

IN THE COURT OF APPEAL OF NEW ZEALAND

CA120/2014
[2014] NZCA 366

BETWEEN HELEN ELIZABETH MILNER
Appellant

AND THE QUEEN
Respondent

Hearing: 10 July 2014

Court: Ellen France, Randerson and Harrison JJ

Counsel: R G Glover for Appellant
M J Lillico and K J Basire for Respondent

Judgment: 5 August 2014 at 10 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Ellen France J)

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Introduction

[1] The appellant, Helen Milner, was convicted following trial by jury of the murder of her 47-year-old husband, Philip Nisbet, at their home on 4 May 2009. Mr Nisbet died from an overdose of the drug promethazine hydrochloride which is sold under the trade name Phenergan.

[2] Ms Milner was also convicted of one count of attempted murder of Mr Nisbet on 15 April 2009 but acquitted of a second count of his attempted murder earlier that same day. Ms Milner was sentenced by the trial Judge, Gendall J, to life imprisonment with a minimum period of imprisonment of 17 years.¹ Ms Milner appeals against conviction.

[3] The appeal against the murder conviction is brought on one basis, namely, that the verdict is unreasonable because the Crown did not prove beyond reasonable doubt how it was possible for Ms Milner to have administered promethazine to Mr Nisbet without his knowledge. Ms Milner says that this failure left open the reasonable possibility that Mr Nisbet committed suicide, as the defence contended at trial. The appeal against the attempted murder conviction stands or falls with the appeal against the conviction for murder.

[4] For the reasons set out below we have decided that the appeal should be dismissed. In brief, the jury could reasonably be satisfied to the required standard that Ms Milner was guilty. The evidence as to the mechanics of administering the promethazine was not extensive but that was simply one factor for the jury to consider in the context of a strong circumstantial Crown case.

Overview

[5] The relationship between Ms Milner and Mr Nisbet began in 2001–2002. The couple were married in late 2005. Both had children from previous relationships.

¹ *R v Milner* [2014] NZHC 233.

[6] After Mr Nisbet died, Ms Milner provided police with a copy of a suicide note.² Police initially proceeded on the basis that Mr Nisbet had taken his own life. By the time of the coroner's hearing in November 2010, doubts were emerging. The inquiry was reopened and police interviewed the couple's family, friends and workmates and investigated the purchases of Phenergan. Ms Milner was charged with murder and with two counts of attempted murder.

[7] The Crown case at trial was that Ms Milner had poisoned her husband because she was unhappy with her marriage and financially motivated by the opportunity to obtain the benefits of a \$250,000 life insurance policy of which she was the sole beneficiary. The suicide exception clause in the policy had expired in the weeks prior to Mr Nisbet's death.³ In relation to the count of murder, the Crown said that Mr Nisbet had been poisoned by Ms Milner crushing up Phenergan pills and most likely feeding them to him in his dinner on the night that he died. Two empty blister packs containing a total of 50 by 25 mg Phenergan tablets were found in the bedside drawer after Mr Nisbet's death.

[8] The first count of attempted murder related to Mr Nisbet's collapse whilst in his truck at work early in the morning of 15 April 2009. Mr Nisbet was taken by ambulance to hospital. He had some symptoms which he put down to a spider bite. He was administered promethazine and told the ambulance officers about a lesion on his leg which could have been a bite mark. Mr Nisbet was discharged from hospital after examination and he returned home.

[9] On the evening of 15 April, Mr Nisbet became unwell again. He said he was feeling lethargic. On his admission to hospital that evening there was no sign of the lesion. The doctor assessing him at the hospital found nothing wrong with him and he was sent home.

[10] The Crown relied on a range of circumstantial evidence including purchases of Phenergan it said were linked to Ms Milner, her discussions with various family members and friends about ways to "get rid of" Mr Nisbet and the number and

² As we discuss later, several suicide notes were produced.

