IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA619/2018
[2025] NZCA 340

BETWEEN	GABRIEL YAD-ELOHIM Appellant
AND	THE KING Respondent

Court:	Mallon and Cooke JJ
Counsel:	J Y Yi for Appellant M J Lillico and I A A Mara for Respondent
Judgment: (On the papers)	18 July 2025 at 11.30 am

JUDGMENT OF THE COURT

A The application for recall is granted.

B A rehearing is ordered.

C The affidavits of Dr Cavney dated 12 September 2024 and the appellant dated 26 August 2024 are admissible on appeal.

D The parties are to file and serve memoranda as directed at [22].

REASONS OF THE COURT

(Given by Cooke J)

[1] In 2018 Gabriel Yad-Elohim was found guilty of murder after a jury rejected the defence of insanity. He was sentenced to life imprisonment with a minimum period

of imprisonment of 13 years.[1] On 1 May 2023 this Court dismissed an appeal against conviction which centred on the insanity defence.[2]

[2] On 6 December 2024 the Supreme Court then dismissed an application for leave to appeal to that Court. But, when doing so, the Supreme Court considered that new evidence relied upon as part of the application for leave ought to be considered by this Court.[3] Mr Yad-Elohim has accordingly made an application for this Court to recall its earlier decision based on the new evidence.

Background

[3] The relevant facts are set out in this Court's earlier decision.[4] Mr Yad-Elohim has a history of mental illness, and there was an acceptance in the psychiatric evidence before the jury that he had schizophrenia. In September 2017 he presented to the Emergency Department at Auckland City Hospital experiencing thoughts and urges to injure Pacific Island, Māori, Asian and African people. He was admitted under the Mental Health (Compulsory Assessment and Treatment) Act 1992. Over the following days, and after administration of anti-psychotic medication, his mental state improved, and he was assessed as symptom free and discharged on 23 September. He killed the victim three days later.

[4] He had approached a person on Karangahape Road seeking to buy drugs, and then travelled with her on the bus to the victim's address. The person persuaded him to hand over $200 and to wait while she bought drugs from the victim. He waited but she did not return as she had run off with his money. Mr Yad-Elohim then went to the apartment and knocked on the door. The victim answered, denying any knowledge of the person who stole the money. Mr Yad-Elohim then began a sustained assault. It is estimated that he inflicted approximately 90 blows. The victim died from blunt force trauma. Mr Yad-Elohim was arrested the following day on Karangahape Road.

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1 *R v Yad-Elohim* [2018] NZHC 2494 at [64] [sentencing notes].
2 *Yad-Elohim v R* [2023] NZCA 136 [Court of Appeal judgment].
3 *Yad-Elohim v R* [2024] NZSC 168 at [14].
4 Court of Appeal judgment, above n 2, at [6]–[17].

[5] Mr Yad-Elohim was born in South Korea of Korean parents. Apart from a short period in Japan, his family lived in Korea. He moved to New Zealand with his mother when he was about 11. He had first come to the attention of Mental Health Services in 2009 when he was 21, and had had periods admitted to hospitals for psychiatric issues. He changed his name when he was about 24 to his present name, which he understood to mean "the hand of God" in Hebrew.

[6] The main issue at trial was whether the defence of insanity applied. Two forensic psychiatrists gave evidence before the jury: Dr James Cavney for the defence, and Dr Peter Dean for the Crown. Both had assessed a wide range of material, including previous assessments undertaken by other psychiatrists.

[7] Both psychiatrists agreed that Mr Yad-Elohim had a disease of the mind for the purposes of the insanity defence, and both ultimately accepted that Mr Yad-Elohim knew the nature and quality of his actions when killing the victim. But Dr Cavney's opinion was that Mr Yad-Elohim did not understand his actions were wrong, having regard to commonly accepted standards of right and wrong, because of the effects of the disease of the mind. Dr Dean accepted Mr Yad-Elohim was experiencing psychosis at the time of the offending, but was of the view that his intent in committing the offence was to gain retribution for being cheated, and that he was not driven by his psychotic illness to kill the victim.

[8] One of the elements that informed Dr Cavney's opinion was information that Mr Yad-Elohim had provided to him shortly before trial, that he believed he was a Japanese anime character called Kurosaki Ichiwo. Dr Cavney considered that when he killed the victim, Mr Yad-Elohim thought he was doing God's work, and had been hearing voices instructing him to do so. Dr Cavney had also stated, however, that he had inadequate time to properly investigate Mr Yad-Elohim's psychosis, including because he had only been instructed shortly before the trial to assess insanity. He had earlier assessed Mr Yad-Elohim's fitness to stand trial, but that had not included an assessment of sanity.

[9] The jury did not accept Dr Cavney's opinion and Mr Yad-Elohim was found guilty of murder.

[10] On appeal this Court did not accept that a miscarriage of justice had arisen on the basis that Dr Cavney had not had adequate time to assess Mr Yad-Elohim's mental state, or because of further evidence admitted on appeal, including an affidavit from Dr David Chaplow which supported the insanity defence.[5]

[11] The new evidence put before the Supreme Court, and now put before this Court on the recall application, is a further affidavit from Dr Cavney, and an affidavit from Mr Yad-Elohim. In an affidavit affirmed on 20 September 2024 Dr Cavney refers to further investigations he had undertaken after trial. In particular he identified a Japanese anime called "Bleach" where the protagonist's name is, in fact, Kurosaki Ichigo. He notes that this character has blond/orange hair in the style that Mr Yad-Elohim had adopted, and that in the first four minutes of the first episode of Bleach there are a number of similarities between those events and what had occurred in this case. In the episode Kurosaki Ichigo assaults a person in a manner similar to the killing of the victim. Dr Cavney says that this information would potentially have been the most relevant evidence for the defence if it had been known at the time of trial.

[12] Mr Yad-Elohim says in his affidavit that he had seen this anime series before the offending, and that he thought that he was this character when he assaulted the victim.

[13] Dr Cavney explains that he had raised the video with appeal counsel, Mr Ron Mansfield KC, prior to swearing his affidavit for the appeal, but that a decision was made not to refer it to the Court. Mr Mansfield says in his affidavit that he did not refer to the video or place it before the Court as he did not consider it would have materially advanced the appellant's position on appeal. But this was in the context of his assessment that "any review of relevant events at trial would reveal that the trial has miscarried".

[14] The Crown opposes recall on the basis that there are no very special reasons to justify it, arguing that the new material is just an elaboration of trial evidence and that it does not overcome the obstacles to the insanity defence. Those obstacles relate to

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5 Court of Appeal judgment, above n 2, at [109] and [120].

the fact that there was a motive for the killing given that Mr Yad-Elohim had been robbed, and that Mr Yad-Elohim did not provide explanations at the time consistent with him killing the victim because of psychotic delusions.

Assessment

[15] As the Supreme Court held in *Uhrle v R*, the test for recall outlined in the civil jurisdiction applies in the criminal jurisdiction, and includes the ability for a judgment to be recalled if there is a special reason in the interests of justice.[6]

[16] We consider that this test is satisfied.

[17] Dr Cavney said that he had had insufficient time to fully explore the issues for the purpose of his assessment of Mr Yad-Elohim, and this formed the basis of the third and primary ground of appeal. New evidence was admitted for the purposes of the appeal, including an affidavit from Dr Cavney, but this affidavit did not include the information about the similarities of the anime character and Mr Yad-Elohim's hairstyle, nor the episode where this character commits an assault and its similarities with Mr Yad-Elohim's assault on the victim.

[18] In common with the Supreme Court, we see the further material now referred to by Dr Cavney as potentially relevant. It supports the contention that, had fuller investigations been conducted at the time, a more complete picture of the potential effect of Mr Yad-Elohim's mental state may have been apparent. It is accordingly relevant to the contention that an investigation of the defence of insanity was not adequately undertaken for trial.

[19] We consider that the significance of this further information should have been considered as part of this argument before this Court. It is information that Dr Cavney describes as "potentially … the most relevant" to the key issue of whether Mr Yad-Elohim understood the nature, quality and moral wrongfulness of his actions. It provided a form of corroboration to his account of being an anime character

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6 *Uhrle v R* [2020] NZSC 62, [2020] 1 NZLR 286 at [29], referring to *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd (No 2)* [2009] NZSC 122, [2010] 1 NZLR 76 at [2] and *Horowhenua County v Nash (No 2)* [1968] NZLR 632 (SC) at 633.

(critically) *during the assault*. It provided an explanation for "a [white] coloured flower" he referred to during his police interview as well as for why he was speaking in Japanese during the police interview (leading to the misunderstanding in arranging a Japanese interpreter for his trial).

[20] Moreover, given that Mr Yad-Elohim had schizophrenia, that he had been admitted to hospital because of his concerns about urges he had to hurt people shortly before the killing, that the assault was inexplicably sustained and brutal, and that Dr Cavney was instructed only just before trial indicating he had not had sufficient time to conduct investigations, we do not consider that these issues can be considered to be beyond argument. It is also apparent that Dr Cavney was effectively cross-examined at trial on the basis that his opinions included speculative views that had not been fully investigated. The appeal should be reheard with all relevant material available for assessing whether the trial was fair in these circumstances.

[21] We accordingly grant the application for recall and direct that there should be a rehearing. For the purposes of that rehearing, the affidavits of Dr Cavney dated 20 September 2024 and the appellant dated 26 August 2024 are admissible.[7]

[22] We direct counsel for the appellant to file and serve a memorandum setting out the proposed directions for the rehearing within 15 working days, and counsel for the respondent to respond to that memorandum 15 working days thereafter. A telephone conference will then be scheduled for the purposes of giving further directions for the appeal. This will include consideration of what further evidence may be required, and whether evidence will be given at the rehearing of the appeal.

Result

[23] The application for recall is granted.

[24] A rehearing is ordered.

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7 Criminal Procedure Act 2011, s 334(3); *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120]; and *Naseeb v R* [2021] NZCA 324 at [28].

[25] The affidavits of Dr Cavney dated 12 September 2024 and the appellant dated 26 August 2024 are admissible on appeal.

[26] The parties are to file and serve memoranda as directed at [22].

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