IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA450/2020
[2023] NZCA 552

BETWEEN	SCOTT WATSON Appellant
AND	THE KING Respondent

Hearing:	26 October 2023
Court:	Cooper P, French and Collins JJ
Counsel:	N P Chisnall KC, K H Cook and H Z L Krebs for Appellant M F Laracy, S C Baker and L C Hay for Respondent
Judgment:	6 November 2023 at 9.30 am

JUDGMENT OF THE COURT

A The Crown's application to exclude the evidence of Ms Crawford and Ms Thirkell is declined.

B Mr Watson is to file and serve an affidavit that complies with r 12B of the Court of Appeal (Criminal) Rules 2001 by 1 December 2023.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] The Crown challenges the admissibility of reports from two forensic scientists filed in support of Mr Watson's appeal, which is scheduled to be heard in June 2024. We shall explain the reports at [11] to [15].

[2] The Crown's objections to the reports are based upon its concern that the reports are not relevant, fresh, or cogent and that the interests of justice do not require the Court to consider the reports.

Background

[3] Ben Smart and Olivia Hope were last seen alive in the early hours of 1 January 1998 near Furneaux Lodge in the Marlborough Sounds.

[4] Following a five-month investigation, Mr Watson was charged with having murdered Mr Smart and Ms Hope. After an 11-week trial Mr Watson was found guilty and sentenced to life imprisonment, with a requirement that he serve 17 years before he could be considered eligible for parole.[1]

[5] Mr Watson's appeal against his conviction and the length of the non-parole term was dismissed by this Court in 2000,[2] and an application for special leave to appeal to the Privy Council was declined in 2003. A first application for the exercise of the Royal prerogative of mercy was declined in 2013. Mr Watson has been denied parole and remains in prison for the murders.

[6] An important aspect of the Crown case against Mr Watson was strands of hair found aboard Mr Watson's yacht, the *Blade*. The Crown case was that Mr Watson's yacht had been scrubbed clean soon after Mr Smart and Ms Hope disappeared. Nevertheless, the Institute of Environmental Science and Research (ESR) scientists found human hair on a blanket aboard the *Blade*. Ms Vintiner, a forensic scientist from the ESR, told the jury that DNA testing showed one of the hair samples came from Ms Hope. At the trial, Mr Watson's counsel questioned the chain of custody of the hair samples and suggested the hair samples recovered from the *Blade* may have become mixed with a sample of hair known to have originated from Ms Hope. Counsel also pointed to a 1-centimetre hole in the evidence bag containing the hair. It was submitted this could have increased the risk of contamination.

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1 *R v Watson* HC Wellington T2693/98, 26 November 1999.
2 *R v Watson* CA384/99, 8 May 2000.

[7] On 10 August 2020, the Governor-General, acting pursuant to s 406 of the Crimes Act 1961, referred Mr Watson's conviction to this Court.[3]

[8] Section 406 of the Crimes Act provided, in part, that where the Governor-General received an application to exercise the prerogative of mercy the Governor-General could refer the question of the conviction to the Court of Appeal.

[9] The reference from the Governor-General in this case was preceded by a report prepared for the Governor-General by Sir Graham Panckhurst, who raised questions about the possible unreliability of the forensic evidence given at trial concerning the strands of hair found aboard the *Blade*. Sir Graham's report referred to two reports from a Mr Doyle, a forensic scientist, who criticised the Crown's evidence concerning the strands of hair found on the *Blade*.

The reference from the Governor-General

[10] It is convenient to set out in full the scope of the reference:

> **5 Second application for exercise of Royal prerogative of mercy**
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> …
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> (4) Among other matters, the applicant submitted that 2 reports, dated 18 September 2017 and 19 March 2018, by a forensic scientist, Sean Doyle, provide new expert opinion evidence concerning the reliability of the forensic evidence at trial regarding the hairs recovered from the applicant's yacht that were said to be from Olivia Hope.
>
> (5) In particular, it was submitted that the reports raise questions concerning—
>
> (a) ESR's adherence to relevant quality standards relating to the collection, handling, and forensic examination of those hairs and other bodily material; and
>
> (b) the reliability of the results obtained from the DNA testing of the hairs conducted in New Zealand, Australia, and the United Kingdom; and

[3] Although s 406 of the Crimes Act 1961 was repealed on 1 July 2020 by the Criminal Cases Review Commission Act 2019, pursuant to cl 3 of sch 1 of that Act, s 406 of the Crimes Act continues to apply to applications for the exercise of the royal prerogative of mercy received, but not yet determined, by the Governor-General as at 1 July 2020.

(c) the fairness and accuracy of the evidence given at trial about the DNA testing and the results obtained from it.

…

6 Reason

(1) The matter referred to in clause 5(4) and (5) indicates that evidence has become available since the applicant's trial and appeal against conviction that may raise doubts about the reliability of an important aspect of the prosecution case, namely the forensic evidence referred to in clause 2(4)(e) and (5) [the hair evidence].

…

The challenged reports

[11] In addition to filing evidence from Mr Doyle, Mr Watson's legal advisors have submitted reports from Ms Crawford and Ms Thirkell.

[12] Ms Crawford has 20 years' experience as a forensic scientist. Ms Thirkell has been a crime scene investigator for 25 years.

[13] Ms Crawford's report is 38 pages long and includes an additional 10-page appendix in a font size so small as to be almost illegible.

[14] Ms Crawford's report is heavily qualified and circumspect. The focus of her report is upon the procedures in place in 1998 for the examination of hair and DNA samples and whether the procedures followed in Mr Watson's case met international guidelines. Ms Crawford suggests in her report that the steps taken when obtaining the hair samples in dispute did not conform with ESR standards and that the failure to adhere to the ESR standards might have increased the risk of contamination. Specifically, Ms Crawford states:

(a) The failure to separate the questioned and reference hairs in both time and place during the examination may have increased the risk of contamination.

