IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA205/2020
[2022] NZCA 421

BETWEEN	JAYSON WIREMU POIHIPI Appellant
AND	THE QUEEN Respondent

Hearing: 12 May 2022

Court: Miller, Duffy and Ellis JJ

Counsel: C G Tuck for Appellant
S K Barr for Respondent

Judgment: 8 September 2022 at 11.45 am

JUDGMENT OF THE COURT

A The application to adduce further evidence on appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Duffy J)

[1] Mr Poihipi was convicted of the murder of Lynace Parakuka after trial by jury on 27 September 2019.[1] He appeals against conviction on the basis of trial counsel error.

[2] Several affidavits and reports have been put into evidence before us. The appeal is not advanced on a fresh evidence basis, rather, the evidence is introduced

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1 Crimes Act 1961, s 167(b).

to demonstrate what would have been available had trial counsel pursued certain steps. We make reference to this evidence to the extent we consider relevant.

Background

[3] Mr Poihipi is now 23 years old and was 19 at the time of the offending, which occurred in 2018. He has some level of cognitive difficulty. Although he has not been formally diagnosed it is suspected he has foetal alcohol syndrome.[2] He has poor comprehension and struggles to read and write. Following his conviction Mr Poihipi suffered from suicidal ideation and was placed in the at-risk unit at Waikeria Prison.

[4] The police summary of facts alleged the following. On 7 September 2018 Mr Poihipi and Ms Parakuka, his girlfriend, had been drinking alcohol at an associate's house. The pair made their way back to Mr Poihipi's uncle's house and went separate ways for a period of time. They happened upon each other on the street at about 11 pm and became involved in a heated argument. Mr Poihipi grabbed Ms Parakuka by her hand and dragged her onto the grounds of a nearby school, where they continued to argue. Mr Poihipi then lashed out at Ms Parakuka, punching her several times and causing her to fall to the ground. He described the punches as being as hard as he could punch. Ms Parakuka attempted to get up, but Mr Poihipi kicked her in the head. She fell to the ground, unconscious. Mr Poihipi walked a short distance and sat down for about 20 minutes. He could hear Ms Parakuka breathing in a laboured manner before she made a gurgling noise and then stopped making noise. This prompted him to check on her. Upon seeing her injuries and that she was not breathing, he ran to get help. He returned to Ms Parakuka with an associate. Emergency services were not able to resuscitate her.

[5] The sentencing notes add that there were 11 to 20 blows to Ms Parakuka's head and face, and Mr Poihipi and his associate had attempted to resuscitate Ms Parakuka at the scene.[3]

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2 The report of Dr Jansen before us on appeal notes that it is "more likely than not that he has a degree of Foetal Alcohol Syndrome" but "this is not yet proven". There is no reference in the pre-sentence PAC report to foetal alcohol syndrome.

3 *R v Poihipi* [2019] NZHC 3048 at [5]–[6].

[6] Mr Poihipi was charged under s 167(b) of the Crimes Act 1961. The Crown case was that he caused Ms Parakuka's death by intentional assault knowing that death was likely. It was common ground that Mr Poihipi had assaulted Ms Parakuka by punching and kicking her. The issue in dispute was whether he knew that death was likely. The defence case was that Mr Poihipi was guilty of manslaughter only. He did not appreciate the assault would cause death because he was intoxicated, he lashed out in anger and violent assaults were normalised to him due to his mother's experience with domestic abuse.

[7] Mr Poihipi gave two police evidential video interviews (EVIs). In the first, recorded within hours of the assault, he denied accountability for the assault altogether and blamed it on an earlier assault Ms Parakuka had suffered. In the second, recorded on 9 September 2018, he accepted the assault but said he did not intend to kill Ms Parakuka and did not realise the assault would cause death. He appeared upset and remorseful. Mr Poihipi said he was drunk at the time of the assault but did not disclose any drug use.

[8] According to the evidence of Mr Gowing, trial counsel, Mr Poihipi instructed him that the second EVI gave a true account of events. Mr Gowing therefore relied on the second EVI in place of a brief of evidence.

[9] However, Mr Poihipi says now that he was under the influence of psychedelic mushrooms and had used methamphetamine a few days prior. This was not stated in the second EVI. He says that he wanted the mushroom use and proximate methamphetamine use to be put into evidence to prove that he did not realise death was likely.

[10] Mr Poihipi did not tell Mr Gowing about the methamphetamine use. He did tell him that he had ingested mushrooms. Mr Gowing interviewed Mr Poihipi's sister about that claim. His notes of the meeting state she informed him that she saw Mr Poihipi "chew a few of them" before taking them off him and consuming some herself. She did not feel any effect "as it wasn't enough and I was too drunk". Mr Gowing did not consider her to be a reliable witness because she did not disclose the drug use in her police statement when asked about intoxication and she admitted

to her memory being poor because she was a chronic alcoholic. There was no independent evidence of the mushroom use affecting Mr Poihipi that night and in fact there was some evidence that he did not appear to be intoxicated. His uncle and cousin, who saw him that evening, did not consider him to be acting abnormally (although the officer conducting the first EVI thought Mr Poihipi was drunk).

[11] Mr Poihipi says that he always wanted to give evidence but did not know what he might say and was anxious about going into the witness box. Mr Gowing's records describe Mr Poihipi as "reluctant" to give evidence. Mr Gowing states that he gave Mr Poihipi advice to the effect that if he (or his sister) were to give evidence to introduce the mushroom use this would undermine the credibility of his second EVI because it would show the jury he was lying. Mr Gowing told Mr Poihipi that the second EVI put the defence case at its best. Mr Poihipi elected not to give evidence and signed a written acknowledgment of this.

The appeal

[12] Mr Tuck for Mr Poihipi submits that Mr Gowing failed to prepare, investigate and advance key elements of the defence case:

(a) the issue of proximate drug taking (mushroom use);

(b) Mr Poihipi's history of anger; and

(c) whether proximate injuries suffered by Ms Parakuka contributed to her death;

Mr Tuck also submits Mr Gowing failed to prepare and advance the defence case by failing to call witnesses and failing to take instructions on pretrial issues.

[13] Second, Mr Tuck submits Mr Gowing erred by giving advice to Mr Poihipi to not give evidence. This ground is closely related to the decision not to introduce the proximate drug taking issue.

[14] Third, Mr Tuck submits that Mr Gowing failed to communicate with Mr Poihipi appropriately and was under a duty to do so given Mr Poihipi's cognitive difficulties and mental state.

[15] Accordingly Mr Tuck alleges there has been a miscarriage of justice.

Law

[16] For Mr Poihipi to succeed on the appeal, the Court must be satisfied there has been a miscarriage of justice.[4] The leading case on trial counsel error is *R v Sungsuwan*, where the Supreme Court stated:[5]

> [70] In summary, while the ultimate question is whether justice has miscarried, consideration of whether there was in fact an error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome, generally will be an appropriate approach. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary. But whatever approach is taken, it must remain open for an appellate Court to ensure justice where there is real concern for the safety of a verdict as a result of the conduct of counsel even though, in the circumstances at the time, that conduct may have met the objectively reasonable standard of competence.

[17] Thus, an appropriate approach is to consider whether there was in fact any error or irregularity on the part of counsel, and whether there is a real risk it affected the outcome. If the matter could not have affected the outcome any further scrutiny of counsel's conduct will be unnecessary.[6]

[18] In *Hall v R*, this Court stated that there are three fundamental decisions on which trial counsel's failure to follow specific instructions would likely give rise to a miscarriage of justice: "relating to plea, electing whether to give evidence and to advance a defence based on the accused person's version of events".[7] Other errors are less likely to lead to a miscarriage of justice.

[19] Further, trial counsel has a discretion over their trial strategy. Trial counsel error that is capable of leading to a miscarriage of justice is distinct from circumstances

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4 Criminal Procedure Act 2011, s 232(2).
5 *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730.
6 At [70].
7 *Hall v R* [2015] NZCA 403, [2018] 2 NZLR 26 at [65].

where trial counsel has made a tactical decision which was reasonable in the context of the trial.[8] It is not a matter of whether counsel could have reached a different decision or conducted the trial in another way.[9]

[20] A defendant who elects not to give evidence must make that decision on a properly informed basis. This means the defendant must have been given advice that considers, in the particular circumstances of a defendant's trial, the potential benefits and risks associated with the defendant giving evidence.[10]

Discussion

Failure to investigate, prepare and advance key elements of defence case

[21] Mr Tuck submits that Mr Gowing failed to follow instructions that Mr Poihipi had consumed mushrooms prior to the killing and to put this to the jury. He says Mr Gowing should have turned his mind to, or sought expert opinion on, the effects of psylocibin (the active compound in psychedelic mushrooms) on a young brain, especially when taken for the first time, and the impact of this on Mr Poihipi at the time of the killing and at the first interview.

