

NOTE: PUBLICATION ANY INFORMATION THAT IDENTIFIES, OR THAT MAY LEAD TO THE IDENTIFICATION OF JUROR PROHIBITED BY S 32B OF THE JURIES ACT 1981

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360350.html>

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011. SEE <http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360352.html>

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

**SC 62/2019
[2019] NZSC 106**

BETWEEN T (SC 62/2019)
 Applicant

AND THE QUEEN
 Respondent

Court: Winkelmann CJ, Glazebrook and O'Regan JJ

Counsel: S L McColgan for Applicant
 K S Grau for Respondent

Judgment: 7 October 2019

JUDGMENT OF THE COURT

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

Introduction

[1] Mr T was convicted of 31 offences committed against his step-daughters. His appeal against his conviction was dismissed by the Court of Appeal.¹ The appeal against sentence was allowed in part. He now seeks leave to appeal to this Court. His application is over a month out of time but, as the delay is relatively short and the Crown does not object, an extension of time is granted.

[2] The leave application is made on the ground that the foreperson of the jury was a retired police officer. The appellant submits this could have affected the independence or impartiality of the jury or could have given the appearance of having done so. As such, it is submitted that this “undermines the fundamental right to a fair trial and therefore public confidence in the justice system”.

Background

[3] The juror in question, when her name was drawn in the balloting process, told the Judge she was a former police officer and that, although she knew the officer in charge, she did not know her well. She said that their relationship was purely professional. The Judge asked the juror whether her former profession or association with the officer in charge would affect the way she would assess the evidence and she said it would not. She was then allowed to take her place on the jury and was subsequently elected foreperson. Counsel were not consulted. Nor were they informed of the discussion with the juror.

[4] Mr T’s trial counsel (Mr Fairley) recognised the juror in question as a former police officer after the jury had been empanelled. He consulted with his client about this during the lunch adjournment and, after this discussion, Mr T agreed that she should be left to serve as a juror and he signed a note to this effect.

¹ *T (CA742/2017) v R* [2019] NZCA 150 (Miller, Simon France and Peters JJ) [CA judgment] at [75].

[5] It is worth noting that the evidence before the Court of Appeal was that the officer in charge and the juror would have seldom encountered each other, despite both working at the same police station, because the juror was uniformed staff and the officer in charge was a member of the Criminal Investigation Branch. The officer in charge confirmed she never socialised with the juror and that they had no relationship, professional or otherwise, beyond serving at the same police station. The juror retired from the Police around three years before she served as a juror in this case.

Court of Appeal decision

[6] The Court of Appeal noted that the juror was not disqualified from serving on a jury as disqualification only operates while the person is a serving police officer.²

[7] The Court went on to consider whether “a fair-minded and informed member of the public would have a reasonable apprehension or suspicion that the juror would not have discharged her task impartially”.³ In this case, the Court considered that such a member of the public would know that the juror had resigned from the Police some three years before the trial, that she had no past or present connection with the case or with the officer in charge, and that she had given the Judge an assurance she was capable of performing her obligations.⁴

[8] The Court also considered various relevant English authorities on disqualification to be supportive of this position.⁵ The English authorities were decided in the context that serving police personnel are no longer automatically disqualified from serving as jurors.

[9] In the present case, the Court considered that the critical issue for the jury was whether it accepted the complainants’ evidence.⁶ It said that the police evidence was

² At [20]; see Juries Act 1981, s 8(g).

³ At [27], citing *R v C (CA395/2008)* [2009] NZCA 272, [2010] 2 NZLR 289 at [35].

⁴ At [28].

⁵ At [29], citing *R v Khan* [2008] EWCA Crim 531, [2008] 3 All ER 502 and *R v Abdroikov* [2007] UKHL 37, [2007] 1 WLR 2679.

