IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA292/2021
[2024] NZCA 534

BETWEEN	DAVID GRANT SINCLAIR Appellant
AND	THE KING Respondent

Hearing:	30 September 2024
Court:	Collins, Brewer and Osborne JJ
Counsel:	N P Chisnall KC and S J Watt for Appellant E J Hoskin and W J Harvey for Respondent
Judgment:	21 October 2024 at 11 am

JUDGMENT OF THE COURT

A The application to adduce further evidence is declined.

B The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] In July 2019, Mr Sinclair had the responsibility of caring for his 10-month-old son, "CJ". On 8 July, CJ was unsettled due to teething. In the early hours of the morning of 9 July, Mr Sinclair contacted his mother and told her CJ had rolled off a bed and was moaning. When Mrs Sinclair arrived, she found that CJ had stopped breathing and was "floppy". Mrs Sinclair started CPR. An ambulance was called at

about 4.36 am and police arrived soon thereafter. Mr Sinclair told the police that CJ had fallen down the side of a bed and hit his head on the carpet. CJ was flown to Christchurch Hospital's Intensive Care Unit (ICU), where a scan revealed that CJ had suffered significant injuries.

[2] The injuries suffered by CJ comprised:

(a) injuries to his brain;

(b) a significant (ear to ear) skull fracture;

(c) subarachnoid bleeding;

(d) brain swelling; and

(e) retinal haemorrhaging.

[3] Doctors also observed multiple bruises over CJ's body, including to his scrotum and groin, face, forehead, behind his ear, on the back of his neck, down the middle of his back, under his chin, on his stomach, shoulder, upper arm and forearm, armpit and down his legs including behind his knees. Doctors also discovered a broken bone in CJ's foot.

[4] CJ was placed on life support but passed away on 10 July 2019. In his evidential video interview with police, Mr Sinclair maintained his position that CJ had rolled off a bed and hit his head on carpet.

[5] Mr Sinclair was charged with having murdered CJ. He gave evidence saying that CJ had actually fallen down a flight of nine stairs. He accepted that his earlier explanation about the cause of CJ's injuries was a lie.

[6] Mr Sinclair was convicted on 16 November 2020 and sentenced by Edwards J on 19 March 2021 to life imprisonment with a requirement he serve a minimum period of 17 years' imprisonment (MPI) before he is eligible to be considered for parole.[1]

[7] Mr Sinclair appeals his conviction. Three grounds are advanced:

(a) Mr Sinclair's right not to disclose a defence under s 32(1)(b) of the Evidence Act 2006 was breached when the prosecutor commented on Mr Sinclair's failure to talk to his mother and a close friend about some of the injuries we have summarised at [3]. As we shall explain, some of those injuries pre-dated the brain injuries CJ suffered on 9 July. We will refer to this ground of appeal as the "failure to disclose a defence issue".

(b) Edwards J erred by omitting to tell the jury that they did not need to accept the "factual assumptions" that underpinned the evidence of some experts. We will refer to this ground of appeal as the "factual assumptions issue".

(c) Edwards J erred by not cautioning the jury about the lack of objectivity of two experts called by the Crown. We will refer to this ground of appeal as the "experts objectivity issue".

[8] Mr Sinclair has also applied to adduce new evidence on appeal. That evidence comprises reports from Dr Jayamohan and Dr Sudhakar. It is contended that there is a real risk that a miscarriage arose through the jury not having the benefit of the proposed evidence from Drs Jayamohan and Sudhakar.

The Crown case

[9] It is likely that the fatal injuries suffered by CJ were inflicted shortly before 3.27 am on 9 July 2019. At that time, Mr Sinclair googled "does a baby's head flop backwards from concussion". Mr Sinclair then accessed a banking application and an

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1 *R v Sinclair* [2021] NZHC 569 [sentencing notes].

online gambling website on his phone and at 4.17 am undertook a second google search, asking "what does it mean if my one-year-old baby's neck has gone all floppy after a fall out of bed". Both those searches were done in a private mode browser. Soon thereafter Mr Sinclair sent a message to his mother through Facebook. She came around to Mr Sinclair's house almost straight away. As we have noted, Mrs Sinclair started CPR and an ambulance was called at about 4.36 am.