³ The insurance broker had explained to Mr Nisbet and Ms Milner when the policy was taken out in late January 2008 that for the first 13 months there would be no cover for suicide.

nature of the suicide notes produced after Mr Nisbet's death. The Crown also called scientific evidence about the likely cause of Mr Nisbet's ill-health in April.

[11] The expert evidence called by the Crown established, and it was agreed, that the concentration of promethazine in Mr Nisbet's blood was 0.7 mg per litre of blood. There was no dispute about the evidence that ingestion of excessive promethazine was the cause of Mr Nisbet's death.

[12] The defence case was that Mr Nisbet's death was suicide. Ms Milner elected not to give evidence at trial. For present purposes, the relevant defence evidence came from Professor Ian Whyte, a clinical toxicologist and clinical pharmacologist with expertise in drugs and toxic substances and their effects in humans. Professor Whyte gave evidence about the likely cause of Mr Nisbet's ill-health on the two occasions on 15 April 2009 and about the number of Phenergan tablets that would cause the concentration of promethazine found in Mr Nisbet's bloodstream. He also gave evidence about the bitter taste of a crushed up Phenergan tablet and that taken in this form the tablet had a numbing effect on his mouth when he conducted a taste test.

[13] The way the Crown and defence cases were run, Mr Nisbet's death was either self-administered or a result of the administration of Phenergan by Ms Milner.

The relevant principles

[14] The relevant statutory ground of appeal is under s 385(1)(a) of the Crimes Act 1961. This Court must allow the appeal if it is of the opinion the verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. In *R v Owen* the Supreme Court confirmed that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.⁴ The Supreme Court endorsed a number of aspects of this Court's decision in *R v Munro*, importantly for the present case, that the appellate court is performing a

⁴ *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [5] and [17].

review function, not one of substituting its own view of the evidence, and that the weight to be given to individual pieces of evidence is essentially a jury function.⁵

[15] In the context of a case based on circumstantial evidence the principles set out in *Thomas v The Queen* are still relevant.⁶ There may be evidence in a circumstantial case which, if relied on standing alone, would require the jury to speculate but which, when considered along with other evidence at trial, would give rise to no doubt at all. Evidence may of course be unsafe to rely on because it is of a character that can never gain in its value from the context.⁷

[16] Mr Glover for Ms Milner relies on a passage in the separate concurring judgment of Turner J in *Thomas*. Turner J said that there may be cases “in which without the affirmative proof of some collateral circumstance, not itself an essential ingredient of the crime charged, the Crown case must fail, for reasons special to the particular case”.⁸ Turner J went on to say that in those cases:⁹

... it will be necessary for that particular fact to be proved to the satisfaction of the jury beyond reasonable doubt; for if it is not so proved, ex hypothesi a reasonable doubt must remain on the whole case. But such cases are exceptional. This case is not one of them. An example, if one is needed, will be found in the facts of *R v Dehar* [1969] NZLR 763 [(CA)].

[17] We turn then to apply these principles to this case.

The appeal against the murder conviction

[18] As we have foreshadowed, the appeal against the murder conviction is brought on the basis that the Crown did not adduce satisfactory evidence as to how Ms Milner could have administered promethazine to Mr Nisbet without his knowledge. Mr Glover says that the evidence from the defence expert, Professor Whyte, shows that there was a 90 per cent probability that death occurred as a result of ingesting 45 by 25 mg Phenergan tablets. He says the Crown case rested on the basis death may have resulted from the ingestion of as few as

⁵ At [13]; *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87 at [86]–[90].

⁶ *Thomas v The Queen* [1972] NZLR 34 (CA).

⁷ See the discussion of *Thomas* in *R v Goodman* [2008] NZCA 384 at [12]–[13].

⁸ At 41.

⁹ At 41.

14 tablets. The argument is that, based on Professor Whyte's evidence, there was only a 10 per cent probability that Mr Nisbet ingested a number of tablets other than 45, such as only 14. The significance of the number of tablets ingested arises from evidence about the bitter taste of crushed Phenergan and about its numbing effect on the mouth. Mr Glover also pointed to evidence from Mr Nisbet's doctor as to his problems with anxiety. By contrast, Mr Glover says, the same issues would not have arisen if Mr Nisbet took the tablets himself in water.

