓS P, MILLER AND COOPER JJ

A **We determine the application as a full court of the High Court.**

B **The application for release of bodily samples of the deceased for further scientific testing is granted.**

C **The parties are to submit a consent memorandum as to terms.**

REASONS OF THE COURT

(Given by Kós P)

[1] Ms Milner was convicted of the murder by poisoning of her husband, Philip Nisbet. He died in 2009, evidently as the result of an overdose of the drug

promethazine hydrochloride. Ms Milner was also convicted on one count of attempted murder by poisoning some two weeks before Mr Nisbet died. Ms Milner was sentenced by Gendall J to life imprisonment with a minimum period of imprisonment of 17 years.[1]

[2] An appeal against conviction to this Court failed.[2] The Court assessed the Crown case as "a strong circumstantial" one, referring to evidence of Ms Milner purchasing quantities of the drug under an assumed name, being seen to crush pills, expressing a wish to kill Mr Nisbet by using drugs, wanting to obtain the benefit of an insurance policy over Mr Nisbet's life, and the writing of a suicide note purportedly by Mr Nisbet being more consistent with her spelling than his.[3] Leave to appeal further was declined by the Supreme Court.[4]

[3] Ms Milner wishes now to advance an application to the Governor-General for exercise of the Royal prerogative of mercy. To support that application, she wishes to have scientific testing undertaken on biological samples from Mr Nisbet's body that remain in the possession of the Institute of Environmental Science and Research (ESR).[5] It is proposed the testing be undertaken by Professor Johan Duflou, a consulting forensic pathologist at the University of Sydney.

[4] There was no contest at trial as to cause of death. It was accepted that Mr Nisbet died as the result of an overdose of promethazine hydrochloride. The defence theory at trial was suicide: Mr Nisbet may have self-administered the drug, which had killed him. The defence theory now, which it is hoped the testing may help sustain, is that Mr Nisbet may not have ingested sufficient quantities of the drug to cause death at all, and that he died as a result of a latent heart condition.

[5] The new theory was referred to in the 2015 application for leave to appeal to the Supreme Court. At that stage the expert reports obtained by Ms Milner were very tentative. They remain tentative in the absence of testing of body samples. Even then

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1 *R v Milner* [2014] NZHC 233.
2 *Milner v R* [2014] NZCA 366.
3 At [38]–[53].
4 *Milner v R* [2015] NZSC 38, (2015) 27 CRNZ 412.
5 The biological samples are, we understand, minute or microscopic samples of Mr Nisbet's hair, liver, blood and urine.

they may remain so. Further toxicological study may be indecisive because of instability of the drug within blood over time (meaning uncertainty as to quantities at death a decade ago) and because DNA testing may not demonstrate pathogenic cardiac abnormality (even if it existed).

[6] The questions before us are two:

(a) Who (if anyone) has jurisdiction to make the orders for further testing?

(b) What (if any) orders should be made?

Before addressing these issues, we will describe the process leading up to this hearing.

A protracted process

[7] Counsel for Ms Milner, Mr Glover, approached the Coroner on the basis that she retained jurisdiction over the samples.

[8] The Coroner however informed Mr Glover that she was *functus officio* and had no jurisdiction to make an order in respect of the samples.

[9] Mr Glover then approached the High Court. A memorandum was filed, in January 2019, incorporating an application under r 2.12 of the Criminal Procedure Rules 2012.

[10] At that point the Coroner produced a legal opinion she had obtained. This suggested that the Court with jurisdiction was the Court of Appeal. So the application was referred to this Court.

[11] In this Court the issue was considered, administratively, by French J. She expressed a provisional view that this Court did not have jurisdiction because the samples were not exhibits and never in this Court's custody. She indicated that if counsel were of a different opinion, submissions should be filed.

[12] Mr Glover went back to the High Court. His application was considered on the papers by Gendall J.

