Supreme Court of New Zealand
Te Kōti Mana Nui

13 AUGUST 2019

MEDIA RELEASE

MARK EDWARD LUNDY v THE QUEEN (SC 95/2018)

CASE SYNOPSIS

This synopsis is provided to assist in understanding the history of the case and the issues to be heard by the Court. It does not represent the views of the panel that will hear the appeal in the Supreme Court. The synopsis does not comprise part of the reasons for the judgment of the Court of Appeal. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz. A direct link to the judgment is included at the end of this synopsis.

Introduction

Mark Lundy was first convicted of the murders of his wife and daughter in March 2002. His appeal against conviction to the Court of Appeal was dismissed in 2002. However, following a further appeal to the Privy Council in 2013 his convictions were set aside and a retrial was ordered. The retrial was held in early 2015. Mr Lundy was again convicted of both murders. The Court of Appeal dismissed his appeal against these convictions in 2018. Mr Lundy was granted leave to appeal to the Supreme Court earlier this year.

The murders

The bodies of Mr Lundy's wife and daughter were discovered on the morning of 30 August 2000 at their family home in Palmerston North. Both had been killed by a blow to their head with an axe or tomahawk. The murder weapon was never found.

Mr Lundy worked as salesman and often travelled around the lower North Island. On the night of the murders, he had been staying at a motel in Petone. After being told of the murders, Mr Lundy drove quickly

back to Palmerston North. He was stopped by police and his car was seized. The car was later searched. Inside the police found a stained polo shirt Mr Lundy admitted wearing on the night of the murders.

The stains on the shirt found in Mr Lundy's car were forensically examined. The Crown case at trial was that the stains on the polo shirt contained brain tissue from one of the victims, Mrs Lundy. It relied on the expert evidence of the scientists who tested the shirt to support this hypothesis.

Mr Lundy's appeal to the Court of Appeal following the retrial

The admissibility of expert scientific evidence

Mr Lundy appealed to the Court of Appeal against his convictions at the retrial. The primary ground of appeal was that scientific evidence relied on by the Crown to link Mr Lundy to the murders should not have been admitted.

Evidence was given at the retrial that the stains contained brain or spinal cord tissue (although not necessarily human brain tissue). This evidence was based on immunohistochemistry (IHC) testing. Mr Lundy argued that IHC analysis was untested as a means of proving the source of tissue in a criminal case.

However, the Court of Appeal held that the IHC evidence was admissible. The IHC testing used to determine the presence of brain tissue on Mr Lundy's shirt was robust and reliable. In addition, the expert witnesses called by both the Crown and Mr Lundy agreed that the tissue on the polo shirt was brain tissue.

The Crown also led evidence that the brain tissue found on Mr Lundy's shirt was more likely to be human brain tissue than animal brain tissue, although it was not possible to say how much more likely. This evidence was based on messenger RNA analysis (mRNA). Before the retrial, the Court of Appeal held in a pre-trial decision that this evidence was admissible. However, on his conviction appeal, Mr Lundy again argued that this evidence was not scientifically valid and should not have been admitted.

The Court of Appeal held that the mRNA evidence should not have been admitted at the retrial. The evidence required the jury to resolve a complicated scientific debate about whether the mRNA testing was sufficiently robust. This was a task for which the jury was not equipped. The Court explained that its decision differed from the pre-trial decision because new evidence concerning the validity of mRNA analysis and the jury's ability to understand the scientific debate had become available.

The proviso to s 385(1) of the Crimes Act 1961

Mr Lundy's appeal was brought under s 385 of the Crimes Act 1961, which applied because the offence occurred before the Criminal

Procedure Act 2011 came into force. Section 385(1) provides that where the Court of Appeal finds evidence was wrongly admitted at trial, it must allow the appeal unless it considers that no substantial miscarriage of justice actually occurred. This power to dismiss the appeal if no substantial miscarriage of justice occurred is known as the proviso to s 385(1).

In *R v Matenga*, the Supreme Court held that where an error of law such as the wrongful admission of evidence has occurred, the Court may apply the proviso and dismiss an appeal only if it considers that the guilty verdict was inevitable. In order to come to the view that the guilty verdict was inevitable the Court must feel sure, on the basis of the admissible evidence, that the defendant is guilty. In addition, before applying the proviso, the Court must be satisfied that the defendant received a fair trial. The right to a fair trial is affirmed in s 25(a) of the New Zealand Bill of Rights Act 1990.

Despite concluding that the mRNA evidence should not have been admitted at Mr Lundy's retrial, the Court of Appeal applied the proviso to s 385(1) and dismissed Mr Lundy's appeal.

The Court of Appeal said that it was left sure of Mr Lundy's guilt. The Court considered that it was particularly damning that brain tissue was found on the shirt Mr Lundy admitted to wearing on the night of the murders. Large amounts of Mrs Lundy's DNA were also found in the same area as the brain tissue. Other evidence relied on by the Court of Appeal included that traces of blue and orange paint were found on the victims. It was accepted that Mr Lundy marked his tools with blue and orange paint.

The Court of Appeal also considered that Mr Lundy received a fair trial. The admission of the mRNA evidence did not make the trial unfair. The mRNA evidence – that the brain tissue was more likely human than not – was equivocal. In addition, that Mrs Lundy's DNA was found in the same area as the CNS tissue was a strong indicator that the tissue was human even without the mRNA evidence.

Issues for the Supreme Court

The Supreme Court granted Mr Lundy leave to appeal. The approved ground of appeal is whether the Court of Appeal erred in applying the proviso to s 385(1) of the Crimes Act. The Supreme Court declined leave to appeal on a number of other grounds including whether the IHC evidence should have been admitted at the retrial.

The approved ground of appeal will require the Supreme Court to determine whether the Court of Appeal erred in relation to either of the two elements of the proviso. These are:

(a) whether the Court of Appeal was correct to determine that Mr Lundy received a fair trial. This will require the Court to

consider the significance of the wrongly admitted mRNA evidence in the context of the retrial; and

(b) whether the Court of Appeal was correct to determine that the convictions were inevitable despite the wrongful admission of the mRNA evidence. This will require the Court to review the admissible evidence to determine whether the Court of Appeal erred in determining that it could be sure of Mr Lundy's guilt.

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Supreme Court leave decision: [2019] NZSC 45 (6 May 2019)
Court of Appeal decision: [2018] NZCA 410 (9 October 2018)
Privy Council decision: [2013] UKPC 28 (7 October 2013)