[19] The appeal is not advanced on the basis of any criticism of the directions of the trial Judge. However, Mr Glover says that with hindsight there should have been a direction to the effect that if the jury was not satisfied that there was a means by which Ms Milner could have got Mr Nisbet to take the pills without knowing he was doing so then she must be acquitted.

[20] Mr Lillico for the Crown submits that the Crown had to prove the elements of the offending beyond reasonable doubt but not that Mr Nisbet took 14 tablets of Phenergan. This was a case where the jury had the scientific evidence to consider alongside all of the other circumstances. In any event, the submission is that even on the defence evidence, Phenergan introduced through food or a doctored pill was plausible as a mechanism for murder.

Analysis

[21] We do not accept Mr Glover's proposition that the Crown had to prove as a separate factor how the drug was administered without Mr Nisbet's knowledge. Turner J, in the extract from *Thomas* relied on by Mr Glover, pointed to the facts in *Dehar* as an illustration of the situation in which a collateral factor may require proof beyond reasonable doubt as a separate matter in a circumstantial case. The issue in *Dehar* was the ability of the jury to rely on lies and the need for a direction about the use the jury could make of lies.¹⁰ The facts are not dealt with in any detail but this Court said the position was that, excluding the statements of the appellant about his movements made out of court or in the witness box, there was insufficient evidence

¹⁰ *The Queen v Dehar* [1969] NZLR 763 (CA).

in the Crown case to establish the charge beyond reasonable doubt.¹¹ If the jury found that, after proper direction, the appellant had lied then those lies would have added to the rest of the Crown case. Those facts are not of the same character as those in issue in this appeal.

[22] We consider that the question of the ability to administer the drug without knowledge was just a factor to be assessed in the context of the other circumstantial evidence. This issue was explored in the evidence and properly raised in submissions by the defence. Further, Gendall J directed the jury that they had to be sure that Ms Milner drugged Mr Nisbet “with Phenergan without his knowledge”. Accordingly, the issue was squarely before the jury.

[23] The jury had to be satisfied beyond reasonable doubt that Ms Milner was responsible for Mr Nisbet’s ingestion of the drug and that this led to his death. On the evidence, we are satisfied that it was open to the jury to exclude the possibility of suicide. Given the way the trial was run by both sides, exclusion of this possibility left administration of the drug by Ms Milner as the only available explanation for the cause of Mr Nesbit’s death. This was not a case where the ingestion of the drug could not have happened in the way contended for by the Crown and, as we shall discuss, the other evidence was very strong. Further, Mr Glover’s proposition relies on speculation as to what might have occurred if Mr Nisbet had become aware of the bitter taste of the drug or became concerned about the numbing effect.

[24] We also agree with the submission for the Crown that even on the scientific evidence for the defence, the jury could have been satisfied of guilt. We turn then to review the relevant evidence dealing first with the scientific evidence.

(a) The scientific evidence

[25] The Crown evidence came from Dr Martin Sage, the forensic pathologist who undertook the post-mortem. He confirmed the cause of death was the ingestion

¹¹ At 764.

of promethazine. He also confirmed Mr Nisbet had food in his stomach.¹² The Crown also heard from Dr Sarah Russell, a forensic toxicologist with the Institute of Environmental Science and Research (ESR). She confirmed that the only drug in Mr Nisbet's system was promethazine and the level of the drug in his bloodstream was higher than that expected from therapeutic use. Finally, as we shall discuss, there was evidence about the ability to crush up the Phenergan tablets and place them in another pill container and about a taste test conducted by the police under the auspices of the ESR. As we have indicated, the defence evidence on this topic came from Professor Whyte.

[26] Both Dr Sage and Professor Whyte were asked for their opinion on the number of tablets of Phenergan Mr Nisbet would have had to have ingested to result in the level of promethazine in his blood.