[22] However, as Mr Gowing deposes, engaging experts in an analysis of the possible impact of psychedelic mushrooms on mental state would have been moot given there was no evidence of the mushrooms having any effect on Mr Poihipi, and only inconsistent evidence that he had consumed any. His cousin and uncle reported that he seemed to be acting normally when he and Ms Parakuka visited them and when he returned after the killing to get help. The police merely reported that he seemed drunk. His sister stated to Mr Gowing that she had seen Mr Poihipi "chew a few of them" and that there was no effect on her after consuming the rest. The fundamental evidence confirming consumption and some effect had to be established before further evidence would be useful, and on the evidence available, it could not be.

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8 *R v Scurrah* CA159/06, 12 September 2006 at [18].
9 *R v Sungsuwan*, above n 5, at [66].
10 *Weston v R* [2019] NZCA 541 at [25] citing *Nightingale v R* [2010] NZCA 473 at [12].

[23] Further, the account given by Dr Jansen in the psychiatrist report now before us (written post-conviction) of the effect of Mr Poihipi's mushroom use on his behaviour is not necessarily conclusive. He states that research:

> has not generally found a causal relationship between taking [psychedelic hallucinogens] and violence – indeed the reverse seems to be true … What happened in this case appears to be a rare event.

[24] Dr Jansen's analysis of Mr Poihipi's likely mental state was also not necessarily conclusive as to whether the mushroom use meant he could not appreciate the assault was likely to cause death:

> 177. The evidence from both Mr Poihipi himself and from witnesses indicates to me that Mr Poihipi probably did know who he was at the time of the offence, and where he was, and most of the time he is likely to have known who the victim was. However, he has said that he did not know who she was all of the time, that she appeared to be several different people, and that he was 'going in and out' of a drug-induced state.
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> 178. I have not seen cause to doubt his account that they argued over a number of matters, and they have argued before with violence resulting.
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> 179. However, Mr Poihipi's jealousy at the peak of the psilocybin experience may have been pathological, and his stated belief that she was setting him up for the gangs seems likely to have been paranoid, as were his concerns about others laughing at him. At least some of his beliefs are likely to have arisen from, or been strengthened by, substances consumed.
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> 180. Mr Poihipi has also provided prosaic reasons for the argument, such as his losing money at pokies [sic], and being evicted from his sister's home.
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> 181. Mr Poihipi has denied forming any intent to kill the victim. He described losing control of himself in the face of perceived extreme provocation and paranoid beliefs.
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> 182. In my opinion, Mr Poihipi did know at the time that his actions were wrong for him to perform, and he did mean to attack the victim. He thus does not have a defence of automatism available to him as regards the attack, and he also does not have a defence of insanity available to him.
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> 183. However, there may well have been a degree of disconnection between mind and body once this attack was underway, in terms of its severity, and the psilocybin could, in this instance, have caused that.
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> 184. There are thus some medical grounds to conclude a degree of diminished responsibility, and to question whether Mr Poihipi formed an intent to kill the victim, as opposed to losing control of himself in response to beliefs and perceptions which were at least partly false.

[25] Even if the jury accepted that Mr Poihipi was having drug-induced delusions, they would have had to believe that he did not appreciate his assault would be likely to cause death. It was not a matter of whether he formed "intent to kill" because he was charged on the basis of reckless knowledge. The expert evidence predominantly points to the drug use affecting his motivation to assault rather than his understanding of the consequences. Further, insofar as Dr Jansen comments on diminished responsibility influencing murderous intent, we note that diminished responsibility is not a defence (or partial defence) to murder in New Zealand.[11]

[26] The jury already had evidence of Mr Poihipi's intoxication. In his second EVI he stated he had been drinking all day and one of the police officers attending the scene gave evidence that he was intoxicated. Another officer gave evidence that Mr Poihipi said he had an 18-pack of Cody's. The Judge gave an orthodox intoxication direction, which permitted the jury to take intoxication into account when assessing Mr Poihipi's state of mind at the time of the killing and his ability to comprehend consequences. We doubt that adding the evidence of mushroom use would have been capable of affecting the outcome of the trial. Additionally, had the mushroom use evidence been introduced, the credibility of the second EVI would have been weakened because Mr Poihipi did not disclose this use, which would have called into question what else he kept from police.

