IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA450/2020
[2024] NZCA 170

BETWEEN	SCOTT WATSON Appellant
AND	THE KING Respondent

Hearing:	17 May 2024
Court:	French, Courtney and Thomas JJ
Counsel:	N P Chisnall KC and H Z L Krebs for Appellant M F Laracy and S Baker for Respondent
Judgment:	21 May 2024 at 10.30 am

JUDGMENT OF THE COURT

The application is declined.

REASONS OF THE COURT

(Given by Thomas J)

Background

[1] On 11 September 1999, the appellant, Mr Watson, was convicted in the High Court at Wellington of the murders of Olivia Hope and Ben Smart.[1] Mr Watson was sentenced to life imprisonment with a minimum period of imprisonment of 17 years.[2] Mr Watson's appeal in late 1999 to this Court against his convictions and

1 Crimes Act 1961, ss 167 and 172 — maximum penalty of life imprisonment,

2 *R v Watson* HC Wellington T No 2693/98, 26 November 1999; and Criminal Justice Act 1985, s 80(1).

the length of the non-parole period was dismissed.[3] In November 2003, the Privy Council declined to grant special leave for Mr Watson to appeal his convictions.

[2] Mr Watson has made two applications to the Governor-General for the exercise of the Royal prerogative of mercy in respect of his murder convictions. His first application was declined in July 2013 but his second, made on 20 November 2017, was successful.

[3] The Governor-General's reference is "the question of the convictions of Scott Watson for murder, entered in the High Court at Wellington on 11 September 1999". The appeal is set down for a five-day hearing from 10–14 June 2024.

[4] One of the grounds of appeal is that the identification procedure that resulted in a Mr Wallace identifying Mr Watson when shown photographic "Montage B" did not produce a reliable identification, and it therefore should have been inadmissible.

[5] Mr Watson has adduced affidavits from two experts on eyewitness identification evidence, Dr Gary Wells and Dr Adele Quigley-McBride, in support of the submission that the identification evidence is unreliable and its admission gave rise to a miscarriage of justice.

The present application

[6] Mr Watson has applied to this Court for orders requiring production of a report by Dr Margaret Bull Kovera dated 20 December 2023 (the Report) pursuant to s 389(a) of the Crimes Act 1961 and, if the Court thinks fit, requiring Dr Kovera to attend the hearing to be examined pursuant to s 389(b).[4] The application asserts the evidence is fresh, credible and cogent,[5] and will assist the Court to determine the appeal. The Crown opposes the application.[6]

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3 *R v Watson* CA384/99, 8 May 2000.

4 Section 389 of the Crimes Act was repealed, on 1 July 2013, by s 6 of the Crimes Amendment Act (No 4) 2011. It was in force at the time this proceeding commenced so it applies to this appeal: see Criminal Procedure Act 2011, s 397.

5 Referring to the test for admission of fresh evidence on appeal as articulated in *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120].

6 The parties consented to the application being dealt with on the papers and accordingly filed detailed written submissions. Because of a possible uncertainty over the Court's jurisdiction in 1999 to determine such an application solely on the papers, the Court also convened an oral

The Report

[7] Dr Kovera is a psychology Professor. She was engaged by the Crown to review relevant case materials and prepare a report on the psychological research on eyewitness memory that is relevant to understanding the likely reliability of the eyewitness identification made in Mr Watson's case.

[8] The Crown says it sought a report from an academic who works in broadly the same US academic milieu as Mr Watson's visual identification experts, Drs Wells and Quigley-McBride. The Crown requires Drs Wells and Quigley-McBride for cross-examination at the substantive hearing.

[9] On 30 November 2023 at a teleconference (and by email on 4 December 2023), the Crown advised Mr Watson's counsel, Mr Chisnall KC, and the Court that it would not be filing any evidence from Dr Kovera. On 22 December, the Crown disclosed the Report to Mr Chisnall.

Section 389 of the Crimes Act

[10] Section 389 provided, relevantly:[7]

> **389 Supplemental powers of Court of Appeal**
>
> For the purposes of any appeal or application for leave to appeal against conviction or sentence the Court of Appeal may, if it thinks it necessary or expedient in the interests of justice,—
>
> (a) Order the production of any document, exhibit, or other thing connected with the proceedings the production of which appears to the Court to be necessary for the determination of the case:
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> (b) If it thinks fit, order any witnesses who would have been compellable witnesses at the trial to attend and be examined before the Court, whether they were or were not called at the trial, or order the examination of any such witnesses to be conducted in manner provided by rules of Court before any Judge of the Court or before any officer of the Court or District Court Judge or other person appointed by the Court of Appeal for the purpose, and allow the admission of any depositions so taken as evidence before the Court:

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hearing to give the parties the opportunity to make any further submissions orally.

7 We refer to the legislation as it was at the time the proceedings commenced.

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> and exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters, and issue any warrants necessary for enforcing the orders or sentences of the Court:
>
> Provided that in no case shall any sentence be increased by reason of or in consideration of any evidence that was not given at the trial.

[11] Section 389(a) allows the Court to call for the production of anything "connected with the proceedings" if it "appears to the Court to be necessary for the determination of the case". This power has been interpreted liberally, particularly as to the necessary degree of connection.[8] It appears that s 389(a) has been used to obtain material not otherwise available to the parties or the Court and which is considered necessary for determination of the case. In respect of third-party disclosure, this Court has said that the power under s 389(a) "is not lightly to be exercised".[9] The jurisdiction is not part of an investigatory procedure and would not be assumed for that purpose other than in exceptional circumstances.[10] In deciding whether to make an order under s 389(a), the Court may have regard to the extent to which the material is readily available and the degree of difficulty or expense in providing it.[11]

[12] We note the power contained in s 389 is described as "supplemental", suggesting it is in addition to steps otherwise available to the parties.

[13] Section 335 of the Criminal Procedure Act 2011 is the equivalent provision to s 389. It provides for the "[s]pecial powers of appeal courts" in conviction, sentence or contempt appeals.[12] Section 335(2)(e) provides the court with the jurisdiction, if it thinks it necessary or expedient in the interests of justice, to order the production of any document, exhibit, or other thing connected with the proceeding. Like s 389 of the Crimes Act, s 335 requires the applicant to "lay a realistic evidentiary foundation"

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8 See Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Thomson Reuters) at [CA389.01]. This is an earlier edition of *Adams on Criminal Law*, which contains commentary on s 389 of the Crimes Act. See also *R v Dean* CA172/03, 17 December 2004, at [96], referring to *R v Pora* CA447/98, 18 October 1999 and *R v D* [1996] QB 283.

9 *Polyblank v R* [2013] NZCA 208 at [10], quoting *R v D* CA371/95, 17 April 1996 at 4.

10 *R v D*, above n 9, at 4, discussed in *R v Nepia* 32/00, 3 October 2000 at [11].

11 Robertson, above n 8, at [CA389.01], referring to *R v Best* CA133/98, 2 March 1999.

12 *Rolleston v R* [2020] NZSC 113, [2020] 1 NZLR 722 at [19] per Winkelman CJ, O'Regan, Ellen France and Williams JJ; and *Montaperto v R* [2021] NZCA 170 at [20]

that the proposed disclosure is relevant.[13] The overriding criterion is always what course will best serve the interests of justice.[14] Again, like s 389, s 335(2)(e) has been used to obtain material held other than by parties to the proceeding.[15]

[14] We have not been referred to any case where s 389(a) (or s 335 of the Criminal Procedure Act) has been used in the way the appellant seeks; that is, to require a document obtained by one party but which it does not intend to adduce in evidence to be provided to the Court in the face of that party's opposition.

Section 368(2) of the Crimes Act

[15] Counsel suggest a degree of assistance can be derived from the relevant authorities addressing s 368(2) of the Crimes Act 1961 which governs the ability of the court to direct the Crown to call witnesses at trial.[16] The test is also the interests of justice. The relevant principles governing s 368(2) were summarised in *Rapana v R*:[17]

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13 *Tamihere v R* [2020] NZCA 554 at [4]. In that case, the appellant, Mr Tamihere, made an application for non-party disclosure hearing. The Court considered the application under s 335(2)(e) of the Criminal Procedure Act and s 25 of the Criminal Disclosure Act 2008. The Court held that under the s 335(2)(e) test, there was a realistic evidentiary foundation the proposed disclosure was relevant, and "the nature of the Governor-General's reference is such that this does not amount to a general investigation into the availability of a particular ground of appeal": at [7]. The application for a non-party disclosure hearing was therefore granted, although we note it never proceeded to a substantive decision.

14 This is taken from the test for fresh evidence on appeal as set out in *R v Bain* [2004] 1 NZLR 638 (CA) at [34]; and *Lundy v R*, above n 5, at [119]. This approach has been applied to applications under s 335 of the Criminal Procedure Act 2011: see McAlister *v Police* [2022] NZHC 1247 at [25].

15 Mathew Downs (ed) *Adams on Criminal Law – Procedure* (looseleaf ed, Thomson Reuters) at [CPA335.04] states that the power under s 335(2)(e) may be used for two purposes. First, to obtain material from the records of other courts: see *R v Pora*, above n 8 (evidence from criminal trial of another offender impinging on likelihood of appellant's guilt); and *R v Dean*, above n 8 (material relevant to a sentencing appeal)). Or second, to obtain material held by private individuals or individuals not connected with the appeal, so long as the material is directly connected to matters in issue on appeal: see *R v Stephens* [1987] 1 NZLR 476 (CA) (report of a departmental inquiry into the conduct of certain forensic work was not a document "connected with the proceedings")).

16 Section 368 of the Crimes Act was repealed, on 1 July 2013, by s 6 of the Crimes Amendment Act. It has been replaced by s 113 of the Criminal Procedure Act, which is in similar terms. Like with s 389 of the Crimes Act, s 368 applies to this proceeding: see above n 4.

17 *Rapana v R* [2015] NZHC 2286 at [14]. The application in *Rapana* was made under s 113 of the Criminal Procedure Act, however, Edwards J summarised the principles from the cases of *McGinty v Attorney-General* [2001] NZAR 449 (HC) at [18]–[19] and *R v Wilson* [1997] 2 NZLR 500 (HC) at [504]–[511], both of which were decided under the Crimes Act. The appellate courts have approved this formulation of the principles: this Court in *Crook v R* [2020] NZCA 148 referred to *Rapana* when dealing with a s 113 application, leave was then sought in the Supreme Court but was declined, with the Court saying that this Court "applied settled authority to [the] facts", *Crook v R* [2020] NZSC 86 at [19].

(a) Applications will be rare and infrequent.

(b) The interests of justice include but are not limited to considerations of fairness to the defence.

(c) It is the prosecutor's responsibility to decide what witnesses to call, subject to a duty to act fairly towards the accused. That involves putting the Crown case fairly.

(d) The court will not interfere with the Crown's discretion unless it can be demonstrated that the prosecutor has been influenced by some improper or oblique motive.

(e) The Crown may decide not to call a witness because it regards the evidence as untrustworthy, unreliable or incapable of belief.

(f) The court should bear in mind the distinction between the respective functions of the prosecutor and the judge.

(g) In many cases it will be sufficient for the Crown to discharge its duty by offering details of the witness to the defence so that the defence may call the witness.

[16] While that approach is of some assistance, there is in our view a material difference between the Crown's obligation to call witnesses in a trial and its role as respondent in an appeal.

Submissions

[17] Mr Chisnall submits it is necessary or expedient in the interests of justice to make the order. He says the Report is fresh, credible and cogent, and will assist the Court in determining the appeal.

[18] Mr Chisnall notes there is no authority supporting the proposition that the fact the document in issue was commissioned by a party to the proceedings prevents the

Court from making the order sought. He submits that the interests of justice test under s 389 is open-textured. The requirement the document be directly connected with matters in issue on appeal is clearly met, in his submission.

[19] Mr Chisnall points out that Dr Kovera was engaged by the Crown to assess the evidence of Mr Watson's visual identification experts, and that the Crown intends to assert that Mr Watson has not proved the "key facts" underpinning their report, as well as submitting that their report is not admissible. Mr Chisnall suggests that there are implications of the Crown's approach — particularly given that Dr Kovera reached the same conclusion as Drs Wells and Quigly-McBride — that the identification evidence is unreliable. In Mr Chisnall's submission, if the Crown proposes to test the appellant's experts and submit their evidence is not credible or cogent given the assumptions or facts underlying their conclusions, then it has a duty to put the same propositions to Dr Kovera.

[20] Further, Mr Chisnall says that "suppressing" the Report is not consistent with the Crown's overarching duties as a model litigant to act in a fair, detached and objective manner.[18] He rejects the Crown's proposal that Dr Kovera's summary conclusion be adduced as evidence "if Dr Kovera is not ultimately before the Court at the appeal". He regards that as unsatisfactory, saying the Report must be before the Court in its entirety rather than part of its conclusion only.

[21] Mr Chisnall then contends that the Crown's argument that the Report is now before the Court in any event is tacit acceptance that the Court can take it into account. If so, in his submission, the Crown has a duty to require Dr Kovera for cross-examination given its position that she also relied on incorrect key facts and therefore her evidence is inadmissible.

[22] Finally, Mr Chisnall notes the Crown contention that all three experts raise an important issue as to how far expert evidence can go which, in his submission, reinforces that an order for production of the Report is in the interests of justice.

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[18] See Crown Law Office *Solicitor-General's Prosecution Guidelines* (1 July 2013) at [1.3].

[23] The Crown says that the application is improper. Ms Laracy, for the Crown, notes that there has been disclosure of the Report and it addresses facts the Crown is willing to put before the Court. Dr Kovera's evidence aligns with the appellant's expert evidence. Dr Kovera does not offer materially different conclusions and does not fill a critical evidential gap. In Ms Legacy's submission, the supplemental powers in s 389 should not be used unless it is necessary, in the interests of justice, to fill some critical gap, which is generally a gap the parties cannot themselves address. Ms Laracy notes that Mr Chisnall has the Report and the ordinary fresh evidence procedures are available. Mr Watson can call Dr Kovera himself. The application under s 389 is therefore misconceived. Moreover, it will generally be unjust and a distortion of the adversarial process to require the Crown to call a witness on whose evidence it does not rely and whom it would seek to impugn. It is for the Crown to decide what evidence it adduces and whom it calls, noting that almost all case law concerning the power of the court to direct the Crown to call a witness arises in the trial context.

[24] The Crown says it is not "suppressing" any evidence. The Report is an opinion from a foreign expert obtained by the Crown to inform its position and it is for the Crown to decide what to make of it and whether it considers the Report useful. Ms Laracy explains that the Crown was under time pressure in obtaining an expert opinion to inform the Crown's thinking on the issue of identification. It considered Dr Kovera's focus on Mr Wallace's memory was too narrow and did not take into account the full context of what he had seen and heard that night. For that reason, the Crown simply asked Dr Kovera to complete her Report but decided not to call her. It then disclosed the Report to the appellant for him to make his own decisions as to whether and the extent to which he would use it.

[25] Ms Laracy contends that the ordinary route for the appellant to put expert evidence before this Court on appeal — the law of fresh evidence — has clear advantages in terms of substantive fairness and procedural clarity: the evidence is put before the Court in admissible form by one party; the other party is entitled to test it by cross-examination; and the Court stands outside the process of obtaining the evidence on which it must adjudicate and is not required to form a view on the evidence until it has been properly tested.

[26] Ms Laracy also maintains that the Report has now been produced, given it was attached to Mr Watson's application. But, she says, simply because it has been produced does not mean that the Report is admissible. It now needs to be decided whether and how the Report can be used in evidence and whether an order under s 389(b) ordering Dr Kovera to attend the hearing and be cross-examined should be made. This is in the face of Mr Chisnall's concession that, if the Court makes an order under s 389(a), an order under s 389(b) will not be required.

[27] Ms Laracy says the Crown has made a limited concession that Dr Kovera's summary conclusion can be adduced as evidence. That does not mean the Crown agrees her conclusion is correct, given the Crown's view that the reasoning process and factual foundation to support her conclusion are questionable to the extent the Crown is not confident of it.

[28] Ms Laracy notes there is very little difference between all three experts in respect of the social science on identification and the Crown does not dispute that. The Crown does not maintain that the whole of the appellant's expert evidence is inadmissible but questions the extent to which the experts' conclusions are admissible. The Crown's position is that the conclusions of all three experts exceed those which experts can properly draw and are therefore inadmissible. That will be the subject of Crown submission at the substantive hearing.

Discussion

[29] We accept that the Report is "connected with the proceedings". It has bearing on the reliability of the eyewitness identification, which is a ground of appeal, suggesting it was unreliable and is supportive of the appellant's report jointly authored by Drs Wells and Quigley-McBride.

[30] However, the power under s 389 of the Crimes Act is not to be exercised lightly. Production of the Report will be ordered if it is "necessary or expedient" in the interests of justice and if its production is "necessary" for the determination of the appeal. We are not satisfied it is.

[31] We do not accept Mr Chisnall's submission to the effect that, in light of the Crown's overarching duty of fairness, the Crown should present Dr Kovera's report because her opinion may have the tendency to undermine the arguments the Crown wishes to make in resisting Mr Watson's appeal. We say that in particular given the Crown's agreement that it does not object to a summary of Dr Kovera's conclusion being adduced as evidence as follows:[19]

> For the purposes of this appeal, the Crown accepts that Dr Margaret Bull Kovera,[20] a United States based expert on the science of visual identification procedures in criminal proceedings, concluded on the basis of material provided to it by the Crown[21] that … *Taken together, in my opinion, there is substantial evidence that there were factors present in this case that could have adversely affected [Mr Wallace's] ability to make a correct identification. In part, my concern with the reliability of the identification stems from the suggestive practices with which the police collected the identification evidence (suspect biased lineup composition, non-blind administration of the photo array procedure, and repeated identification attempts with the same suspect and witness)* …

[32] We consider that concession appropriate and helpful in the circumstances. That the concession depends upon Dr Kovera not being before the Court at the appeal is understandable — if she is to appear, it will be because the Report has been adduced in evidence. Ms Laracy says, in that case, the Crown will test Dr Kovera's approach and conclusions in respect of the issues the Crown has raised in relation to all three experts.

[33] The Crown has acknowledged that Dr Kovera's evidence aligns with the appellant's expert evidence, saying she does not offer materially different conclusions. Ms Laracy says that many aspects of the Report are reliable and consistent with general principles discussed in the expert evidence filed by the appellant. The Crown will not contest such matters and Ms Laracy says they are largely matters of accepted scientific expertise concerning environmental/contextual and procedural factors that, if present, may make a visual identification more likely to be unreliable.

[34] Given the Crown's approach, we cannot agree that the production of the Report is "necessary for the determination" of the appeal. The Crown is formally on record

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19 Footnotes and emphasis original.
20 Credentials to be set out from her report.
21 To be specified by item. The appellant already has this information.

as conceding that Dr Kovera's conclusions are consistent with those of the appellant's experts.

[35] The challenge to the material relied on by all experts underpinning their conclusions is a separate matter to be dealt with at the appeal. As the Crown has acknowledged, Dr Kovera appears to have relied on the same material. The concerns the Crown identifies relate to the adequacy and accuracy of the factual findings and/or analysis for some of their opinions, the proper scope of expert opinion evidence given the central issue is whether the identification evidence should have been admitted at trial, and the conclusions the experts have drawn. In particular, the Crown will submit that aspects of the experts' evidence are inadmissible because they exceed the limits of what expert evidence can properly address.

[36] We are not convinced by Ms Laracy's argument that the Report has already been produced for the purposes envisaged by s 389(a), which requires an order of the court for production of a document which appears to the court to be necessary for determination of the case. In any event, we do not need to take this submission any further, given our clear view that, if the appellant wishes the Report to be adduced in evidence, then it is a matter for him to call Dr Kovera following the requisite procedural steps.[22] The Crown points out that Dr Kovera has never been a Crown witness or deponent and it claims no "property" in Dr Kovera.

[37] The current approach to fresh evidence is governed by *Lundy v R*.[23] While the decision in *Lundy* was issued after s 389 was repealed,[24] the "three step sequential test involving the issues of credibility, freshness, and admissibility" is appropriate.[25]

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22 In order to adduce fresh evidence on appeal, the appellant must file and serve an affidavit that complies with r 12B of the Court of Appeal (Criminal) Rules 2001.

23 *Lundy v R,* above n 5, at [120], recently affirmed by this Court in *Kriel v R* [2024] NZCA 45 at [100].

24 Section 389 of the Crimes Act was repealed on 1 July 2013. *Lundy v R,* above n 5, was issued on 7 October 2013.

25 *Collins v R* [2014] NZCA 342 at [35], referring to *Lundy v R*, above n 5, at [120]. See *Ellis v R* [2021] NZSC 77, (2011) 29 CRNZ 749 at [33] for an example of the Supreme Court applying the *Lundy* test for fresh evidence to proceedings commenced before that decision was delivered. We note that the overriding test is what the interests of justice require (*Lundy v R* at [119]) and as such in the case of a Governor-General's reference the freshness and credibility criteria may be less rigorously applied: *Redman v R* [2013] NZCA 672 at [25], citing *R v Haig* (2006) 22 CRNZ 814 at [53].

[38] It may well be, given the Crown's concessions, that the appellant will decide it is unnecessary to seek to adduce the Report as fresh evidence, but it is obviously a matter for the appellant. We acknowledge the legal aid considerations to which Mr Chisnall refers but, in the context of the significance of this appeal, we would expect legal aid would not be a barrier to the engagement of Dr Kovera.

Result

[39] For the reasons given, the application is declined.

Solicitors:
K3 Legal Limited, Auckland for Appellant
Te Tari Ture o te Karauna | Crown Law Office, Wellington for Appellant