[27] Dr Sage's evidence was that it was not possible to make a scientific estimate. Accordingly, he said he did not know if 25 or 50 tablets would have been required. He did say he thought the amount of promethazine in the bloodstream reflected 35 times the normal dose, although it was about 10 times lower than the very few cases where death has been attributed to promethazine alone.

[28] Professor Whyte, similarly, said it was not possible to estimate exactly how much Phenergan Mr Nisbet had taken. However, he was willing to make a rough estimate. Professor Whyte gave a range, namely, 353–5830 mg which would reflect a range of 14 by 25 mg tablets to approximately 233 by 25 mg tablets. He went on to say during cross-examination:

A. ... there's a 90% likelihood it's somewhere in that range. It's more likely to be in the centre of that range because this, the data used to estimate this comes from a study where there was a range of numbers across and central tendency so you have, the likelihood starts low at the ends, increases to a peak in the middle and goes back low at the other end.

Q. I appreciate but I understood that your evidence was that that was the range that you accepted?

A. Somewhere within that range is 90% likely to be.

¹² Ms Milner referred to Mr Nisbet eating an evening meal in her evidence before the coroner.

- Q. So it may not necessary be the case of course then on that basis that Mr Nisbet in fact ingested 50, 25 milligram tablets at all, it might have been substantially less?
- A. It could have been, yes, and it could have been sub – equally could have been substantially more.

[29] Professor Whyte was asked whether more than 50 tablets could have been ingested, and the following exchange ensued:

- A. Yeah, the same probability that you're talking about on the bottom end of the range is true at the top end of the range.
- Q. Well here we seem to be limited to 50 because that's the number of blister pack Phenergan which was found beside the bed would you accept that?
- A. Yes and that the 50 tablets is quite consistent with 0.7 milligrams per litre.

[30] The first point to be made about Professor Whyte's evidence is that it is not right to say, as the appellant contends, that there is a 90 per cent chance that Mr Nisbet would have taken 45 tablets. Rather, the 90 per cent figure represents the likelihood that the number of tablets would be in the specified range. We acknowledge that Professor Whyte's evidence was that the number of tablets was more likely to be in the centre of this range.

[31] However, and importantly, Professor Whyte accepted that as few as 14 tablets might have been ingested and resulted in Mr Nisbet's death although he considered that "the most likely number of milligrams that fits the concentration" was 1,200 mg of promethazine, that is, 45 tablets. At the least, he said 14 tablets was at the bottom end and he was talking about the "central tendency", namely, for the amount of promethazine ingested to be around 1,200 mg.

[32] If the number of tablets was as low as 14 then the jury could have been satisfied on the basis of the taste test undertaken by the police that, while the food may not have been very tasty, it would not have been sufficiently bitter to mean a person would not eat it.

[33] Detective Constable Moyle explained that, under the supervision of Dr Gillespie from ESR, he undertook a blind taste test. The samples of crushed up Phenergan were dissolved in a meal of diced pork with a sweet and sour simmer sauce. Detective Constable Moyle said that the sample he tested containing no Phenergan tablets crushed up in it had no unusual taste. His evidence was that the sample with 25 tablets crushed up was “slightly bitter” but not so bitter to mean he would not eat the food. The sample with 50 tablets crushed up was described as having a strong bitter taste.

[34] Detective Constable Moyle also told the jury that when he crushed 50 by 25 mg tablets they had a blue fleck through them from the blue coating on the pills. However, when dissolved in water and then mixed into the pork and sauce mixture the blue colour was no longer visible. He said the only after effect was that his mouth was numb for the next three to four hours.

[35] The jury also heard evidence of an experiment in which Dr Gillespie crushed up Phenergan tablets and put the promethazine in the form of crushed up material into an empty Paracetamol capsule casing. He explained that 577 mg of the crushed material or two and a half Phenergan tablets fitted into each capsule casing.¹³

[36] Accordingly, we agree with the Crown submission that there was a plausible narrative for ingestion of the Phenergan either in the evening meal or by way of a doctored pill or pills.¹⁴ It is unnecessary to speculate, as Mr Glover invited us to do, on whether or not Mr Nesbit noticed or raised with Ms Milner a concern about the taste of the meal.