[13] Gendall J however concluded that custody of the samples had transferred to the Court of Appeal and that this Court alone had jurisdiction to grant the application.[6] He therefore disagreed with French J's provisional view.

[14] The Judge traced the chain of custody to this Court thus:[7]

(a) Under s 19 of the Coroners Act 2006, the Coroner had an exclusive right to custody of Mr Nisbet's body from the time the death was reported to her as the designated coroner until she authorised the release of the body under s 42 of the Coroners Act.

(b) After the Coroner released her findings (that she could not find proof of death by suicide), the police reopened their homicide inquiry in relation to Mr Nisbet's death and would have taken custody of the bodily samples and other potentially evidential material.

(c) At trial, some physical material would have been produced by way of exhibits.[8] Other material not produced in evidence was nonetheless "other things connected" with her trial for the purposes of s 324 of the Criminal Procedure Act 2011. At this point, the High Court assumed custody over the bodily samples.

(d) When Ms Milner appealed her convictions to this Court, custody of the samples transferred to this Court pursuant to s 324 of the Criminal Procedure Act. As leave to appeal to the Supreme Court was declined, the Supreme Court never became an "appeal court" within the meaning of s 324(a). There being no legislative provision or rule of court providing for the automatic release or transfer of custody of

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6 *Milner v R* [2019] NZHC 1471 [High Court judgment] at [20].
7 At [12]–[20].
8 That does not appear, however, to include these samples, which were retained by or on behalf of the Crown.

> "other things" at the conclusion of an appeal, this Court retains custody until some action is taken to release the samples pursuant to s 324(b) of the Criminal Procedure Act, which provides that any "other things" may be released in accordance with any rules of court.

[15] So Mr Glover returned again to this Court.

[16] What is before us now is an application, not an appeal. Mr Glover asks us to grant the orders sought by his client. The thrust of his submissions was that someone had to have jurisdiction to make the orders. And, really, he did not mind who, so long as the orders were made.

[17] The Crown was willing to permit testing on mutually acceptable conditions if someone would order it.[9] We asked for further submissions on the jurisdiction question. We are grateful to Mr Sinclair and Ms Fenton for appearing at short notice. They submitted that the samples were indeed "things connected with the trial", and within the control of the trial court. But they took the view that the trial court (the High Court) retained that control. In short, the Crown agreed with French J and disagreed with Gendall J.

[18] Ms Lee-Anne Cartier is Mr Nisbet's sister. She entered an appearance as an interested person. Ms Pender made submissions on Ms Cartier's behalf. Their thrust was that no one had jurisdiction to make the orders. Ms Pender submitted that once this Court dismissed Ms Milner's appeal against conviction, it ceased to have control over exhibits (including the samples) and now lacks jurisdiction to order release. The High Court and Coroner were similarly *functus officio*. The samples should now be returned to Mr Nisbet's family, under s 55 of the Coroners Act.[10]

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9 The conditions concerned the identity of the testing agency and observation by a Crown expert. The conditions are not contested. But nor are they complete. For instance, chain of custody is not addressed.

10 As at the date of the hearing, no request for return of the samples had been made by Mr Nisbet's family.

Who (if anyone) has jurisdiction to make the orders for further testing?

[19] Section 31 of the Coroners Act provides that the coroner may direct a post-mortem examination. Such a direction was given in this case. The post-mortem was performed by forensic pathologist Dr Martin Sage. He concluded that the cause of death was the ingestion of excessive quantities of promethazine.

[20] Coroner Johnson then undertook an inquiry in accordance with s 57 of the Act. She concluded that promethazine ingestion caused death, but that whether Mr Nisbet or another person was responsible could not be determined. A police investigation followed. It resulted in Mrs Milner being charged with the murder of Mr Nisbet.

[21] Initially the police had the exclusive right to custody of the body, under s 18 of the Coroners Act. That right then passed to the Coroner, under s 19. The right ends on release of the body under s 42. In this case, the body was released to Mr Nisbet's family, but some bodily samples were retained by the pathologist.

