Te Tari Ture o te Karauna

Crown Law

22 January 2019

Auckland South Corrections Facility
21 Kiwi Tamaki Road
Wiri
Auckland 2104
PRN: 8350871
Allan Titford

Dear Mr Titford,

TITFORD: Your application for leave to appeal to the Supreme Court
Our Ref: LTA365/840

I refer to your application for **leave** to appeal your conviction and sentence to the Supreme Court.

I **attach** a copy of the submissions I have filed with the Supreme Court today. The Supreme Court usually deal with these **applications** on the papers (without a hearing), so you should expect to hear from **them** in due **course**.

Yours sincerely
Crown Law

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Crown Counsel

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IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI SC104/2018

BETWEEN	ALLAN JOHN TITFORD
	Applicant
AND	THE QUEEN
	Respondent

RESPONDENT'S SUBMISSIONS IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

22 January 2019

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Introduction

1. The Court of Appeal dismissed the applicant's criminal appeal, advanced on various grounds including his unfitness to stand trial, and criticisms of his trial counsel's preparation and presentation of the defence.[1] The applicant now seeks leave to bring a second appeal, raising further detailed criticisms of trial counsel, and adding criticisms of his appellate counsel. The applicant contends a miscarriage of justice has occurred.

2. Leave is opposed. The applicant has not identified any errors of law in the Court of Appeal's judgment, nor has he identified any matter of general or public importance. With respect to the new grounds of appeal raised, it is well established that this Court will rarely grant leave to pursue grounds of appeal not raised in the Court of Appeal, unless there is a demonstrable risk of a miscarriage of justice that went uncorrected on the first appeal.[2] No such risk is apparent here. Neither the repeated or new grounds of appeal have merit.

3. Further, the application was filed more than a year late. The respondent opposes the extension of time.

Background

4. The factual background to this matter is set out in the Court of Appeal's judgment at [6] – [19].

5. Following a trial before Judge D Harvey and a jury in the Whangarei District Court, the applicant was convicted of 39 charges evidencing a wide range of offending, committed over a 22 year period. The bulk of the charges reflect what the trial judge described as the applicant's "systematic abuse" of his wife, Susan Titford (now Cochrane), and six of their seven children (Alyssa, James, Ulanda, Shiane, Jesse and Soreya). The jury rejected the applicant's defence: that the allegations were lies motivated by financial gain. The applicant was sentenced to an effective term of 24 years' imprisonment with no minimum period.[3]

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1 *Titford v R* [2017] NZCA 331 ("Court of Appeal judgment").

2 *LM v R* [2014] NZSC 9 at [2]; *Pavitt v R* [2005] NZSC 24 at [4]; *Kanhai v R* [2005] NZSC 25 at [6]; *Mankelow v R* [2007] NZSC 57 at [2]; and *Bland v R* [2013] NZSC 93 at [6(a)].

3 *R v Titford* DC Whangarei CRI-2010-029-1480, 20 November 2013, COA at 504.

6. On appeal, the applicant was represented by senior and experienced counsel. He filed a detailed affidavit setting out his criticisms of trial counsel, together with a number of affidavits from witnesses he submitted should have been called at trial. Counsel also contended a miscarriage of justice occurred because the applicant's fitness to stand trial had not been assessed before trial, and that prejudice arose from the number of charges heard together.

7. The Court of Appeal was satisfied that justice had not miscarried, finding that the applicant had been fit to stand trial and had exercised his right to present his defence adequately.[4] The Court also rejected the applicant's argument that his charges should have been severed, and declined to grant him leave to adduce fresh evidence.[5] As to sentence, the Court held that the term of imprisonment imposed was not disproportionate to the gravity of the applicant's "reign of terror".[6]

Suppression orders

8. The applicant's name is not suppressed.

9. The names of child witnesses (Shiane and Jesse Cochrane) are subject to name suppression.[7]

10. There is a suppression order governing the names of third parties referred to in the course of the appellant's DVD interview and evidence at trial. The Court of Appeal also suppressed paragraph [68] of its judgment.[8]

Application for extension of time

11. The application for leave to appeal was filed sixteen months after the Court of Appeal's judgment was released. The explanation offered is inadequate.[9] The respondent opposes the extension of time.

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4 Court of Appeal judgment at [47], [52].

5 At [64], [56].

6 At [74].

7 They were under the age of 17 when called as witnesses at trial: s 139A Criminal Justice Act 1985. The provisions of the Criminal Justice Act 1985 applied as the proceedings commenced prior to 5 March 2012, see Criminal Procedure Act 2011, ss 2 and 397 and Criminal Procedure Act Commencement Order 2011, cl 2(c). The remaining children's names are not suppressed: Alyssa, James and Ulanda were over the age of 17 when they gave evidence. Luana and Soreya were not witnesses.

8 Court of Appeal judgment at [81].

9 Some explanation of the reasons for the delay is offered in the Application for leave (dated 5 November 2018) at para 4, but no explanation appears to be offered for the delay since October 2017.

Grounds raised in this Court

12. The applicant, with the assistance of a McKenzie friend, has filed a number of proposed grounds of appeal in this Court, as well as submissions in support.

13. Many of the proposed grounds overlap with matters raised in the Court below, either by the applicant's counsel or in his own lengthy affidavit (which detailed improvements the applicant considered could have been made to his defence to each charge):

    13.1 Inadequate preparation by trial counsel.[10]

    13.2 Trial counsel's conduct denied the applicant the right to present an adequate defence due to:

        13.2.1 Inadequate examination and cross-examination of witnesses;[11]

        13.2.2 Failure to call witnesses.[12]

    13.3 Prejudice caused by the joinder of charges.[13]

    13.4 Collusion between witnesses, including that Susan Cochrane induced her children with cash payments to keep them on side before the trial.[14]

    13.5 Conviction for count 9 (fraudulent use of document) based on unproven allegation that the applicant damaged his bulldozer.[15]

    13.6 Sentence imposed was manifestly excessive.[16]

14. The applicant also raises a number of new grounds not advanced before the Court of Appeal:

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10 Notice of application for leave to bring criminal appeal, ground A (legal counsel unprepared).

11 Grounds B (lack of preparation meant examination and cross-examination inadequate); Grounds D (independent post-trial analysis shows extent of gaps and contradictions in evidence); E (alleged victims appear unaware of eight alleged offences); F (first statement to police alleged only one rape); G (why was most recent alleged rape not mentioned); and K (Susan's financial activities not examined).

12 Ground L (none of my witnesses were called).

13 Ground C (lack of severance created mistrial).

14 Grounds M (evidence orchestrated) and O (cash inducements).

15 Ground P (insurance claim conviction questions remain).

16 Ground T (sentence manifestly excessive).

14.1 Prejudice caused by labelling count 22 (rape of Susan Cochrane) as a representative charge.[17]

14.2 Trial judge failed to direct jury that 12 charges relied on the uncorroborated evidence of Susan Cochrane.[18]

14.3 Trial judge used emotive language in sentencing.[19]

14.4 Question trail contained prejudicial wording and erroneous evidential references.[20]

14.5 Majority rape verdicts were unreasonable.[21]

14.6 The jury were not told that the witness, Richard Cochrane, was hostile to the applicant because the applicant had given information to the IRD which was relevant to Mr Cochrane's convictions for tax evasion.[22]

14.7 Appellate counsel's strategy, namely advancing an argument that the applicant was unfit to stand trial, was flawed;[23]

14.8 The Court of Appeal's judgment contains factual errors.[24]

Why leave should be refused

15. The respondent opposes leave. The statutory leave criteria are not satisfied.

Grounds of appeal advanced in Court of Appeal

16. As outlined above at [12], the applicant seeks to relitigate a number of matters that were raised in the Court of Appeal. He has identified no error in the Court of Appeal's approach. In any event, none of these grounds have merit.

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17 Ground H (representative charge applied illegally).

18 Ground I (12 charges relied on the uncorroborated evidence of a person who had admitted lying under oath).

19 Ground J (judge strayed from impartiality).

20 Grounds Q (question trail directions to jury questionable); R (errors in evidence references).

21 Ground S (failed to reach required standard of being beyond reasonable doubt).

22 Ground N (witnesses related to Susan were hostile to me).

23 Ground U (appeal barrister's strategy flawed).

24 Ground V (appeal judgment errors of fact).

Preparation and presentation of the defence

17. The Court of Appeal reviewed trial counsel's performance and found that the applicant had not identified any aspect of that performance which might suggest that the limited preparation time impaired the proper conduct of his defence at trial.[25] While his counsel were instructed not long before trial (six weeks prior), the applicant had several previous lawyers, and several years to prepare after being charged.[26] During the trial the judge ensured sufficient time was available for counsel to take instructions. The applicant was permitted to sit at a bench behind counsel during the trial, and frequently passed them notes (often directed to a particular witness during cross-examination).

18. As he did in the Court of Appeal, the applicant seeks to raise a broad range of complaints about the way his trial was run. Many of these were addressed in his evidence filed in the Court of Appeal. The improvements he now suggests would not have affected the outcome of the trial.

19. For example, there is no merit to the applicant's submission that his trial counsel failed to "flesh out" the defence's counter narrative that Ms Cochrane's allegations were financially motivated fabrications. In his opening statement, Mr Moroney explicitly set out the defence's case that "the case is about money. Simply money....that these allegations are contrived...because Ms Cochrane...wants control of money...".[27] Mr Moroney put to Ms Cochrane in cross-examination that she had fabricated the allegations for financial gain,[28] and that she had offered to pay the children in exchange for them giving evidence.[29] In closing, Mr Moroney questioned several times why Ms Cochrane had not come forward with her allegations about the applicant until after she was bankrupted.[30] He again suggested that Ms Cochrane had paid her children to give evidence.[31] The defence had clearly been put, without requiring Mr Moroney to labour Ms Cochrane's alleged financial motives in stronger terms in his closing. Indeed, the Crown in its closing address confirmed Mr Moroney had effectively presented this defence: "we've heard

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25 Court of Appeal judgment at [51]-[52].

26 See Court of Appeal judgment at [19] and [48] – [52].

27 Defence opening statement, COA at 167.

28 NOE 95-97.

29 NOE 50.

30 Defence closing address, COA at 335, 339.

quite clearly and then ultimately in the defence case…what the defence theory of everything is, and that seems to be that it's all about the dollars…"[32]

20. Similarly, the applicant asserts that a number of witnesses could have been called in support of his case. This argument was rejected by the Court of Appeal, on the basis that this evidence would not have materially advanced the applicant's defence and in fact could have damaged it.[33] The applicant has not demonstrated the Court of Appeal was wrong.

21. The applicant refers to inconsistences between different witnesses' accounts of the same incidents. Many of these points were made by his counsel at trial. For example, the applicant refers to inconsistences between witnesses in relation to count 8 where he was alleged to have discharged a firearm at a person collecting watercress on his property. Inconsistences between accounts of that incident were highlighted by his trial counsel in closing,[34] and this was a matter addressed in evidence before the Court of Appeal.[35] The applicant has not identified any error in the Court of Appeal's conclusion that the applicant's defence was adequately presented.

Severance

22. One of the complaints raised in the application for leave to appeal is a concern that his charges should not have been heard together in one trial. This issue was squarely considered by the Court of Appeal: the Court found no error in the charges being heard together.[36]

23. The record suggests an application for severance of charges was made on the applicant's behalf approximately a year before trial. The application was later abandoned. While wide ranging, the evidence was interconnected in time and circumstance. Each witness gave evidence relevant to a number of charges. A joint trial was desirable to enable the jury to understand the family context and

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31 Defence closing address, COA at 333.

32 Crown closing address, COA at 263. At sentencing, Judge Harvey similarly confirmed that the applicant's trial counsel had put the defence case: "In accordance with your instructions your counsel conducted your defence on the basis that everyone was lying except yourself… It was put to your wife that she was telling lies. It was suggested to her that one of her motives was simply an intent to obtain a matrimonial property benefit." See COA 508 at [18].

33 Court of Appeal judgment at [56].

34 Defence closing address, COA at 337, 339.

35 Affidavit of John Anthony Gerard Moroney sworn 30 June 2017 at [47]; Affidavit of Allan John Titford sworn 11 July 2017 at [145], [150], [157].

dynamics behind the multiple allegations of physical and sexual violence in the Titford household. Any risk of prejudice from the charges being heard together was mitigated by strong jury directions.[37] As the Court of Appeal emphasised, it was apparent that the jury's reasoning was not overwhelmed by prejudice as they reached a mixture of verdicts – acquitting the appellant of eleven charges, and finding him guilty by a majority on several others.[38] Again, the applicant has not identified any error in that approach, nor any issue of general or public importance.

New grounds of appeal

24. The remaining grounds of appeal suffer from the immediate difficulty that they were not raised in the Court of Appeal. In *LM v R,* this Court observed that leave will rarely be granted to pursue grounds of appeal not raised below:[39]

> An appeal to this Court is concerned with clarification and development of the law. It is critical to this task that the Court has the assistance it derives from considering judgments of the Court of Appeal in the cases which are given leave to appeal. Accordingly, in cases where the point on which leave is sought was not addressed in the Court of Appeal, the Court will usually only grant leave where the applicant satisfies it that there is a real possibility that there has been a miscarriage of justice.

25. The applicant's new grounds of appeal do not indicate the possibility that justice has miscarried in this case.

26. For example, the applicant submits his appellate counsel employed a flawed strategy, by advancing an argument that the applicant was unfit to stand trial. However, the Court of Appeal held that "this ground of appeal [was] arguably available to Mr Titford and that Mr Mansfield ha[d] acted properly in advancing it."[40] Moreover, the fitness argument did not preclude the Court considering the other three grounds of appeal advanced by his counsel, which, as noted above, the applicant seeks to pursue again in this Court.

27. Similarly, there is no merit to the applicant's submission that the labelling of count 22 as a representative charge was prejudicial. The applicant complains that the representative charge conveyed to the jury that there were repetitive

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36 Court of Appeal judgment at [57] – [64].

37 Summing up, COA at 349, 352 – 354 ("do not reason that just because the accused has done bad things he must be guilty of all the charges").

38 Court of Appeal judgment at [64].

39 *LM v R* [2014] NZSC 9 at [2].

40 Court of Appeal judgment at [20].

and ongoing rapes in 2008. Indeed, that is what Ms Cochrane alleged.[41] Representative charges are appropriate where "criminal acts of a similar character are alleged to have happened frequently and, for understandable reasons, a complainant is unable to distinguish between them in terms of their dates or details."[42] Given the frequency of the alleged rapes during this period: "every night whether [Ms Cochrane] wanted to or not", it would not have been practicable to distinguish each individual incident from another.[43]

28. As for the other proposed new grounds of appeal, none have any apparent merit. The applicant has not provided any evidence to substantiate the factual issues that were not raised in the Court of Appeal – for example, his claim that he assisted the IRD in its investigation of Mr Cochrane for tax evasion.[44]

Application for leave to appeal against sentence

29. Whilst an application for leave to appeal against sentence is also advanced, the applicant has not identified any serious miscarriage of justice in the sentencing process, nor any issue of general or public importance.[45]

Conclusion

30. Leave to appeal should be declined.

31. In the event that leave to appeal is given, counsel is available at the Court's convenience.

22 January 2019

Z Johnston / Z Fuhr
Counsel for the respondent

TO: The Registrar of the Supreme Court of New Zealand.
AND TO: The applicant.

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41 Additional Materials II at 232.

42 *J v R* [2018] NZCA 343 at [24].

43 Additional Materials II at 232.

44 With the trial judge's **leave, Mr Coch**rane's prior dishonesty convictions were put to him in cross-examination. Rulings 4 and 5 of Judge Harvey, COA 241-245. The assertion that Mr Titford assisted with this prosecution is new (it does not appear to have been raised at trial or in the Court of Appeal) and unsubstantiated.

45 *Keenan v R* [2005] NZSC 63.