[10] The Crown case was that CJ died from injuries he suffered from a result of a violent assault inflicted upon him by Mr Sinclair during the early hours of 9 July 2019 by either slamming CJ into a hard object or by hitting him with a hard blunt instrument.

[11] The evidence for the Crown included:

(a) evidence about the injuries suffered by CJ prior to 9 July; and

(b) evidence concerning the severity of the injuries suffered by CJ on 9 July.

Prior injuries

[12] The Crown relied on the earlier injuries to CJ to support its proposition that Mr Sinclair had a propensity to be violent towards CJ.

[13] Although it was not possible to determine when all of the bruises suffered by CJ were caused, the medical and other evidence demonstrated that at least the following injuries occurred before 9 July:

(a) the injuries to CJ's scrotum and groin;

(b) the broken bone in his foot; and

(c) earlier injuries to his brain.

[14] Mr Sinclair said three of the bruises to CJ's forehead had been caused by him hitting himself with a toy while in the bath sometime before 9 July. The injury to CJ's

foot was said by Mr Sinclair to have occurred when Mr Sinclair accidentally stood on CJ's foot.

[15] Most of the evidence concerning the prior injuries suffered by CJ focused upon the injuries to his scrotum and groin. In his evidence, Mr Sinclair said those injuries occurred when Mr Sinclair was clipping CJ into a car seat. He said the buckle mechanism caught CJ's scrotum.

[16] The Crown experts rejected this explanation. For example, Dr Christian, a paediatrician from Philadelphia, refuted Mr Sinclair's explanation for the car seat belt clip as being the cause of the injuries seen on CJ's scrotum and groin. She offered three reasons for her view that Mr Sinclair's explanation was implausible:

(a) the protective layer of CJ's nappy would have insulated him from the car seat buckle;

(b) she had never seen such injuries caused by a car seat belt; and

(c) the diffuse nature of the bruising on the scrotum and groin area rendered the car seat belt explanation implausible.

Fatal injuries

[17] Dr Richardson, a neurosurgical doctor, saw CJ when he was admitted to the ICU. Dr Richardson said that "the whole [of CJ's] brain was injured". Dr Dupree, the paediatric radiologist who examined scans and magnetic resonance imaging (MRI) images of CJ, said that CJ's skull injury was "the most complex and extensive skull fracture" that she had seen in her career. Dr Doocey, a consultant paediatrician at Christchurch Hospital who examined CJ on 9 July, likened the injuries to CJ's brain to those caused in motor accidents involving "vehicles going at high speeds". Dr Sage, the pathologist who performed the autopsy on CJ, said the fracture to CJ's skull was "unusually severe". He also agreed with the comparison between CJ's head injuries and those caused by a "high speed road vehicle crash".

[18] The medical witnesses agreed that CJ's head injuries were inconsistent with the explanations provided by Mr Sinclair. Dr Sage said that Mr Sinclair's explanation that CJ's injuries were caused by him falling down nine stairs was "very implausible". Dr Doocey, Dr Christian and Professor Duflou, a doctor called by the defence, all said Mr Sinclair's account of CJ having fallen down the stairs was an implausible explanation for his injuries.

Application to adduce new evidence

[19] It is convenient to deal with the application to adduce evidence obtained from Dr Jayamohan and Dr Sudhakar before dealing with the grounds of appeal we summarised at [7]. Dr Jayamohan is a consultant paediatric neurosurgeon employed by the Oxford Radcliffe NHS Trust in England. He is a recognised expert in traumatic head injuries suffered by babies and young children. Dr Sudhakar is a consultant paediatric neuroradiologist at the Great Ormond Street Hospital for Children in London and he is also a recognised expert in paediatric traumatic head injuries.

[20] The application to adduce fresh evidence must be viewed in the context of Mr McKenzie, trial defence counsel, briefing and calling Professor Duflou as an expert witness at Mr Sinclair's trial. He is a forensic pathologist in Sydney. In an affidavit filed in this Court, Mr McKenzie explains that Professor Duflou was selected primarily for three reasons:

> 10.1 He was a contemporary of the Crown pathologist Mr Martin Sage and was equal to him in experience; and
>
> 10.2 He had appeared in court frequently for both the defence and Crown, giving him added credibility; and
>
> 10.3 He felt able and qualified to respond to the various pieces of Crown medical/expert evidence, including Dr Christian and later Dr Every.