(b) The failure of the examiner to change her lab coat between examining the reference and questioned hairs may have increased the risk of contamination.

(c) Procedures followed after the examiner made small cuts in the plastic bag containing the reference hairs may also have increased the risk of contamination.

[15] Ms Thirkell's report is 20 pages long and primarily focuses upon deficiencies in the way the ESR scientist secured the blanket aboard the *Blade* and the failure to fully document the steps taken by the scientist examining the *Blade*.

Relevant legislation

[16] We start with s 7(3) of the Evidence Act 2006, which provides:

> (3) Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.

[17] The threshold for admissibility of evidence under s 7 of the Evidence Act is not high. The Supreme Court explained in *Wi v R* that the test for admissibility under s 7 is whether the proposed evidence has any probative tendency.[4]

[18] The reports prepared by Ms Crawford and Ms Thirkell have been tendered as expert opinions and therefore must also comply with s 25 of the Evidence Act. It is only necessary to set out s 25(1) of the Act:

> **25 Admissibility of expert opinion evidence**
>
> (1) An opinion by an expert that is part of expert evidence offered in a proceeding is admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.
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> …

4 *Wi v R* [2009] NZSC 121, [2010] 2 NZLR 11 at [8].

[19] Thus, in order to be admissible, the opinion evidence from Ms Crawford and Ms Thirkell must be "substantially helpful" in enabling this Court to either:

(a) understand other evidence; or

(b) ascertain a fact that is of consequence to the determination of the appeal.

Relevance

[20] Ms Laracy, for the Crown, submitted that the issue in the reference from the Governor-General is whether there was a real risk of contamination of the crime scene hair samples. Ms Laracy submitted that in order for opinion evidence to be relevant it must be substantially helpful in proving or disproving whether or not contamination occurred in relation to the hair samples taken from the *Blade*.

[21] Expert evidence is admissible when it is substantially helpful in understanding other evidence in the proceeding. It is not necessary that the experts proffer an opinion that there was contamination. As we understand it, Ms Crawford and Ms Thirkell's evidence is intended to help the Court understand the establishment and evolution of procedures designed to prevent or minimise contamination. This is an issue raised by the reference from the Governor-General and the expert evidence on this topic complements other evidence relating to whether or not there was contamination.

[22] Although the test for admissibility of expert opinion is higher than the test for admissibility of other evidence under s 7(3) of the Evidence Act, we cannot at this juncture say that the reports from Ms Crawford and Ms Thirkell will not substantially assist this Court in understanding the evidence in the case, or in determining whether or not there was a substantial risk that the hair samples seized from the *Blade* were contaminated either at the time they were located or when they were examined in a laboratory.

Freshness

[23] The Crown submits that Mr Watson and his legal advisors have completely failed to explain how the evidence from Ms Crawford and Ms Thirkell is fresh in the sense that it could not reasonably have been obtained, with reasonable diligence, for the trial. Ms Laracy points out that it is clear Mr Watson's trial counsel had access to experts on evidence contamination and that persons with qualifications similar to those of Ms Crawford or Ms Thirkell would have been available to give evidence.

[24] Mr Chisnall KC, for Mr Watson, submits that the overall interests of justice now trump issues of freshness.

[25] We accept that credible evidence that is not fresh may be admissible depending on the strength of that evidence and its potential impact on the safety of the conviction. This point was explained in the following way by the Privy Council in *Lundy v R*:[5]

> [120] … the proper basis on which admission of fresh evidence should be decided is by the application of a sequential series of tests. If the evidence is not credible, it should not be admitted. If it is credible, the question then arises whether it is fresh in the sense that it is evidence which could not have been obtained for the trial with reasonable diligence. If the evidence is both credible and fresh, it should generally be admitted unless the court is satisfied at that stage that, if admitted, it would have no effect on the safety of the conviction. If the evidence is credible but not fresh, the court should assess its strength and its potential impact on the safety of the conviction. If it considers that there is a risk of a miscarriage of justice if the evidence is excluded, it should be admitted, notwithstanding that the evidence is not fresh.

[26] It is also important to bear in mind r 12B(3)(b) of the Court of Appeal (Criminal) Rules 2001, which requires an appellant who wishes to rely on fresh evidence to file an affidavit that explains "why the further evidence was not available at the trial and why it could not, with reasonable diligence, have been called".

[27] Thus, while cogent evidence that is not fresh may, depending on the significance of that evidence, be admissible, an appellant cannot unilaterally waive r 12B of the Court of Appeal (Criminal) Rules. There is an obligation on Mr Watson to file and serve an affidavit that complies with r 12B. He should do so by 1 December 2023.

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5 *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273.

Cogency

[28] It is, at this stage, extremely difficult to assess the cogency of Ms Crawford and Ms Thirkell's evidence. The panel which hears Mr Watson's appeal will be in a far better position to assess what, if any, cogency attaches to the challenged evidence after it considers all other relevant evidence.

[29] Ms Laracy acknowledged the difficulty in this Court ruling on the admissibility of evidence without the advantage of understanding all of the evidence that will be traversed in the appeal.

Result

[30] The Crown's application to exclude the evidence of Ms Crawford and Ms Thirkell is declined.

[31] Mr Watson is to file and serve an affidavit that complies with r 12B of the Court of Appeal (Criminal) Rules by 1 December 2023.

[32] The Crown's application to exclude the evidence can be pursued at the appeal if necessary.

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