[37] On our approach this scientific evidence, in any event, could be considered in the context of the overall, strong, Crown case. We highlight the other evidence described below.

¹³ The additional mass is presumably made up of other ingredients and/or the blue coating in addition to the 25 mg per tablet of promethazine.

¹⁴ We add that the Crown Solicitor in closing made reference to an alternative possibility of suffocation. There was limited evidence on this possibility but it was not a feature of the trial at all.

(b) Other aspects of the evidence

[38] First, there was evidence of the purchases of another drug called Nausicalm and of Phenergan at relevant dates under assumed names that could be connected to Ms Milner.¹⁵ The link was provided by the addresses used, names or the proximate use of Ms Milner's bankcard.

[39] The first relevant purchase took place at 11.47 am on 23 January 2009 and was of 10 by 50 mg tablets of Nausicalm. The name of the purchaser given was Carolyn Woodstock and the address of the purchaser was recorded as Ms Milner's address. Ms Kasey Woodstock was at that time the girlfriend of Ms Milner's son, Adam Kearns. Ms Woodstock said Ms Milner had given her some of those tablets when Ms Woodstock was pregnant and feeling unwell. Ms Woodstock was unsure when Ms Milner had given her the tablets but her child was born in July 2009.

[40] In terms of this purchase, Ms Milner's bankcard was used the previous day, 22 January 2009, at 7.18 pm to withdraw \$40.

[41] The second relevant purchase took place on 15 April 2009 at 11.58 am. This purchase of 25 by 10 mg tablets of Phenergan was preceded by the withdrawal of \$100 cash from Ms Milner's account four minutes earlier from an ATM machine about 34 metres away from the pharmacy at which the drug was bought. The purchaser of the Phenergan was listed as Andrea Wilson at a non-existent address.

[42] The third purchase took place on 2 May 2009, at 5.04 pm, two days prior to Mr Nisbet's death. This time 50 by 25 mg tablets of Phenergan were purchased. The purchaser was recorded as Karen Marie Porter with an address of 24A [AB] Street, Christchurch. The pharmacy from which the drug was bought was about 790 metres from the ATM machine where, at 4.24 pm, money was withdrawn using Ms Milner's bankcard. Karen Mary Porter, who lived at 24B [AB] Street, was Mr Nisbet's partner at one time. Ms Porter said she had never purchased Phenergan. Further, there was evidence suggesting Ms Milner thought Ms Porter's name was as

¹⁵ The attempted murder charges were brought on the basis that Ms Milner had administered either Nausicalm or Phenergan without Mr Nisbet's knowledge.

recorded at the pharmacy. Ms Milner told Detective Hugh McLachlan when he was undertaking a part of the police investigation that a document with the name “Karen Mary Porter” was incorrect and that the spelling should read “Karen Marie Porter”.

[43] The defence did not challenge this evidence directly but rather pointed to the fact that others, for example, Adam Kearns, had used Ms Milner’s bankcard from time to time.

[44] Secondly, there was evidence from Adam Kearns that Ms Milner was crushing pills and putting the crushed up material into other pill containers on the evening of 15 April 2009 prior to Mr Nisbet’s second admission to hospital that day.

[45] Thirdly, there was evidence of Ms Milner expressing a wish to kill Mr Nisbet using drugs and associated evidence about her wish to take advantage of the \$250,000 insurance policy on Mr Nisbet’s life.

[46] Adam Kearns referred to his mother talking to him about Mr Nisbet and her wanting to “get rid of him”. Over a long period of time he said that she discussed a number of ways by which she might kill him, namely, drugs, Phenergan and the use of sleeping tablets. He referred, for example, to a discussion one evening when Ms Milner said she had “had enough of Phil again” and was about to “do something again” followed by a question about where the nearest chemist shop open might be.

[47] Kasey Woodstock, who met Adam Kearns in 2008 and became his girlfriend, recalled Ms Milner saying that she could not wait until Mr Nisbet was gone. She gave evidence that Ms Milner wanted the \$250,000 life insurance and had asked whether Ms Woodstock and Mr Kearns knew someone who would kill Mr Nisbet and she would pay them “afterwards”. She also told Ms Woodstock that she needed to get some Phenergan and next time she needed to use “double the amount ’cos the first lot didn’t work”.

[48] Ms Milner’s other son, Gregory Kearns, also said he recalled a conversation in which Ms Milner said that if he got rid of Mr Nisbet he would get \$20,000 of the

life insurance policy. Mr Kearns also said that Ms Milner had asked him whether he thought BZP would cause Mr Nisbet to have an accident while he was driving. This conversation took place a year or two prior to Mr Nisbet's death.

[49] Karen Carey was a neighbour and friend of Mr Nisbet's. She referred to a discussion with Ms Milner in which Ms Milner said that she and Adam Kearns were trying to think of something to put in a drink so Mr Nisbet "would go off the tracks over the Otira" but that Ms Milner did not want to hurt anyone else. Ms Carey described this conversation occurring in the context of what she thought was the couple's "up and down relationship" and that things were tight financially.

[50] Lynette Maynard worked with Ms Milner. She described discussions with Ms Milner in which Ms Milner was "reasonably derogatory" about Mr Nisbet. She also said Ms Milner talked to her about a discussion she had had with Adam Kearns as to how to get rid of Mr Nisbet and what sort of car accidents might occur.

[51] The defence response to this evidence was to highlight various factors such as animosity and other relationship problems that might provide a basis for the witness to lie about what he or she was told rather than a direct challenge to the witness's recollection of the conversation. It was a part of the defence case that a number of witnesses contrived to "pin Mr Nisbet's death" on Ms Milner "at all costs".

[52] Finally, the Crown relied on the fact more than one suicide note was produced by Ms Milner and on the fact that misspellings in one of these notes was consistent with the note having been written by someone other than Mr Nisbet. In particular, one note ended "love allways". There was evidence that Barry Hayton spelt "always" with a double "l" whereas Mr Nisbet did not. Mr Hayton was a former partner of Ms Milner's. There was evidence the two recommenced their relationship in the weeks after Mr Nisbet's death. Further, a substantive part of the note read "we could work through anything BUT". The use of "but" in this way was a formulation used by Ms Milner in other examples of her writing.

[53] There were other strands to the Crown case but these four seem most relevant to us and formed a strong circumstantial case. Having regard to all of the evidence, the jury could reasonably have been satisfied that Ms Milner was guilty of murder.

The appeal against the attempted murder conviction

[54] We can deal with this aspect shortly. That is because at the hearing before us Mr Glover properly accepted that the verdict was open to the jury. This part of the appeal is really advanced as an adjunct to the murder conviction appeal, that is, if that succeeds then the submission is this puts into question the reasonableness of the verdict of attempted murder.

[55] Nonetheless, we briefly address the submissions on this aspect. Ms Milner relied on Professor Whyte's evidence that the objective indicators of Mr Nisbet's ill-health on 15 April 2009 were inconsistent with the ingestion of promethazine. Further, it was submitted that the jury must have accepted Professor Whyte's evidence in acquitting Ms Milner on the count of attempted murder early in the day and, applying the same logic, should have acquitted her on the second count.

[56] As is now accepted, it was open to the jury to convict on this charge in light of all of the circumstantial evidence. In any event, we agree with the submissions for the Crown that there was a basis on the scientific evidence to reach the verdict of guilty.

[57] We deal first with the argument based on Professor Whyte's evidence. To put that in context we say a little more about what occurred on 15 April 2009.

[58] The ambulance was called at 7.35 am that morning to attend a person bitten by a spider. The ambulance officers went to Mr Nisbet's aid. At that point he was in the cab of a truck as he had been at work. Mr Nisbet told the ambulance officers that he had been working in the garden two days previously. He said he had been itchy on the previous day and felt dizzy and nauseous, had some periods of hot and cold and his leg was painful. He thought he may have been bitten by a spider. At that point his blood pressure was high and his heart rate was fast. He was seen to have a firm, tender lesion on his right lower leg.