[21] Mr McKenzie also explained "that the realities of legal aid funding" meant that applications to fund multiple experts are likely to be carefully scrutinised "especially, as in this case, where the existing expert [Professor Duflou] felt able to comment fully on the matter at issue".

[22] Dr Jayamohan and Dr Sudhakar's proposed evidence focuses on whether the stair fall hypothesis advanced by Mr Sinclair at trial was possible.

[23] Dr Jayamohan explains in his report the reasons why Mr Sinclair's stair fall explanation had flaws. He refers however to a clinical study conducted by Dr Paul Steinbok and others in which one of the five deceased patients studied, a seven-month-old infant who had fallen down the stairs, suffered similar injuries to CJ.[2] Dr Jayamohan acknowledged that the background details of the case are not particularly clear.

[24] Dr Jayamohan also cautions against the use of statistics and that case reports, such as that in the Steinbok study, show injuries like those suffered by CJ can occur innocently albeit extremely rarely.

[25] Dr Sudhakar refers to the Steinbok study and to another by Patrick Lantz and Daniel Couture.[3] Dr Sudhakar says the studies describe two instances in which young infants had fallen down the stairs and received strikingly similar injuries to CJ. Dr Sudhaker did however note that the infant in the Lantz and Couture study is a single case report, and details of the fall are missing from the report.

[26] Mr Chisnall KC advanced the following reasons for us to admit the reports from Dr Jayamohan and Dr Sudhakar.

[27] First, the reports focus on whether the stair fall hypothesis is possible and the proposed evidence highlights the dangers inherent in the way the Crown witnesses "harnessed the reported rarity of children accidentally dying in a scenario like that described by the appellant". Mr Chisnall submitted that unlike Dr Jayamohan, Dr Sudhakar and Professor Duflou, the Crown experts at trial "reasoned backwards to say the rarity of severe injuries amongst children who fall means that CJ was assaulted".

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2 Paul Steinbok and others "Early Hypodensity on Computed Tomographic Scan of the Brain in an Accidental Pediatric Head Injury" (2007) 60(4) Neurosurgery 689.

3 Patrick E Lantz and Daniel E Couture "Fatal Acute Intracranial Injury, Subdural Hematoma, and Retinal Hemorrhages Caused by Stairway Fall" (2011) 56(6) J Forensic Sci 1648.

[28] Second, the reports from Dr Jayamohan and Dr Sudhakar explain that there are two cases in the literature which described injuries almost identical to those suffered by CJ and which show such injuries can occur accidentally.

[29] Third, the reports from Dr Jayamohan and Dr Sudhakar provide "a tempered and cogent counterfactual to the strongly worded opinions heard by the jury at trial" which "equated improbability with proof of guilt".

Analysis

[30] The criteria for admitting new evidence on appeal was explained in the following way by the Privy Council in *Lundy v R*:[4]

> [120] The Board considers that 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.

[31] Mr Chisnall accepted "that with reasonable diligence, Drs Jayamohan and Sudhakar's evidence could conceivably have been adduced at trial" and that the proposed new evidence is not fresh.

[32] We have focused on the cogency of the proposed evidence by asking whether the evidence in issue may have resulted in a not guilty verdict.

[33] Mr Chisnall accepted that the proposed evidence from Dr Jayamohan and Dr Sudhakar does not add to that given by Professor Duflou and is substantially similar to the evidence given by the Professor.

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

[34] The accidental fall down the stairs theory was canvassed in considerable detail before the jury. The Crown experts were cross-examined about that hypothesis. The theory that CJ had died through accidentally falling down the stairs was described as "possible" but "implausible" by Dr Sage. Dr Every, an ophthalmologist, agreed that you could "never exclude it" as a possibility and Professor Duflou said the stair fall narrative was a possibility but also accepted that it was not one that he would necessarily favour above others.

[35] Professor Duflou referred in his evidence to the two cases of fatal falls set out in the Steinbok and Lantz reports. Professor Duflou said there are:

> … isolated reports of infants who fall downstairs and have injuries which have striking similarities to those seen in the present case. In two of those cases there has been a combination of skull fracturing, subdural, subarachnoid and intraventricular damage, cortical [contusion] and extensive retinal haemorrhage involving multiple layers of the retina.

In his closing address, Mr McKenzie referred to those reports.