[22] The samples taken by Dr Sage (which are presently in the possession of ESR) would have been removed by him under s 47(1) of the Coroners Act. That provides that a pathologist may take a bodily sample if the pathologist believes on reasonable grounds that the taking is necessary for the purposes of the post-mortem. There are restrictions on size and extent of removal in the section.[11] The remaining samples are, we are informed, minute.

[23] Section 48(2) of the Coroners Act governs the retention of samples after release of the body. It provides:

> The pathologist is, when the body is released, permitted to retain the body part or bodily sample, but only if—
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> (a) the part or sample is a minute one received, removed, or taken for microscopic analysis, or other analysis that requires only a minute part or sample, and is, in the pathologist's opinion, necessary for the purposes of the post-mortem; or

[11] Coroners Act 2006, s 47(2)–(3).

> (b) the retention is, in the pathologist's opinion, necessary for the purposes of the post-mortem, and is authorised by the coroner in accordance with section 49; or
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> (c) the pathologist explained to the family members or other people to whom the body is to be released that the pathologist proposed to retain the part or sample for a specified purpose and none of those members or people objected to the pathologist's proposal.

[24] In this case, s 48(2)(a) applies. Retention is permitted, but the immediate family must be advised of the matters set out in s 50(4) — which includes reasons for retention and the right to request return of the items retained. Absent a request for return — and no such request was made here — s 56 provides for limited rights of use (for post-mortem or evaluative purposes) and otherwise disposal by the pathologist.

[25] Importantly, however, s 54(2)(a) provides that no part may be returned, or disposed of under s 56, unless the coroner has first confirmed in writing that the return or disposal:

> … appears unlikely to prejudice the prevention, detection, investigation, prosecution, and punishment of criminal offences relating to the death concerned or its circumstances.

No such certificate has been given. Nor should it be given, so long as an application for exercise of the prerogative of mercy is extant.

[26] The right to apply for exercise of the prerogative of mercy is a vital protection against miscarriage of justice.[12] Where new evidence casting doubt on a conviction exists, or may be shown to exist, a second, renewed appeal to this Court is seldom possible.[13] An application for leave to appeal to the Supreme Court may be advanced, potentially more than once.[14] But that Court has observed that it may not be well-placed to evaluate new evidence for the first time.[15] So the prerogative is a vital backstop against miscarriage in cases involving fresh evidence. While most

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12 The prerogative of mercy is not defined by statute, although s 406 of the Crimes Act 1961 provides some procedural pathway provisions.

13 *Lyon v R* [2019] NZCA 311 at [14].

14 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2008] NZSC 94, (2008) 19 PRNZ 132 at [1]; and *Suckling v R* [2016] NZSC 133, (2016) 27 NZTC 22-071 at [6].

15 See, for example, *Bunting v R* [2019] NZSC 95 at [8].

applications for exercise of the prerogative fail, and many are brought by persons rightly convicted, a number brought by the wrongly convicted do succeed.[16]

[27] We do not see it as the function of this or any other court to prejudge an application for exercise of the prerogative. The courts should not, therefore, decline an application for scientific testing of evidential material in support of a prerogative application, unless it is wholly speculative and unsupported by cogent expert opinion. This is not such a case, as the Crown accepts. It does not oppose testing. Rather it takes the view that it should occur, under appropriate conditions.

[28] We accept Mr Sinclair's submission that Ms Cartier's proposition that no curial authority exists to order testing of remaining evidential samples, in support of an application for exercise of the prerogative, does not accord with the interests of justice. If statutory authority did not exist, the inherent jurisdiction of the High Court would likely be engaged to protect the prerogative. Where a competent application (in the terms described in the preceding paragraph) has been made, neither destruction of, nor denial of access to, potentially relevant evidential material would be consonant with the interests of justice.[17]

[29] However, and in common with Gendall J, we consider statutory authority to permit testing of evidential material retained under s 48 of the Coroners Act does exist. That authority is to be found in s 324 of the Criminal Procedure Act:

> **324 Custody of exhibits, etc**
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> Any documents, exhibits, or other things connected with the trial of any person who, if convicted, is entitled or may be authorised to appeal against conviction or sentence—
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> (a) must be kept in the custody of the trial court or appeal court, as the case may be, in accordance with any rules of court:

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[16] For instance, in applications by Arthur Allan Thomas, David Dougherty and Rex Haig: see *R v Dougherty* [1996] 3 NZLR 257 (CA); and *R v Haig* (2006) 22 CRNZ 814 (CA). An application was also made by Teina Pora, although his conviction ultimately was set aside via the conventional appellate pathway: *Pora v R* [2015] UKPC 9, [2016] 1 NZLR 277. In his case, and that of Mr Dougherty, another person was eventually convicted in their place: see *R v Rewa* [2019] NZHC 577; and *Reekie v R* CA339/03, 3 August 2004.

[17] We would thus be drawn to the same conclusion reached in English cases concerning paternity or health-related testing, where silence of the relevant legislation cannot be said to exclude inherent jurisdiction, and the denial of access would give rise to injustice: see, for example, *B (BR) v B (J)* [1968] P 466 (CA); and *Spencer v Spencer* [2016] EWHC 851, [2016] Fam 391 at [73].

(b) may be released in accordance with any rules of court.

[30] The samples here are not "documents" or "exhibits". But they can properly be regarded as "other things connected with the trial of any person". Any extant material connected to the trial that might reasonably be resorted to in the event of a successful appeal (and consequent retrial) or in support of an application for exercise of the prerogative of mercy should be regarded as remaining within the courts' ultimate control for the purposes of s 324, even if not formally within their custody (as would be the case with an exhibit). The biological samples here meet that test, regardless of the fact that they are presently in the possession of ESR, on behalf of the pathologist.

[31] The next question is which court has ultimate authority in respect of those items. The answer, we conclude, is that it is the trial court, unless an appeal court is still seized of the proceeding.

[32] An appeal court has powers to call for production of the same items under ss 334(1)(a) and 335(2)(e) of the Criminal Procedure Act. Rule 1.8(4) of the Criminal Procedure Rules provides an exhibit must be transferred to the Court of Appeal with the appeal file or if requested. But that did not apply here, the samples having never held the status of exhibits. Unsurprisingly, no direction was made for the production of the biological samples in this Court during the appeal process.

[33] We conclude that control remained, and remains, in the High Court. Access is then governed by the Criminal Procedure Rules. While r 1.8 concerns the custody of exhibits, and is inapplicable here, r 1.5(2) provides:

> If these rules do not make provision or sufficient provision for a matter that arises in a proceeding, the court may give any directions or rulings about the matter that the court considers appropriate in the interest of justice.

What (if any) orders should be made?

[34] First, we consider that this application has travelled long enough. We will not remit it once more to the High Court. Instead, we shall use the power provided in s 103 of the Senior Courts Act 2016 to sit as judges of the High Court and determine the application in accordance with s 9(1) of that Act.

[35] Secondly, given our conclusion at [27] above, we are satisfied that the application is properly brought and should be granted. We note that the Crown accepts that to be so.

[36] Thirdly, the precise terms on which the application should be granted have not been argued before us, the primary question being jurisdiction. We understand there to be no contest, however. We invite the parties to submit a consent memorandum prescribing terms.

Result

[37] We determine the application as a full court of the High Court.

[38] The application for release of bodily samples of the deceased for further scientific testing is granted.

[39] The parties are to submit a consent memorandum as to terms.

Solicitors:
Crown Law Office, Wellington for Respondent
Franks Ogilvie, Wellington for Interested Party