⁶ At [30].

uncontroversial.⁷ The Court considered that this meant that a member of the public even less likely to apprehend any possibility of bias on the part of the juror.⁸

[10] The Court was also referred to *R v Turner*.⁹ In *Turner*, the juror chosen by the jury to be the foreman was a former senior police officer (retired some nine months earlier). As in this case, the defendant became aware of the juror's previous employment by the Police after the trial had begun, and, after taking advice from counsel, did not act.¹⁰ The Court of Appeal considered that the defendant, by proceeding with knowledge of the position and without objecting to it, effectively waived any right to contend later that the jury's verdict was unjust on that basis.¹¹

[11] At the hearing of Mr T's appeal, his then counsel had expressed reservations about the *Turner* case, given the failure of the Court to refer to s 25(a) of the New Zealand Bill of Rights Act 1990 and to other important authority.¹² The Court declined to revisit *Turner*. It commented that in this case, Mr T made an informed decision to proceed and the Court not persuaded this was wrong.¹³

[12] The Court agreed that the trial Judge should have given counsel the opportunity to make submissions as to whether the former police officer should sit on the jury. The Court commented that, although nothing had come to light which suggested the juror should have been excluded, a future case may be different.¹⁴

Parties' submissions

[13] On behalf of Mr T, it is submitted, as noted above, that the retired police officer should not have been a juror and that her presence on the jury compromised a fair trial. As the juror was asked to sit in judgement on facts where one of the parties was her former employer (the Police, through the Crown), counsel submitted that it was "akin

⁷ At [30].

⁸ At [30].

⁹ *R v Turner* CA439/95, 25 July 1996.

¹⁰ At 3. See also CA judgment, above n 1, at [31].

¹¹ At 3. See also CA judgment, above n 1, at [31].

¹² At [32]. Other authority counsel for Mr T pointed to was *Webb v R* (1994) 181 CLR 41.

¹³ At [32].

¹⁴ At [33].

to a Judge sitting in a Judge-alone trial where the defendant is a former client of his or hers”. This, it was submitted, compromised his fair trial rights.

[14] It is also submitted on behalf of Mr T that this Court should reconsider the principle in *Turner* to remove “any suggestion that a waiver occurs by a decision to proceed”. Rather, the submission is that the fact “an informed decision was made does not correct or avoid the risk of independence, the risk of impartiality or the risk that the trial process may be seen as unfair”.

[15] The Crown submits that the test for apparent bias is well settled and was correctly applied by the Court of Appeal to the particular facts in this case. The leave criteria are therefore not met.¹⁵ It submits further that there is no reason to doubt the correctness of *Turner*. In the Crown’s submission, *Turner* demonstrates that the test for apparent bias will not be met in a case such as Mr T’s. In this regard it is submitted that Mr T’s acceptance of the situation demonstrates his acceptance that the juror would not be partial.

[16] The Crown submits that the Court’s comment that the Judge should have given counsel an opportunity to make submissions on whether the juror should have been excused cannot found a suggestion of miscarriage when it is clear that the result would have been the same, namely that the juror could serve.¹⁶

[17] The Crown also submits there is no evidential foundation to suggest the foreperson was biased and/or influenced other jurors. Instead, the juror had raised the issue of her former employment and no concerns were raised about her behaviour. The jury’s verdict suggested a careful appraisal of the evidence, leading to not guilty verdicts on some of the more serious charges of violence against the third complainant who retracted his most serious allegations at trial.

¹⁵ Senior Courts Act 2016, s 74.

¹⁶ Referring to CA judgment, above n 1, at [33].

Our assessment

[18] The Court of Appeal applied the established test to the particular facts of the case. No point of general or public importance arises. Further, nothing raised on behalf of Mr T suggests the Court of Appeal erred in its assessment.

[19] We also note this was a case where the decision of the Court of Appeal was that there was no apparent bias. The issue of waiver did not arise. There is therefore no need for us to make any comment about the scope of *Turner*.

Result

[20] The application for an extension of time is granted.

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

Solicitors:
Crown Law Office, Wellington for Respondent