[27] We put the potential prior methamphetamine use to one side as Mr Poihipi did not disclose this to trial counsel so Mr Gowing could not reasonably have been expected to pursue it.

[28] The alleged failure to call defence witnesses is a corollary of the above. His sister's affidavit prepared for this appeal states that she would have given evidence Mr Poihipi "stuff[ed] a handful [of mushrooms] in his mouth" but he "denied having any" and she "did not notice if [he] was tripping". Even if she had given this evidence it is unlikely this would have established that Mr Poihipi was intoxicated by the mushroom consumption to the extent that he may not have appreciated the consequences of his actions.

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[11] Dr Jansen spent some time practicing in the United Kingdom where diminished responsibility is a partial defence to murder.

[29] We do not consider that Mr Poihipi's history of anger would have assisted the defence case. While it may have supported the defence case that Mr Poihipi "lashed out", that was already obvious. The fact that he acted in anger does not detract from murderous intent.

[30] We agree with Mr Gowing that the proximate injuries suffered by Ms Parakuka from the earlier assault (see [7] above) were not especially relevant to the defence. It was not precisely clear when the earlier assault occurred, and the Crown pathology report as to cause of death was self-evident. Additionally, this issue *was* pursued briefly in cross-examination, however the pathologist made it clear that it would be easy to distinguish between injuries inflicted just prior to or at the time of death and those inflicted several days earlier. Further evidence was unlikely to have assisted.

[31] Mr Tuck has not pointed to any pretrial issues that should have been the basis of an application, which, if granted, may have affected the outcome. He says admissibility of police evidence should have been challenged because the police talked to Mr Poihipi on a cigarette break without the requisite warnings. However, as Mr Gowing notes, that evidence largely reiterated what Mr Poihipi said in his EVIs and had little impact on the outcome of the trial.

[32] Accordingly, we are satisfied there was no trial counsel error relating to a failure to investigate, prepare and advance key elements of the defence case.

Failure to properly advise Mr Poihipi regarding giving evidence

[33] This ground of appeal is closely linked to the issue of not introducing the mushroom use evidence, because that was the only piece of evidence Mr Poihipi indicated he did not disclose in his second EVI. As discussed above, it is unlikely that this evidence would have been material to the verdict. Further, giving evidence would have exposed Mr Poihipi to cross-examination, where he would have been questioned on the inconsistencies of the defence case, highlighting them and likely undermining his credibility. For example, the Crown pathology report suggested a much more sustained and brutal attack than Mr Poihipi admitted in his second EVI, and he would have been challenged on that. There were clearly disadvantages to Mr Poihipi giving evidence.

[34] Mr Tuck is critical that the document Mr Poihipi signed to confirm his election to not give evidence merely records cross-examination as a risk of giving evidence and does not record any other benefits or risks. He submits it does not go into enough specific detail, especially as to the potential benefits of giving evidence.

[35] However, Mr Gowing had clearly discussed this risk in some detail with Mr Poihipi, the main risk being that Mr Poihipi's second EVI would be undermined. Mr Poihipi confirmed in cross-examination before us that he had had a number of discussions with Mr Gowing about whether or not he should give evidence, both before trial and after the Crown case. He agreed that Mr Gowing had explained to him that the second EVI was good for his defence and the problems with him giving evidence. He understood it was his decision to choose whether or not to give evidence and accepted Mr Gowing's advice because he thought Mr Gowing "was a good lawyer".

[36] Mr Tuck also points to the fact that Mr Gowing did not prepare a brief of evidence and this caused Mr Poihipi to feel confused and unsure about what evidence he would give, even though he did want to give evidence. However, Mr Gowing relied on the transcript of the second EVI as Mr Poihipi informed him it set out what had happened. They went over the transcript carefully together. Mr Gowing's evidence was that Mr Poihipi was consistent that he did not want to give evidence so no further preparation was made. There may have been a lack of understanding on Mr Poihipi's part about precisely what he would say but it was clear between him and Mr Gowing that the main purpose of giving evidence would be to introduce the mushroom use evidence.

[37] Mr Tuck submits that Mr Poihipi needed to give evidence to clarify the first EVI. However it was a legitimate defence strategy to simply maintain that the first EVI was a lie but the second EVI was the truth. This did not require Mr Poihipi to give evidence.

