

**IN THE COURT OF APPEAL OF NEW ZEALAND**

**I TE KŌTI PĪRA O AOTEAROA**

**CA102/2021**  
**[2021] NZCA 635**

BETWEEN                      JOSEPH DOUGLAS MCGIRR  
   Appellant

AND                                THE QUEEN  
   Respondent

Hearing:                      11 November 2021  
  
Court:                             Brown, Mallon and Moore JJ  
  
Counsel:                     A J Bailey for Appellant  
   M R L Davie for Respondent  
  
Judgment:                     30 November 2021 at 11.00 am

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**JUDGMENT OF THE COURT**

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**The appeal is dismissed.**

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**REASONS OF THE COURT**

(Given by Brown J)

**Introduction**

[1]      Following the death of Lauren Biddle in a spa pool at his home, apparently from an overdose of MDMA, Mr McGirr was found guilty of attempting to pervert the course of justice by removing her clothing from his house and concealing it down a bank at his property. He appealed his conviction on the ground that a miscarriage of justice occurred because of a jury misdirection.

## **Factual background**

[2] At a gathering in October 2018 at Mr McGirr's Christchurch property the appellant and Ms Biddle consumed alcohol, cannabis and MDMA, a Class B controlled drug which belonged to Mr McGirr. At the time Mr McGirr was serving a community-based sentence with the condition that he not consume alcohol. Some time after midnight while they were in his spa pool Mr McGirr realised that Ms Biddle was under the water, apparently deceased.

[3] Mr McGirr and the other person still present, Mr Higginson, gave conflicting evidence as to what occurred. Mr Higginson said Mr McGirr told him that Ms Biddle was dead. Mr Higginson wanted to call an ambulance but Mr McGirr was insistent that should not happen. Mr Higginson tried to revive Ms Biddle by the spa and again spoke to Mr McGirr about calling for help. According to Mr Higginson, Mr McGirr said: "You're not fucken ringing the police ... You've gotta take her somewhere else." Mr Higginson put Ms Biddle in his car and left the property. He then summonsed emergency services but Ms Biddle could not be revived.

[4] By contrast Mr McGirr said that it was he who had attempted to revive Ms Biddle by administering CPR. Having noticed that Mr Higginson was also unconscious in the spa pool, Mr McGirr then rescued him and alternated between Mr Higginson and Ms Biddle in his resuscitation efforts. Once Mr Higginson was successfully revived, Mr Higginson took Ms Biddle away to hospital. Mr McGirr explained that he could not leave the property on account of his curfew.

[5] What was not in dispute is that after Mr Higginson left with Ms Biddle, Mr McGirr proceeded to tidy up alcohol bottles and cans and put the cover on the spa pool. He removed various items of Ms Biddle's clothing and her bag to a bush area down a bank on his property and used a shovel to conceal them beneath dirt and leaves.

[6] Mr McGirr faced a trial on four charges: two of supplying a Class B controlled drug (to Mr Higginson and Ms Biddle), one charge of attempting to pervert the course of justice and one charge of cultivating cannabis. He pleaded guilty to the last of those at the commencement of trial. He gave evidence at the trial. At the conclusion of the

trial, Mr McGirr was found not guilty of both charges of supplying a drug but guilty of attempting to pervert the course of justice.

### **The grounds of appeal**

[7] The grounds of appeal in Mr McGirr's notice of appeal were that the Judge misdirected the jury as to the grounds for conviction (albeit in an unspecified manner) and erred in ruling inadmissible the proposed evidence of a medical expert. The latter ground was not pursued. The written submissions of Mr Bailey (who was not counsel at trial and had not filed the notice of appeal) argued that a miscarriage of justice occurred because the Judge omitted to direct the jury that they needed to be sure Mr McGirr interfered, not only with the police investigation into Ms Biddle's death, but also with the prosecution which might have arisen out of the investigation.

[8] In the course of the hearing Mr Bailey expanded on the argument by highlighting that Mr McGirr's efforts to avoid the police coming to his property may have been motivated not by a desire to prevent inquiry into Ms Biddle's death but by one or more other considerations.

[9] This Court must allow the appeal if satisfied that a miscarriage of justice has occurred, being an error that has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial.<sup>1</sup>

### **Analysis**

#### *The question trail*

[10] The focus of the argument advanced in the written submissions was the question trail pertaining to the charge of attempting to pervert the course of justice. It read:

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<sup>1</sup> Criminal Procedure Act 2011, s 232(2)(c) and (4).

### CHARGE 3: ATTEMPTING TO PERVERT THE COURSE OF JUSTICE

The Crown Solicitor charges that Joseph Douglas McGirr between 21 October 2018 and 22 October 2018 at Christchurch wilfully attempted to pervert the course of justice by concealing the clothing of Lauren Mikaila Biddle.

- 1. Are you sure that between 21 and 22 October 2018, Mr McGirr removed Ms Biddle's clothing from his house and concealed it down a bank at his property?**

If "yes" go to question 2.

If "no" find Mr McGirr "not guilty" on this charge.

- 2. Are you sure that at the time Mr McGirr concealed the clothing, he knew that a Police investigation into Ms Biddle's death was either underway, or inevitable?**

If "yes" go to question 3.

If "no" find Mr McGirr "not guilty" on this charge.

- 3. Are you sure that concealing Ms Biddle's clothing had a tendency to hinder or obstruct the Police investigation into Ms Biddle's death?**

*NB. It is not necessary that concealing the clothing did hinder or obstruct the Police investigation, only that it had a tendency to do so.*

If "yes" go to question 4.

If "no" find Mr McGirr "not guilty" on this charge.

- 4. Are you sure that at the time of concealing Ms Biddle's clothing, Mr McGirr was intentionally trying to hinder or obstruct the Police investigation into Ms Biddle's death?**

If "yes" find Mr McGirr "guilty" on this charge.

If "no" find Mr McGirr "not guilty" on this charge.

[11] Proceeding from the premise that a police inquiry does not in itself form part of the "course of justice", Mr Bailey contended that the Judge erred in his formulation of questions 2, 3 and 4 by omitting any reference to the avoidance of judicial proceedings. He analysed in some detail three decisions of this Court which he submitted comprehensively state the relevant law: *Meyrick v R*,<sup>2</sup> *McMahon v R*<sup>3</sup> and *R v MPP*.<sup>4</sup> It will suffice to refer to *Meyrick* which Mr Bailey said made it clear that the moving or taking possession of physical items that a person knows police want to

<sup>2</sup> *Meyrick v R* CA513/04, 14 June 2005.

<sup>3</sup> *McMahon v R* [2009] NZCA 472.

<sup>4</sup> *R v MPP* [2017] NZCA 314, (2017) 28 CRNZ 204.

obtain for investigative purposes, even when done for the purposes of frustrating/hindering/obstructing the police, is not sufficient.

[12] He submitted that one of two additional factors must exist: either a search warrant must already be in existence for the items and that is known by the defendant, or the defendant's actions must have the tendency and intention to adversely affect actual or contemplative court/tribunal proceedings. Emphasis was placed on the following passage from *Meyrick*:<sup>5</sup>

The "course of justice" undoubtedly includes the administration of justice by publicly established tribunals, see, for instance, *Rogerson*. It is sometimes said that the "course of justice" extends to cover police investigations. **There is no doubt that criminality attaches to actions which have the tendency (and are intended) to adversely affect court proceedings (or indeed prevent such proceedings being commenced) even though those actions are in the context of police investigations, and occur prior to proceedings being commenced ... But the fact remains that the tendency and intention which are critical must be addressed to actual or contemplated proceedings before publicly constituted tribunals, a point which emerges clearly from *Rogerson*.**

[13] It was Mr Bailey's contention that questions 2 to 4 of the question trail should instead have been phrased similar to the following:

Q2. Are you sure that at the time Mr McGirr concealed the clothing, he knew that judicial proceedings might be instituted in respect to Ms Biddle's death?

Q3. Are you sure that concealing Ms Biddle's clothing had a tendency to adversely affect judicial proceedings in respect to Ms Biddle's death (or had a tendency to prevent judicial proceedings being commenced)?

Q4. Are you sure that the concealing of Ms Biddle's clothing was undertaken with a view to adversely affecting judicial proceedings (or preventing judicial proceedings being commenced) in respect to Ms Biddle's death?

[14] He accepted that, given the circumstances of Ms Biddle's death, a police investigation of some sort was likely but submitted that made it all the more important for the focus on Mr McGirr's actions to be on possible judicial proceedings rather than a police investigation. There was also no reference to judicial proceedings in the Crown case. Rather it was heavily reliant on Mr McGirr's actions being motivated by

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<sup>5</sup> *Meyrick v R*, above n 2, at [42] (emphasis as in counsel's submissions).

a police investigation, Mr Bailey drawing attention to extracts from the prosecutor's opening, cross-examination and closing which made reference to the inevitability of a police investigation into Ms Biddle's death.

[15] Mr Davie for the Crown acknowledged that there are cases in which the trial Judge has directed the jury in terms of a defendant's intent as to a prosecution which might follow from a police investigation, but submitted that the omission to do so in this case did not result in a miscarriage of justice. He drew attention to the judgment of the Court of Appeal of England and Wales in *R v Rafique*,<sup>6</sup> where defendants who disposed of a firearm and ammunition following an accidental shooting which killed a person were found guilty of attempting to pervert the course of justice.

[16] On appeal the Court of Appeal of England and Wales considered that, although the jury direction was erroneous because it conflated police investigations with the course of justice, the misdirection was not material, stating:<sup>7</sup>

However, on the facts of the present case, it must follow from a finding that there was an intention to impede police investigations that there was an intention to pervert the course of public justice. On these facts, there can be no explanation for intentionally impeding police investigating other than an intention to pervert the course of public justice. When asked, [counsel for Mr Rafique] could offer no other explanation. On the directions given, the jury clearly rejected the appellants' explanations as to why they disposed of the shotgun cartridges and concluded that the appellants intended to impede police investigations. In those circumstances, there was no material misdirection.

[17] Emphasising the similarity of the present case to *Rafique*, Mr Davie submitted that as Mr McGirr intended to hinder or obstruct the police investigation the irresistible inference was that he intended to hinder or obstruct the prosecution as well. It was not a case like *Meyrick* where the relevant conduct may simply have been undertaken solely to annoy the police.<sup>8</sup>

[18] In response to the Crown's reliance on *Rafique*, Mr Bailey in oral submissions argued that the English Court of Appeal's decision relied on the particular circumstances of that case. Specifically he drew attention to the comment that counsel

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<sup>6</sup> *R v Rafique* [1993] QB 843 (CA).

<sup>7</sup> At 852.

<sup>8</sup> See *Meyrick v R*, above n 2, at [47].

for Mr Rafique could offer no other explanation for intentionally impeding a police investigation other than an intention to pervert the course of justice. His argument appeared to be that *Rafique* could be distinguished as in the current case there were alternative explanations for Mr McGirr's actions. It is appropriate to address that thread of the submissions before returning to whether there was a material omission in the jury directions that amounts to a miscarriage of justice.

*Alternative explanations*

[19] The tenor of the argument developed by Mr Bailey in the course of the hearing was that Mr McGirr's actions may have been motivated not by a concern about an investigation into Ms Biddle's death but by other considerations.

[20] He first suggested that Mr McGirr clearly had reason for not wanting to draw attention to his home or for not wanting people of authority to be aware of his living situation. He then suggested that clearly an operative matter on Mr McGirr's mind was his cultivation of cannabis, noting that he had discarded the plants. Another possibility was that, given there had been a death, suspicion, gossip or moral blame were possible additional reasons why he would not want to be connected with such an unfortunate event. In the course of criticising a reference in the Crown's submissions to the supply of drugs charges on which Mr McGirr was acquitted, Mr Bailey said that he was not encouraging the Court to try to work out with precision what Mr McGirr was doing when there were a number of potential operative factors on his mind at the relevant time.

[21] Mr Bailey's argument might have gained traction in circumstances where the question trail had been non-specific or if Mr McGirr had not given evidence. However the question trail was neither silent nor ambiguous concerning the focus of the contended inevitable police investigation: it specifically referred to an investigation into Ms Biddle's death. Hence the proposition developed in the course of argument could not be cast as a criticism of the question trail nor of the summing-up, as both ensured the jury considered whether there was an alternative explanation.

[22] Having regard to what it was submitted Mr McGirr's intentions might have been when he acted as he did subsequent to Mr Higginson having removed Ms Biddle

from the property, in reality this argument could only be construed as an attack on the jury's verdict. The hurdle which this argument faces is that Mr McGirr gave evidence and the jury reached its verdict having considered that evidence. As the Judge observed in the summing-up:

Whilst Mr McGirr accepts that he put the clothes down the bank, he denies he had any intent to interfere with the course of justice. He, to use his words, was "freaking out", having consumed alcohol and drugs and having just witnessed a person die before his eyes. Specifically, he had not turned his mind to whether there would be a police investigation and had no wish at all to interfere with one.

[23] That description was reflected in the evidence of Mr McGirr. His cross-examination concluded in this way:

Q. Okay and you knew that there would be a police investigation in to this young woman's unexpected death, didn't you?

A. It wasn't until I came up from the bushes and I saw the police that both eyes and the state of mind to actually realise that and the reality of the situation really dawned on me.

Q. And you knew there would be a police investigation in to her death because she had consumed drugs.

A. Well you would have thought that there wouldn't be any drugs left around the place if that was actually the case.

Q. Okay and at the time you removed her clothing and bag etc, you did that because you wanted to hide the fact of her being at your house that morning or that evening and in so doing, hinder the police investigation? That's correct, isn't it?

A. Incorrect. I had an innate desire to do something reverential with her clothing.

A few answers previously he had referred to his intention as being "purely to consecrate what was left of her belongings".

[24] Indeed the evidence that he felt that he needed to do something to commemorate Ms Biddle was led in his examination-in-chief:

Q. And we've heard evidence during the Crown case that you threw the clothes down the bank. Why did you do that?

A. Um, well I was going down, I went past the clothesline, I went down the hill, just threw her stuff on the ground and I think there was one



shovel full of leaves and what not, um, yeah, I just sat down and I think I tried to push it into a bit of a cross and I think I said the 23<sup>rd</sup> Psalm — the Lord is my Shepherd. I just kind've felt as though something lifted, you know, it all seems a bit weird, you know, looking back but it's kind've real when you have someone die right in front of you. You feel as though you really need to do something, yeah, it was just a peaceful moment really down in the native bush with her stuff and, yeah, I was pretty upset to put it mildly.

[25] Not only did Mr McGirr provide that explanation for burying Ms Biddle's belongings, contrary to Mr Bailey's submission he volunteered the evidence that he was not worried about a police investigation into his cannabis plants. In the course of cross-examination on the actions he took in tidying up his property, the following exchange occurred:

- Q. And you missed the cannabis too in your rush didn't you, the cannabis leaf?
- A. No, obviously I wasn't worried about a police investigation if that's what you're trying to get at.

[26] In his closing address Mr McGirr's then counsel described Mr McGirr's actions in this way:

As far as the charges of attempting to pervert — or the charge of attempting to pervert the course of justice and supplying the ecstasy are concerned, I've analysed Joe's actions and feelings on the night at some length, I'm sorry I've gone on so long, but it's very important that you grasp how he felt that night and you saw it, indeed, in the witness box, and when you take all I've said into account, I do not think you will be left in any doubt that what Joe McGirr did on the 21<sup>st</sup> of October 2018 and the following morning, was not an attempt to conceal Lauren's clothing with a view to hiding something, although heaven knows what from the police, it was the reaction of a traumatised man to a tragic event which had occurred on his property and an action which, as the nature of that event sank in, he immediately told the police about.

[27] It is apparent from the jury's verdict that they did not accept the explanation offered by Mr McGirr. They must have answered questions 3 and 4 in the affirmative. That outcome was unsurprising viewed against the totality of the evidence. In our view there is no basis for the implicit submission that the jury's verdict was unreasonable on the evidence as Mr McGirr did have an alternative explanation.