[36] Professor Duflou accepted under cross-examination that the Steinbok and Lantz reports lacked detail. A similar acknowledgment was made by Dr Jayamohan who said that the Steinbok case was the "ultimate rarity".

[37] Cogency is not to be assessed on the basis on the number of witnesses who say essentially the same thing. In this case, Professor Duflou, a highly qualified expert, was called by the defence. His evidence was substantially consistent with that which Drs Jayamohan and Sudhakar would have given had they been called as witnesses.

[38] Because no new material evidence emerges from the reports from Drs Jayamohan and Sudhakar, we do not think that the possibility of a miscarriage arises through the failure to call them at trial. The evidence that they would have given was properly and professionally conveyed to the jury by Professor Duflou.

[39] Because the proposed evidence adds nothing material to the evidence at trial, it fails the cogency test in the sense that no miscarriage of justice arose through the failure to adduce the proposed evidence from Drs Jayamohan and Dr Sudhakar at trial.

[40] The application to adduce the new evidence on appeal is declined.

First ground of appeal: the failure not to disclose a defence issue

The prosecutor's closing address

[41] In her closing address, the prosecutor made reference to Mr Sinclair's failure to disclose his explanations for injuries that were sustained by CJ before 9 July.

[42] The prosecutor said the following about three of the bruises on CJ's forehead:

> The defendant gave evidence and he questioned the account his mother had given, but don't you think Mrs Sinclair if she had seen those bruises and could honestly give that evidence that we would've heard about it earlier in the trial. Like [Mr Sinclair's friends] Ricky Robertson, Scott Bradley, and Charlie Jones, Mrs Sinclair is obviously supportive of her son. If there was an innocent explanation for those bruises on the forehead I suggest one of those witnesses would've told us about it.

[43] When talking about the injuries to CJ's scrotum and groin, the prosecutor said:

> The other reason, the Crown says, you have to question the defendant's explanation of an accidental injury is why on earth if this was accidental has he not mentioned it to his mother or even to his friends? If this is an injury that happened accidentally, would you not expect him to speak to his Mum, his go-to person as he described her and show her the injury? Things happen when you're looking after children, you can accidentally step on their foot or harm them in an accidental way. Is this not the kind of thing you'd pick up the phone to your mother and say: "Oh, Mum I've done the most awful thing, you want to see his groin, it's got so bruised." But he didn't.
>
> And not even ask Scott Bradley who has a son the same age. And Scott Bradley talked about the supportive relationship they've had with one another and in fact Scott Bradley had dropped some Pamol off at some stage to help the defendant with the teething. Wouldn't you mention it to Scott and tell him what had happened?
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> Wouldn't you ask your Mum whether she thought you should take him to the doctor. We know when the medical staff finally saw that injury, the real concern was that CJ's testicles encompassing [the] very swollen scrotum and whether they'd been damaged.
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> …
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> He couldn't go to the doctor about that groin injury. He knew that. That's why he didn't tell his Mum. It's another example the Crown says of the defendant saving his own skin to the detriment of his son.

[44] In submitting that the prosecutor breached Mr Sinclair's right not to disclose a defence, Mr Chisnall relied on s 32 of the Evidence Act and in particular, s 32(1)(b):

> **32 Fact-finder not to be invited to infer guilt from defendant's silence before trial**
>
> (1) This section applies to a criminal proceeding in which it appears that the defendant failed—
>
> (a) to answer a question put, or respond to a statement made, to the defendant in the course of investigative questioning before the trial; or
>
> (b) to disclose a defence before trial.
>
> (2) If subsection (1) applies,—
>
> (a) no person may invite the fact-finder to draw an inference that the defendant is guilty from a failure of the kind described in subsection (1); and
>
> (b) if the proceeding is with a jury, the Judge must direct the jury that it may not draw that inference from a failure of that kind.
>
> (3) This section does not apply if the fact that the defendant did not answer a question put, or respond to a statement made, before the trial is a fact required to be proved in the proceeding.

[45] The provenance of s 32 of the Evidence Act was explained by this Court in *Smith v R*.[5] In summary, prior to the enactment of s 32, the common law provided that no inference of guilt could be drawn if a defendant exercised their right to silence or failed to explain a defence before trial.[6] If however a defendant gave evidence at trial, the prosecutor was entitled to submit that the defendant's failure to take advantage of an earlier opportunity to explain his or her defence was a matter that could legitimately be taken into account in assessing the defendants credibility.[7] In *E (CA727/09) v R*, this Court said that the distinction between previous silence being relevant to the defendant's credibility but not to his or her guilt "would test the skills of a philosopher".[8]

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5 *Smith v R* [2013] NZCA 362, [2014] 2 NZLR 421.
6 At [36].
7 At [36], referring to *R v Hill* [1953] NZLR 688 (CA) at 694; *R v Foster* [1955] NZLR 1194 (CA) at 1200; *R v Ryan* [1973] 2 NZLR 611 (CA) at 615; *R v Coombs* [1983] NZLR 748 (CA) at 751–752; and Donald L Mathieson (ed) *Cross on Evidence* (6th ed, Butterworths, Wellington, 1997) at [2.24].
8 *E (CA727/09) v R* [2010] NZCA 202 at [60].

[46] In its reports that preceded the enactment of the Evidence Act, the Law Commission proposed to address the distinction between a defendant's credibility and their guilt when they declare a defence for the first time at trial. The Law Commission's solution was to prevent all comment on the right to silence before trial, including not disclosing a defence before trial.[9]

[47] The Government however rejected the Law Commission's proposal on this topic. As Professor Elisabeth McDonald explains:[10]

> This proposed change to the common law was rejected by Cabinet, following advice from the Ministry of Justice that the prosecutor should have the right to comment generally on the fact that a defence is raised for the first time at trial.

[48] As the Court explained in *Smith*, the enactment of s 32 of the Evidence Act reflected Parliament's decision to reject the recommendations of the Law Commission and to allow prosecutors to comment on the credibility of a defendant who raises a defence for the first time at trial.[11]

[49] In *McNaughton v R*,[12] this Court commented on the narrow distinction between permitting comments being made about a defendant's credibility, but not their guilt when they first disclose a defence at trial.

> [16] The wording of s 32 reflects a tension recognised by the common law between two conflicting interests. One is the legitimate interest of a prosecutor to challenge the defendant's veracity for failing to raise a defence when an opportunity previously arose. The other is a defendant's interest in protection from an illegitimate invitation by the prosecutor to the fact-finder to go further and draw an inference, usually based on the same omission, that the defendant is guilty. In *E (CA727/09) v R* this Court observed that the distinction would test the skills of a philosopher. As [counsel] noted, it will rarely be that advancing the first interest by challenging the defendant's veracity will not necessarily undermine the second interest. Nevertheless, in *Smith* the Court recognised the validity of the distinction. Thus a prosecutor wishing to pursue the first interest must walk a fine and uncertain line if he or she is not to offend the second.

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9 Law Commission *Evidence: Reform of the Law* (NZLC R55, vol 1, 1999) at [128]–[129]; and Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, vol 2, 1999) at [C158]–[C162].

10 Elisabeth McDonald *Principles of Evidence in Criminal Cases* (Brookers, Wellington, 2012) at 262 (emphasis ommitted, footnote omitted), referring to Cabinet Paper "Evidence Bill: Paper 2: Admissibility of Evidence" (4 December 2002) CAB 100/2002/1 at [33].

11 *Smith v R*, above n 5, at [41].

12 *McNaughton v R* [2013] NZCA 657, [2014] 2 NZLR 467 (emphasis in original, footnotes omitted).

Analysis

[50] There are two reasons why we do not accept Mr Chisnall's proposition that the prosecutor in this case stepped beyond the "fine and uncertain line" referred to in *McNaughton*.[13]

[51] First, the plain meaning of s 32(1)(b) of the Evidence Act is that the prohibition in that section is confined to situations where the defendant fails to disclose a defence before trial in relation to the charge or charges he or she is facing in a criminal proceeding. This is the only logical conclusion that can be drawn from the references in the section to "a criminal proceeding" and a failure "to disclose a defence before trial".

[52] Mr Sinclair faced one charge, namely that he murdered CJ on 9 July 2019. While the injuries inflicted upon CJ in the days and weeks before 9 July were relevant from a propensity perspective, they were not the subject of criminal charges. Accordingly, s 32(1)(b) was not engaged when the prosecutor commented on Mr Sinclair's failure to tell his mother and friends that CJ's earlier injuries were the results of accidents.

[53] Secondly, our reading of the prosecutor's comments to the jury about Mr Sinclair's failure to tell others that CJ's earlier injuries were accidental were directed at Mr Sinclair's credibility. Nowhere does the prosecutor say the jury could conclude he was guilty of murder because he did not tell his mother and friends that CJ had suffered accidental injuries prior to 9 July. Rather, the prosecutor carefully stayed on the correct side of the "fine and uncertain line" recognised by the common law and reinforced in s 32 of the Evidence Act.

[54] Accordingly, we are satisfied that the first ground of appeal cannot succeed.

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13 At [16].

The second ground of appeal: the factual assumptions issue

[55] Mr Chisnall drew support for the second ground of appeal from statements made by this Court in *Mehrok v R*, in which the Court said:[14]

> [56] Where expert evidence is relied on, it is for the jury to assess the weight to be given to that evidence. One of the factors that the jury needs to consider is the factual basis for the opinion. Generally, the jury will be directed that expert witnesses may have based their opinions on certain assumed facts and that it is for the jury to consider whether those assumptions were correct. If a jury finds the facts to be different from what the expert witness has assumed, the opinion expressed by the witness may not be an opinion on the facts relevant to the findings that had to be made.

[56] Mr Chisnall submitted that Edwards J erred when she did not tell the jury to consider whether or not the assumed facts which formed the basis of their opinions were correct.

The Judge's directions

[57] The Judge explained to the jury in orthodox ways that they were the sole judges of fact. In her opening remarks to the jury, the Judge explained that it was for the jury to determine what facts they accepted. The Judge expanded on this point in more depth in her summing up:

> [5] … [Y]ou, members of the jury, have the sole responsibility for deciding the questions of fact. It is for you to decide what evidence you accept and what evidence you reject. It is for you to decide what weight you give to the evidence. …

[58] Later in her summing up, the Judge gave the following instructions about the evidence of the expert witnesses:

> [30] When you come to consider the expert evidence, take into account the qualifications, experience and field of specialist knowledge of that witness. However, be careful not to simply defer to the opinions offered in this case. That is particularly important when you come to consider the medical evidence. Some of the opinions you have heard from the experts have been put very strongly and are directly relevant to the questions you must answer. But it is not for the medical people to decide whether Mr Sinclair is guilty or not guilty. It is for you. So, it's for you to decide how much weight or importance you give to the expert evidence, and whether you accept it all in the context of all of the evidence you have heard. You are the fact-finders in this case, not the experts.

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[14] *Mehrok v R* [2019] NZCA 663 (footnote omitted).

[59] When the Judge came to instruct the jury on how they should approach their assessment of CJ's earlier injuries, Edwards J said:

> [76] When you are looking at the injuries, take into account that the evidence suggests that some of CJ's injuries may have been sustained at an earlier time. The experts all agreed that it was difficult to age bruises, but they all agreed that the groin injury was likely sustained earlier than the other injuries. You heard evidence that some of the bruises might also have been older than the others. There was evidence of an old brain injury and the metatarsal bone injury was also thought to be older.
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> …
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> [79] The medical witnesses called by the Crown generally rejected the explanation given by Mr Sinclair for these old injuries. They said that the scrotum injury was consistent with being punched or kicked in that area, or coming down on a hard surface like a beam with a leg either side and that it would only be sustained by direct blunt force contact. Prof. Duflou said he had not seen this type of injury caused by a car seat buckle, and where he had seen this type of injury, it was concluded that it was an inflicted injury. He accepted that the injuries could have been caused by punching, kicking, falling astride something and slamming a baby down on something and that it could not have been caused by a fall down the stairs.
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> …
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> [81] The first step therefore is for you to decide whether you are satisfied that these old injuries were inflicted injuries. If you are satisfied that they were inflicted, then you must decide whether they assist you in determining whether the injuries causing death were also inflicted in this case. If you are not satisfied that the prior injuries either were prior injuries, or that they were inflicted, and if you are not satisfied that they assist you in determining whether the fatal injuries were inflicted, then you put the evidence of the prior injuries to one side and concentrate on the remaining evidence.

[60] After a short break, the Judge returned to her directions concerning the prior injuries:

> [86] First, you need to decide whether they are in fact prior injuries, that is, whether they were sustained at a different time to those causing death. Second, you need to decide whether or not those injuries are in fact inflicted injuries and not caused by some other means. Third, you need to decide whether those injuries were inflicted by Mr Sinclair, and this is a point I didn't make earlier and I want to reiterate. So, the third point is you need to decide whether those injuries are inflicted by Mr Sinclair; and, fourth, you need to decide whether those injuries — if you get to all of that stage — whether those prior injuries assist you in deciding whether the fatal injuries in this case were inflicted. And, as I made — the final point that I made to you before giving you a small break was that even if you get to all of that stage, you don't just assume that Mr Sinclair is guilty of murder or manslaughter simply because you have concluded that there is evidence that he inflicted past injuries on CJ.

> And you must consider all the evidence heard in this trial, and it's that other evidence I want to remind you about now.

[61] Mr Chisnall submitted:

(a) that the broken foot, scrotum/groin injury and older brain injury had to be put to one side when assessing whether or not there was a reasonable possibility that CJ had fallen down the stairs;

(b) that the jury needed to be told that the timing and mechanism of the bruising to CJ was a factual issue for the jury; and

(c) that the directions at [79] pre-supposed that the jury were entitled to find that all of the bruises on CJ occurred at the same time.

[62] Mr Chisnall accepts that the Judge's directions were careful and that what she said at [86] remedied the defect in [81] of her summing up. Nevertheless, Mr Chisnall submitted that the Judge was required to go further and explain to the jury that the experts had based their opinions on certain assumed facts, but it was for the jury to decide whether or not those facts were correct. He submitted that such a direction would have gone some way towards addressing the concerns which we have summarised at [61].

Analysis

[63] We accept that what this Court said in *Mehrok* about an assumed facts direction would have improved what was otherwise an impeccable summing up.[15] We do not accept however that the absence of such a direction caused a miscarriage of justice in Mr Sinclair's trial. Our reasons for reaching this conclusion can be summarised in the following way.

[64] First, the jury could have been left in no doubt that they (and not the medical experts) were the judges of fact and that it was for the jury to determine what evidence about the facts they accepted or rejected.

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15 At [56].

[65] Second, as the Court said in *Mehrok*, juries will *generally* receive an assumed facts direction.[16] The Court did not say that such a direction was essential. It was for the trial Judge to evaluate whether or not such a direction was necessary in this case. We are satisfied that such a direction was not necessary because Mr Chisnall's three concerns which we have summarised at [61] are of little consequence:

(a) There was no dispute that three of CJ's injuries pre-dated 9 July namely, the broken bone in his foot, a prior brain injury and the injury to his scrotum and groin. Mr Sinclair suggested that three bruises on CJ's forehead also occurred before 9 July, but the Crown made clear that Mr Sinclair's explanation for all of CJ's bruises was in issue. The Judge properly explained that the evidence of CJ's prior injuries engaged propensity reasoning and that if they accepted Mr Sinclair had inflicted the previous injuries, they should not assume he was guilty of murder or manslaughter.

(b) The Judge explained at [81] and [86] of her summing up that it was for the jury to determine whether injuries were prior injuries and whether they were inflicted by accident or deliberately by Mr Sinclair.

(c) Nothing in what the Judge said at [79] of her summing up suggested that all of CJ's bruises were inflicted at the same time, and in particular, there was nothing that the Judge said that could have led the jury to think that the injuries to CJ's scrotum and groin occurred on 9 July.

[66] Accordingly, we are satisfied that nothing said in support of the second ground of appeal demonstrates a miscarriage of justice.

Third ground of appeal: experts objectivity issue

[67] The third ground of appeal is that Edwards J was required to tell the jury that the experts were required to be impartial and objective.

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[16] At [56].

[68] Mr Chisnall focused on the evidence of two Crown witnesses in support of this ground of appeal.

Dr Every

[69] Dr Every is an ophthalmologist who commented on the retinal haemorrhaging suffered by CJ. He opined that those injuries were the result of intentional harm. The transcript of his evidence contains the following questions from the prosecutor and his answer.

> Q. And is there any controversy in this field that you think would be useful to explain to the jury in terms of differentiating between accidental and inflicted trauma.
>
> A. Well, it's the whole essence of what's going on here, there doesn't seem to be any doubt that this is a traumatic event that's happened to this child so either it is accidental, or it is non-accidental. And there's a lot of, the consensus in mainstream ophthalmology which is not contentious, which is accepted as, you know, being beyond doubt really, is that abusive head trauma causes significant retinal haemorrhages.

[70] Dr Every then said the following:

> A. … Yeah, this is not accidental head trauma.
>
> Q. What makes you say that?
>
> A. It's not a case of what makes me say that, it's a case of what makes the entire ophthalmic community say that. And that's based in you know many, many, many studies and you know the studies have got a lot more savvy over the years so that studies of, you know, trauma, accident or trauma presenting to people they look at everybody regardless of whether it's accidental or non-accidental and very quickly we start to see the same patterns where — and if it's non-accidental it looks like this, if it's accidental then the haemorrhages are a completely different pattern. And then the other bit of evidence we have as well is that in some scenarios the perpetrators confess to the injury.

[71] Mr Chisnall also criticised the lack of objectivity of Dr Christian and, in particular, the following portions of her evidence:

> A. … So [treating children who may be victims of inflicted injury] is really an important field in [paedeatrics] and I'm proud of the work that I've done and that my colleagues have done to really advance our knowledge and advance the protection of children. There are some

> controversies and they tend to be, if I might say, controversies for the courtroom more so than controversies in our hospitals and in the care that we give. There are many cases where I'm consulted and again, I was consulted today for a child — we get consults, hundreds and hundreds a year at [our] hospital and it's because our trauma surgeons really trust the work that we do. … I think it is important for physicians to know how to stand up and protect children who [are] often too severely injured or too young and don't have a voice or, in my experience, sometimes old enough to say what happened but are too scared sometimes to say what's happened. And they need adults to help protect them. So, sure there are some controversies, but the way that I respond to controversy is I do more research and I do more writing and I do more thinking and I recognise that, you know, in medicine you never say always, you never say never. You put all the information that you have to come up with the right diagnosis. And that's what I try to do all the time.

[72] Mr Chisnall submitted that the way Dr Every and Dr Christian gave their evidence required Edwards J to tell the jury that the experts were required to be impartial and objective.

Analysis

[73] In her summing up, Edwards J did make reference to Dr Every's evidence and in particular, trial counsel's criticisms. The Judge reminded the jury Mr McKenzie had said "that Dr Every, the ophthalmologist, lacked objectivity in his evidence". The Judge then said Mr McKenzie's criticism of Dr Every was "a matter for you to weigh and consider. I would only reiterate what I said which is this is not a trial by expert, but a trial by you."

[74] We agree with Ms Hoskin, counsel for the Crown, that the way in which the Judge addressed trial counsel's concerns about Dr Every's evidence ensured that the jury were alert to the need for experts to be objective when giving their evidence.

[75] Nor do we see this as being a case which required the Judge to give a direction about Dr Christian's objectivity. As Mr Chisnall accepted, the attempts by Mr McKenzie to impeach Dr Christian's independence misfired when he endeavoured to have Dr Sage criticise her impartiality. Dr Sage had described the presence of "zealots" at both ends of the arguments about accidental as opposed to intentionally

inflicted brain trauma in young children. Dr Sage was asked to comment on Dr Christian's placement on this spectrum. He said:

> I wouldn't put her anywhere near the end of the spectrum. I think she gives very balanced and professional evidence.

[76] As this evidence was elicited in cross-examination, Edwards J was wise to not have compounded the defence concerns by implicitly drawing the jury's attention to Dr Sage's glowing comments about Dr Christian's impartiality.

[77] We do not accept that the Judge erred when she did not give a tailored direction to the jury about the need for impartiality and objectivity on the part of experts. Even if such a direction were to have been of assistance, no miscarriage of justice arose through the absence of such a direction.

[78] There is nothing in the third ground of appeal that demonstrates a miscarriage of justice.

Conclusions

[79] We fully endorse two submissions made by Mr Chisnall. He accurately described the Crown's case against Mr Sinclair as "formidable". He also emphasised that notwithstanding the weight of the evidence against Mr Sinclair, he was entitled to receive a fair trial.

[80] For the reasons which we have explained, we are satisfied that none of the grounds of appeal demonstrate that Mr Sinclair was denied a fair trial. On the contrary, everything that we have examined strongly suggests that he was the beneficiary of competent counsel and an unimpeachable summing up by the trial Judge. They ensured there was no miscarriage of justice.

Result

[81] The application to adduce further evidence is declined.

[82] The appeal against conviction is dismissed.

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