[38] We consider that Mr Poihipi was properly informed as to the risks and benefits of giving evidence and accepted this advice in making his decision not to give

evidence. Additionally we are satisfied that Mr Gowing did not err in advising Mr Poihipi to not give evidence. Accordingly there was no error.

Failure to tailor approach to Mr Poihipi's background and mental state

[39] Mr Tuck submits that *Te Wini v R* is authority for the following propositions:[12]

(a) There is a duty for trial counsel to take additional care when acting for a vulnerable young defendant.

(b) There is a duty on trial counsel to adequately explore psychiatric issues which may have a bearing on the defendant's state of mind at the time of the offending and/or fitness to plead.

[40] In *Te Wini*, the defendant was 14 years old at the time of the alleged offending and 15 years, 11 months old at trial. She was taking a medication that impaired alertness and concentration. She was also experiencing depression, complex post-traumatic stress disorder, suicidal ideation, negative cognitions, emotional dysregulation, self harming, hallucinations, flashbacks and nightmares. No accommodations were made at trial to account for her youth or psychiatric state. Further, no psychiatric report was obtained by trial counsel.

[41] This Court canvassed special measures that have been made to murder trials to account for the young age of the accused and cited the rationale set out by Fisher J in *R v Kaukasi*:[13]

> … because of the age of some of these accused unusual measures are justified to reduce stress upon them and hence promote the kind of fairness of trial more readily achieved for an adult. … the difficulty in trials of this nature is that prolonged stress on young accused can disable them from taking any meaningful part in defending charges against them.

[42] We observe that *Te Wini* relates to youth defendants and addresses measures taken by the court during trial to help such a defendant participate fully. It does not address how counsel should deal with their client during trial preparation. Counsel

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12 *Te Wini v R* [2011] NZCA 405.

13 At [20], quoting *R v Kaukasi (Minute No 5)* HC Auckland T014047, 4 July 2002 at [30].

appearing before us were not able to identify any case pointing to a special standard that should be met by defence counsel where the client is youthful or under a disability of some kind. Counsel must always obtain instructions after explaining the nature and consequences of the client's decision.[14] It is implicit in that obligation that counsel's communications, when taking instructions, should be appropriate to the client's age and capacity. Where there are concerns about a defendant's ability to understand the proceeding and instruct counsel, communication assistance pursuant to s 80 of the Evidence Act 2006 can be made available. The objective must be that of full participation in the trial.

[43] It may also be necessary for counsel to seek a specialist report where counsel is aware of difficulties which may affect the client's participation in the trial.[15] In *Te Wini*, this Court commented that counsel should have sought a psychiatric report, because counsel knew of the defendant's psychiatric difficulties and the report could have at least had relevance to her participation at trial and her sentence.

[44] Here, there was nothing to indicate to Mr Gowing that Mr Poihipi, who was aged 18 at the time of the offending, was unfit to plead or participate in his trial. Mr Gowing knew from working for Mr Poihipi previously that he had some difficulty with comprehension, reading and writing. He adjusted his approach to account for this — for example, he read the agreement to elect to not give evidence aloud to Mr Poihipi rather than have him read it.

[45] Additionally, although Mr Poihipi was struggling with suicidal ideation and possibly PTSD, these resulted from his involvement in the killing. This was clear to Mr Gowing from Mr Poihipi's comments that he could not live without Ms Parakuka. Accordingly, there would have been no reason to investigate the impacts of this psychiatric state on Mr Poihipi's state of mind at the time of the killing.

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[14] Lawyers and Conveyancers Act (Lawyers: Client Care and Conduct) Rules 2008, r 13.3. See also r 13.13.

[15] We note also the duty of counsel to be vigilant as to signs that the defendant is not fit to stand trial and to raise any concerns with the Court where appropriate: *McKay v R* [2009] NZCA 378, [2010] 1 NZLR 441 at [39].

[46] Whilst Dr Jansen's report touches on the possibility of Mr Poihipi being affected by foetal alcohol syndrome, there was no firm diagnosis of this condition, nor is there evidence relating to how it might affect Mr Poihipi's ability to receive information from his counsel and provide instructions in response.

[47] It follows that we see no error in relation to how Mr Gowing approached the representation of Mr Poihipi.

Result

[48] The application to adduce further evidence on appeal is granted.

[49] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent