IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA331/2023
[2024] NZCA 95

BETWEEN	TYSON SHANE BROWN Appellant
AND	THE KING Respondent

Hearing: 14 March 2024

Court: Gilbert, Whata and Churchman JJ

Counsel: S R Lack for Appellant
J E L Carruthers for Respondent

Judgment: 4 April 2024 at 9.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Churchman J)

Introduction

[1] Following a two week jury trial in the Auckland High Court, on 21 March 2023 the appellant, Tyson Shane Brown, was convicted of the murder of a two-year-old child, A.

[2] The appellant now appeals his convictions on the grounds that:

(a) The trial Judge erred by failing to give an unreliability direction, pursuant to s 122 of the Evidence Act 2006 (the Act), in relation to the evidence of Ms T.

(b) There has been a miscarriage of justice as a result.

Background

[3] At sentencing, the Judge summarised the facts.[1] In early February 2021, Ms T separated from her then fiancé who was also the father of her 26-month-old daughter, A. In mid-2021, Ms T moved into an address in Weymouth with A. Friends of Ms T, namely KF and JH, later moved into the property and lived in a sleep-out behind the main house.[2]

[4] Mr Brown had known Ms T some years prior, and they re-established contact. Mr Brown began to spend more time with Ms T occasionally staying nights at her address. He was seen by numerous people, including KF and JH, to be verbally abusive towards A. This included yelling at her to be quiet or she would "get it", and to shut up.[3]

[5] Ms T had also faced questions from family members about her care of A. This included inquiries on 22 July 2021 about a cut on the underside of A's chin, which Ms T explained was from her falling in the shower. Ms T also struck A with her hand across her face and shoulder after A had walked in front of Ms T's phone camera whilst she was recording a TikTok video on 22 October 2021. On 26 October 2021, KF took photos of A showing bruises, grazes and scratches on A's face, cheeks, arms and back. On 29 October 2021, Ms T was also seen throwing A into the rear of her car after they were both tested for COVID-19.

[6] On 29 October 2021, Mr Brown tested positive for COVID-19, which meant he was required to isolate at the Weymouth address together with Ms T and A.

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1 *R v Brown* [2023] NZHC 1267.
2 At [6]–[7].
3 At [7].

The offending

[7] On the morning of 31 October 2021, Ms T and one of the occupants of the sleepout sent a series of messages to each other, which included Ms T stating Mr Brown was stressed about the COVID-19 situation within the household, and that she and Mr Brown had been swearing at one another the previous day, with Mr Brown "throwing shit around".

[8] Shortly after 2.00 pm that day, KF heard noises coming from the main house, and messaged Ms T asking whether they were okay and later stating that she was worried. Ms T responded "yep" and queried what KF was worried about.

[9] At about 3.00 pm, Ms T and KF met outside the house when collecting a care food package that had been dropped off. Ms T appeared upset. She told KF that Mr Brown had been telling A off for something she did, and after Ms T had tried to calm him down he got angry and threw her into a wall.

[10] At about 3.43 pm, Ms T received a message from A's father asking how A was and questioning why she had a bruised face in Ms T's TikTok videos. Ms T assured him A was fine and that she had fallen off her slide.

[11] Between 3.51 pm and 4.21 pm, Ms T apparently called a COVID-19 public health service, leaving A in the care of Mr Brown while she was on the call. In his sentencing notes, the Judge inferred from the evidence that during this call, Mr Brown assaulted A, using considerable force either by striking her or striking her head against hard surfaces in A's bedroom.[4] The Judge noted there were three distinct and forceful impacts against her head across multiple planes, causing A to suffer widespread subdural haemorrhaging.[5] She was later found to also have suffered bruising over much of her body, and compression fractures to her spine of the type commonly seen in children her age if they had been slammed forcefully down on their bottom.[6]

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4 At [12].
5 At [12].
6 At [13].

[12] At 5.21 pm, Ms T advised that, for social distancing purposes, she had retreated to A's bedroom. The Judge inferred this was the first occasion Ms T had checked on A.[7] Both Ms T and Mr Brown commenced a series of Google searches from 5.23 pm which included "what happens if a babys lip has ripped from the inside" and "how long can a baby be concussed for". Ms T did not call emergency services until around 8.01 pm. Emergency services arrived at 8.20 pm. A was taken to hospital and died shortly after midnight on 1 November 2021.

Submissions

Appellant's submissions

[13] At trial the defence case was that it was Ms T, not Mr Brown who was responsible for A's death.[8] Mr Brown submits that Ms T had a motive to give false evidence, as there was a risk she would be charged with murder, instead of manslaughter by failing to provide the necessities of life which she had pleaded guilty to, if she accepted responsibility for the fatal assaults on A.

[14] Mr Brown submits that due to this motive, Ms T was an unreliable witness and s 122 of the Act was engaged. As a result, the Judge should have given a reliability warning to the jury, addressing the fact that Ms T could have been exposed to a charge of murder if she admitted committing the fatal assaults.

[15] Mr Brown submits that the credibility or otherwise of Ms T's evidence was central to the appellant's defence at trial, as her denial of responsibility for the fatal assaults was tantamount to direct evidence that the appellant was responsible. There was consequently a real risk that the outcome of the trial was affected, resulting in a miscarriage of justice.

[16] Mr Brown submits the conviction for murder should be quashed and a retrial should be ordered.

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7 At [15].

8 This differed from what Mr Brown had said in his statement to Police which was that A had sustained her injuries falling from a slide.

Respondent's submissions

[17] The respondent submits that a reliability warning was not required. This was because:

(a) Ms T's evidence did not materially advance the Crown case, but rather contradicted it.

(b) The Crown did not rely on Ms T's evidence in any meaningful sense, except insofar as it was verified by independent evidence and went unchallenged by the defence.

(c) Ms T's potential motives for giving evidence that was neither credible nor reliable were explored and explained at trial.

(d) A reliability warning would arguably have been counterproductive to the defence.

(e) The battleground in respect of Ms T was not her credibility and reliability but the strength of the circumstantial case against her.

(f) Defence counsel did not put to Ms T that she denied murdering A to avoid being prosecuted for murder.

(g) Neither counsel nor the Judge raised the issue of a reliability warning in respect of Ms T's evidence.

[18] The respondent submits it is difficult to see what a reliability warning concerning the possibility of Ms T being prosecuted for murder if she admitted to killing A would have achieved.

Approach to appeal

[19] A first appeal against conviction is governed by s 232 of the Criminal Procedure Act 2011. The Court must allow an appeal of a decision in a jury trial if the Court is satisfied that, having regard to the evidence, the jury's verdict was

unreasonable, or if a miscarriage of justice has occurred for any reason.[9] The Court must dismiss the appeal in any other case.[10] If the appeal is allowed, the Court must set aside the conviction.[11] The Court may direct that a judgment of acquittal be entered, direct that a new trial be held, substitute a conviction for a different offence or make any other order it considers justice requires.[12]

[20] A "miscarriage of justice" is defined in s 232(4) as:

> … any error, irregularity, or occurrence in or in relation to or affecting the trial that—
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> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.

[21] A "real risk" that the outcome was affected exists when "there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong".[13] The appellant does not have to establish that the verdict was "actually unsafe" but rather that there is a real risk the verdict would be unsafe.[14]

[22] An "unfair trial" exists when errors are prejudicial or unacceptably give rise to the appearance of unfairness. A verdict will not be set aside merely because there has been an irregularity in one, or even more than one, facet of the trial, and it is not every departure from good practice which renders a trial unfair.[15] A miscarriage is "more than an inconsequential or immaterial mistake or irregularity".[16] Rather, the errors or irregularities must depart from good practice in a manner that is "so gross, or so persistent, or so prejudicial, or so irremediable" that an appellate court must condemn the trial as unfair and quash the conviction.[17] The assessment of the fairness of a trial is to be made in relation to the trial overall.[18] The error, irregularity or occurrence

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9 Criminal Procedure Act 2011, s 232(2)(a) and (c).
10 Section 232(3).
11 Section 233(2).
12 Section 233(3).
13 *R v Sungsuwan* [2005] NZSC 57, 1 NZLR 730 at [110].
14 At [110].
15 *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78], citing with approval *Randall v R* [2002] UKPC 19, [2002] 1 WLR 2237 at [28].
16 *Matenga v R* [2009] NZSC 18, [2010] 2 LRC 36 at [30].
17 *Randall v R*, above n 15, at [28], cited in *R v Condon*, above n 15, at [78].
18 *Wiley v R* [2016] NZCA 28, [2016] 3 NZLR 1 at [35].

must be of sufficient seriousness to warrant the setting aside of the conviction without further inquiry into the potential effect of the error on the trial's outcome.[19]

Should the Judge have made a reliability direction to the jury?

[23] The day after she pleaded guilty to the charge of manslaughter Ms T provided the Police with a formal written statement and agreed to give evidence for the Crown at the appellant's trial. However, the respondent submits that the evidence she gave at trial was not helpful to the Crown's case as it was "riddled with lies".

[24] In closing to the jury the Crown disavowed relying on any aspect of Ms T's evidence.

[25] Mr Brown submits that the Crown, in fact, did rely on some of Ms T's evidence during the "critical time period" when it asserted that the fatal injuries were inflicted.

[26] That is a mischaracterisation of the Crown case. It relied on parts of Ms T's evidence that were verified by independent evidence, including the records of the telephone calls that Ms T had made on the afternoon of 31 October 2021. Ms T's evidence simply confirmed that the records of the telephone calls were correct.

[27] In closing, the Crown did refer to an aspect of Ms T's evidence that was not challenged which was that while Ms T was on the lengthy phone call, Mr Brown was in A's bedroom with A.

[28] A number of aspects of Ms T's evidence at the trial were actually favourable to Mr Brown and, defence counsel, in closing to the jury, asked them to accept those aspects of Ms T's evidence that supported Mr Brown's defence.

[29] An objective assessment of Ms T's evidence is that it did not materially advance the Crown case but rather, in a number of respects contradicted not only that case but the basis of which Ms T had pleaded guilty to the manslaughter charge.

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[19] At [41].

[30] This aspect of Ms T's evidence was commented upon by Johnstone J when he sentenced Ms T. He said:[20]

> [35] Frequently, offenders who give evidence against their former co-defendants receive a sentencing credit for what is described as providing assistance to the authorities. But when you gave evidence, it is doubtful you had any intention of providing assistance. In fact, your evidence, suggesting that prior to your phone call from the COVID Healthline you were not aware Mr Brown was being violent towards [A], contradicted both the Crown's case at trial, and the guilty plea you had entered only a couple of weeks before.

[31] Section 122 of the Act provides that:

> (1) If, in a criminal proceeding tried with a jury, the Judge is of the opinion that any evidence given in that proceeding that is admissible may nevertheless be unreliable, the Judge may warn the jury of the need for caution in deciding—
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> (a) whether to accept the evidence:
>
> (b) the weight to be given to the evidence.
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> (2) In a criminal proceeding tried with a jury the Judge must consider whether to give a warning under subsection (1) whenever the following evidence is given:
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> …
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> (c) evidence given by a witness who may have a motive to give false evidence that is prejudicial to a defendant:
>
> …

[32] In summing up to the jury the Judge dealt with the concepts of credibility and reliability in a general sense. The Judge also specifically referred to the Crown not relying on Ms T being a truthful witness and even going so far as to suggest that Ms T's evidence might be so unreliable that the jury might choose to put it to one side.

[33] The Judge, in summarising the defence case to the jury also specifically referred to those parts of Ms T's evidence that assisted the defence case. The Judge noted a degree of inconsistency in the approach of the defence in referring to those parts of Ms T's evidence that supported the case alongside what he described as "the general thrust of the defence case" being that Ms T's evidence should not be accepted.

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[20] Citation omitted.

[34] Neither of the parties requested the Judge to give a reliability warning. Throughout the trial the Judge had issued a number of bench notes, some of which related to directions that might be required. Counsel had also received a draft of the Judge's summing up before it was delivered. It is clear that the Judge was alive to the risk of not giving a direction which might interfere with the cases that had been presented. In Bench Note No 10, the Judge had referred to whether a lies direction relating to Mr Brown might be required but, after giving counsel the opportunity to comment upon it and noting Mr Brown's request that he not give such a direction, he resolved not to do so.

[35] It is unsurprising that the Judge chose not to give a reliability direction. It may well have distracted the jury and also may well have undermined the defence case by affecting the willingness of the jury to accept those parts of Ms T's evidence that supported the defence.

[36] The Judge has a discretion under s 122. There are a number of factors in this case that justify not giving such a direction. These include the fact that Ms T's evidence did not advance the Crown's case but, if anything, assisted in aspects of the defence case; that the Crown, in closing, had accepted the unreliability of her evidence and, unless it was undisputed did not rely on it; and neither the prosecution nor defence had sought a reliability warning. Accordingly, we are satisfied that no miscarriage of justice arose from the Judge not giving such a warning.

Result

[37] The appeal is dismissed.

Solicitors:
Crown Law | Te Tari Ture o te Karauna, Wellington for Respondent