[28] Nor could the argument be cast as a criticism of the Judge's summing-up which very fairly recorded Mr McGirr's explanation, in particular:

[114] After Mr Higginson and Ms Biddle left, Mr McGirr says that he cleaned up a bit of rubbish from the party in a, I guess, disorganised and emotional state and, in that process, he came across Ms Biddle's clothing. This heightened his already emotional state. He ended up taking the clothes down the hill and partially covering them using a spade with leaves as a mark of respect and reverence. He said it was actually a reasonably peaceful moment and her spirit seemed to lift.

...

[117] Mr McGirr told you that he then went down and had a sleep near the hut with a duvet to compose himself. He came up with the police a little while later.

[118] Again, his actions and reasons for doing all of that in the cold light of the courtroom might seem somewhat illogical but, given his intoxicated state and the trauma of what had just occurred that night, the defence submits that his explanation and motivation is understandable. Mr McGirr denies that he was attempting to hinder the police investigation in concealing the clothing. He had not even contemplated such an investigation must less attempted to obstruct it.

### *Conclusion*

[29] It is clear that police investigations into possible offences against the criminal law or a disciplinary code do not form part of the course of justice. Nevertheless, as the High Court of Australia recognised in *R v Rogerson*, an act calculated to mislead the police during investigations may amount to an attempt to pervert the course of justice.<sup>9</sup> The joint judgment of Brennan and Toohey JJ<sup>10</sup> referred to a passage in the Canadian case *Kalick v R*,<sup>11</sup> a bribery case, which stated that it is quite immaterial whether the police officer intended or contemplated instituting a prosecution and that the due administration of justice is interfered with quite as much by improperly preventing the institution of a prosecution as by corruptly burking one already begun. Brennan and Toohey JJ said:<sup>12</sup>

We respectfully agree. The gravamen of the offence of an attempt to pervert the course of justice is an interference with the due exercise of jurisdiction by courts and other competent judicial authorities. As the courts exercise their

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<sup>9</sup> *R v Rogerson* (1992) 174 CLR 268 at 283–284.

<sup>10</sup> Who with Mason CJ and Deane J comprised the majority; McHugh J dissented.

<sup>11</sup> *Kalick v R* (1920) 61 SCR 175 at 183.

<sup>12</sup> *R v Rogerson*, above n 9, at 284.

necessary and salutary jurisdiction to hear and determine charges of offences against the criminal law only when their jurisdiction is invoked, an act which has a tendency to deflect the police from invoking that jurisdiction when it is their duty to do so is an act which tends to pervert the course of justice.

[30] In the present case where a young woman had died in a spa pool having consumed drugs it was appropriate to describe the prospects of a police investigation as inevitable. Such inevitability was reflected in the second question of the question trail. The conduct which was alleged to amount to the attempted perversion of the course of justice was the hindering or obstructing of the investigation. In our view it was appropriate and desirable for the question trail to focus specifically on that conduct. Appropriately the Judge made that focus clear in his introductory comments in the relevant part of the summing-up:

[34] Right, I will move now to the third charge, which is attempting to pervert the course of justice. This centre on the allegation Mr McGirr intentionally tried to obstruct or hinder what he knew was the inevitable police investigation into Ms Biddle's death by concealing her clothing down the bank.

[31] It would have been preferable, so as to avoid the conflation recognised in *Rafique*, for the question trail to have referred to a police investigation which might have resulted in a prosecution. However we do not agree that it was necessary for the question trail to be formulated in the terms proposed by Mr Bailey which omits any reference to the inevitable police investigation.

[32] We also do not accept Mr Bailey's attempt to distinguish *Rafique* on the basis that Mr McGirr could offer an alternative explanation for his actions other than intending to pervert the course of justice. That was a consideration for the jury which it rejected during trial. Rather, as Mr Davie submitted, the fact that Mr McGirr intended to hinder or obstruct the police investigation in the circumstances leads to the irresistible inference that he also intended to hinder or obstruct a possible prosecution.

[33] Having regard to the totality of the question trail including the introductory paragraph and to the terms of the Judge's summing-up which made reference to it, we are not satisfied there was any material misdirection which could be viewed as resulting in a miscarriage of justice.

## **Result**

[34] The appeal is dismissed.

Solicitors:

Hansen Law, Christchurch for Appellant

Crown Law Office, Wellington for Respondent