[59] The ambulance officers gave Mr Nisbet a standard dose of promethazine (12.5 mg). After the insertion of the cannula his heart rate and blood pressure dropped. It seems to be accepted that this may have been as a result of a fear of needles.

[60] Mr Nisbet arrived at Christchurch Hospital at about 8.18 am. On admission he was seen by Dr Shamil Haroon. Dr Haroon described Mr Nisbet as pretty much normal as far as his vital signs were concerned. He described developing pain and swelling in the lower leg the previous day and feeling weak and nauseated. The doctor's notes recorded that Mr Nisbet found it a little difficult to speak, he had a small circular slightly raised area on his leg, and was feeling weak, lethargic and nauseous. He was administered the Glasgow Coma Scale test at 8.30 am and at 10.00 am and on both occasions a 15 or normal score was recorded.

[61] Dr Haroon accepted that it was quite reasonable to say that the local signs and symptoms (pain, and the firm and tender lesion with a circular area of redness or erythema) were inconsistent with a promethazine overdose and much more likely related to an insect bite.

[62] When Mr Nisbet returned to the hospital at 9 pm that evening he was seen by Dr Jamie Strachan. The doctor's notes recorded that Mr Nisbet continued to feel lethargic with no power in his limbs. He was unable to remember short-term events. His speech was slurred but he was able to talk in full sentences. He was discharged after a review.

[63] The Glasgow Coma Scale again was recorded at 15 and Mr Nisbet was considered to be catastrophising, that is, overrating his symptoms. Dr Strachan could only see a pen mark on the leg, no bite mark.

[64] Dr Wayne Temple, the Director of the National Poisons Centre with expertise in chemistry and human toxicology, said that Mr Nisbet's symptoms on 15 April were "very consistent" with something like promethazine but he could not say that this was the case with certainty. Dr Temple did not consider the bite was likely to be that of a katipo. He also said that the fact Mr Nisbet said he was becoming

increasingly sick was inconsistent with a whitetail or spider bite. If the bite was disappearing in effect then he would not expect Mr Nisbet to have nausea, weakness, lethargy or high anxiety.

[65] Dr Sage considered that the symptoms were consistent with the administration of promethazine but not exclusively or necessarily so. He accepted that there were other things that could explain the symptoms. He said that the reaction to the spider bite would be more than most people exhibit although he accepted some people have quite dramatic reactions to spider bites.

[66] Professor Whyte considered it was extremely unlikely that Mr Nisbet's symptoms resulted from the administration of promethazine. That was because the objective measures, particularly the Glasgow Coma Scale, showed a normal response. Professor Whyte accepted there were two possible explanations for the normal score, first, the doctors felt that it was not important to the issue presenting and, secondly, there was some inexperience in scoring so a score of 15 was given to someone who in fact had a score of 14 or 13. His essential point is that promethazine in overdose typically produces varying degrees of sedation. While Mr Nisbet presented some features of a sedative drug effect the local signs and symptoms and his low pulse rate meant it was very unlikely to be as a result of promethazine. A bite from a katipo or whitetail was a potential culprit. The pain may last for 24 hours or more and the bite mark is usually fairly unremarkable by then.

[67] On this evidence, there was a dispute about the cause of Mr Nisbet's ill-health. There was however a basis in the evidence, particularly that of Dr Temple, on which the jury, taking into account all of the evidence, could be satisfied that promethazine was ingested.

[68] There is also a rational explanation for the different verdicts on the two counts. The first incident involved the administration of promethazine by the ambulance officers. Further, prior to the second incident, Adam Kearns said he saw his mother crushing up pills. The second incident was also much closer in time to the purchase of the Phenergan that day. Finally, there was a basis in the evidence for

the jury to accept that there was a progression in terms of the amounts of Phenergan used. The verdict was reasonable.

Result

[69] For these reasons, the appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent