IN THE COURT OF APPEAL OF NEW ZEALAND

CA4/2017
[2017] NZCA 466

BETWEEN	RICHARD LYALL GENGE Applicant
AND	THE QUEEN Respondent

Hearing: 2 October 2017

Court: Winkelmann, Wylie and Whata JJ

Counsel: C J Tennet and S J Fraser for Applicant
M J Lillico for Respondent

Judgment: 18 October 2017 at 10.30 am

JUDGMENT OF THE COURT

The applications to withdraw the notice of abandonment and to extend time to appeal are declined.

REASONS OF THE COURT

(Given by Winkelmann J)

[1] On 13 October 1995 Mr Genge, along with Messrs Samuel Kirner and Michael October, was convicted of the rape and murder of Ms Anne Marie Ellens. Mr Genge was sentenced to life imprisonment for the murder which included a minimum period of imprisonment of 15 years, with 12 years for the rape to be served concurrently.[1]

[1] *R v Kirner* HC Christchurch T43/95, 25 October 1995 at 2–3 [Sentencing notes].

[2] Mr Genge filed an appeal shortly after trial, but only against the rape conviction and the imposition of a minimum period of imprisonment for the murder. His application for legal aid was granted for the sentence appeal but declined for the conviction appeal. He abandoned both appeals prior to hearing in early 1996.

[3] Mr Genge now applies for orders setting aside the notice of abandonment and granting him leave to pursue the appeals earlier abandoned. He also seeks leave to bring appeals out of time in relation to the murder conviction and rape sentence.

[4] He claims that his decision to withdraw the appeals in respect of the rape conviction and the murder sentence was affected by a wrongful process employed at the time by this Court in dealing with criminal appeals by those reliant on legal aid — a process later described by the Privy Council in *R v Taito* as "a fundamentally flawed and unlawful system".[2]

[5] As to the proposed appeals against the murder conviction and sentence for rape, Mr Genge acknowledges they are filed very late (more than 20 years out of time), but says that he should be granted leave to bring the appeals because the Court should not allow miscarriages of justice to go unaddressed.

[6] The issues before us are as follows:

(a) Should the notice of abandonment for the murder sentence and the rape conviction be set aside and Mr Genge be given leave to pursue those appeals?

(b) In respect of the proposed murder conviction and rape sentence appeals, should leave be granted to Mr Genge to bring those appeals out of time?

[7] Mr Genge's current status is that he is a serving prisoner. Although he is eligible for parole he has, to date, been declined it.

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2 *R v Taito* [2003] UKPC 15, [2003] 3 NZLR 577 at [21].

Background

[8] We have taken the following description of the offending from the decision of this Court in *R v October* on the conviction appeals of Mr Genge's co-offenders — Messrs October and Kirner.[3]

[9] On the morning of 17 September 1994 the body of Ms Ellens was found in the grounds of Christchurch East School, lying on concrete steps leading down from a verandah in front of some classrooms.

[10] In the pathologist's opinion, the pattern of her scalp and brain injuries indicated a ferocious and prolonged assault. She had been held by the hair and her head had been repeatedly bashed against the edge of the steps. There had been further blows, probably with a fist, to the front of the head and face and others to the side of the head — probably violent kicks with relatively soft footwear. There was evidence of recent forceful vaginal penetration. The pathologist's examination revealed bruising to the neck, shoulders, arm and left hand in a pattern consistent with Ms Ellens being forcibly restrained for the purposes of sexual violation.

[11] Other injuries indicated that Ms Ellens had been dragged on her back while conscious, with her jeans still in place. Injuries to the hip and thigh area probably represented kicks from footwear occurring after the jeans had been removed. In the pathologist's opinion most of the injuries occurred at or about the time of death, only one being identified which preceded death by at least half an hour.

[12] Messrs October, Kirner and Genge were charged with Ms Ellens' rape and murder and went to trial in the High Court at Christchurch over a period of two weeks in October 1995.

[13] In the course of trial, Mr Genge gave evidence that he and Mr Kirner met up with Ms Ellens on the corner of Asaph Street. Mr Genge said that he had consensual intercourse with Ms Ellens at the school. Afterwards he went to a drinking fountain and had a wash. When he returned he saw Mr Kirner having sex with Ms Ellens; he

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3 *R v October* CA477/95, 31 July 1996.

did not like this and proceeded to attack him. After Mr Kirner had run off, Ms Ellens was angry that Mr Genge had attacked Mr Kirner. She shouted at Mr Genge and struck him. Mr Genge said he did not remember punching and kicking Ms Ellens but accepted that must have happened. Upon realising she was dead, he picked up his bag and a bottle of whisky and ran off.

[14] Mr Genge said that he met up with Mr Kirner again and they returned to his home together. Mr Genge accepted that his actions caused Ms Ellens' death but said that neither he nor anyone else had raped her. He denied Mr October was with them that evening.

[15] Under cross-examination at trial, Mr Genge agreed that he had pulled off Ms Ellens' boots while they were done up and that he had helped to pull off her pants and underclothes together. He agreed that he could have dragged her onto the verandah. Also under cross-examination, Mr Genge agreed he had put his hands between Ms Ellens' thighs after he had assaulted her, for reasons he could not explain. Mr Genge could not explain how blood came to be found on her underwear. The evidence against Mr Genge included forensic evidence in the form of a fingerprint on a blood-smeared pipe, linking him to the crime scene and pointing to his presence at the time of infliction of injury on Ms Ellens.

[16] There were three relevant eyewitnesses, including one who had seen three men leading a woman in the direction of the school, with one man holding the woman by the wrists as she was trying to pull back. Although the witness was able to identify Mr October, she did not identify either Mr Kirner or Mr Genge.

[17] All three men were convicted of rape and murder. On 10 November 1995 Mr Genge appealed his conviction for rape and the minimum period of imprisonment imposed on him in respect of the murder. In December 1995 Mr Genge was advised that legal aid was declined for the conviction appeal but allowed for the sentence appeal. On 15 February 1996 Mr Genge abandoned both appeals and they were formally dismissed by this Court on 20 February 1996.

Relevant principles

[18] The test to be applied to applications to extend time to appeal under s 388(2) of the Crimes Act 1961 (the relevant legislative provision in this case) was discussed by this Court in *R v Knight*:[4]

> The touchstone is the interests of justice in the particular case. The discretion must be exercised in accordance with the policy underlying the legislative provisions. The feature which provides the reason for the time-limit for appealing set by s 388(1) is the interest of society in the final determination of litigation. That necessarily carries through as a powerful consideration in determining whether leave should be granted under s 388(2) to appeal out of time.

[19] The Court went on to outline specific considerations that should be taken into account:[5]

> Reflecting the policy underlying s 388, the starting point must be the principle that a conviction obtained according to law as it was then understood and applied should stand. Leave to appeal out of time on the ground that there has been a restatement of the applicable law should be granted only where special circumstances can be shown to justify a departure from the principle of finality. The applicant must demonstrate some special feature or features particular to the case that lead to the conclusion that in all the circumstances justice requires that leave be given. Amongst the considerations which will also be relevant in that overall assessment are the strength of the proposed appeal and the practical utility of the remedy sought, the length of the delay and the reasons for delay, the extent of the impact on others similarly affected and on the administration of justice, that is floodgates considerations, and the absence of prejudice to the Crown.

[20] The test to be applied to applications to set aside a notice of abandonment of appeal echoes these considerations. In *R v Cramp* this Court confirmed that a notice of abandonment could be set aside in exceptional circumstances and if the interests of justice so required.[6] In *R v Bridgeman* the following considerations were identified as relevant to the assessment of whether exceptional circumstances exist:[7]

> … the Court will have regard to the importance of finality in criminal cases, the circumstances in which the Notice of Abandonment was given, and the necessity for an applicant for such an order to satisfy the Court that the reasons for the application are of an exceptional nature.

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4 *R v Knight* [1998] 1 NZLR 583 (CA) at 587.
5 At 588–589.
6 *R v Cramp* [2009] NZCA 90 at [26].
7 *R v Bridgeman* CA87/04, 10 November 2005 at [9].

[21] Again the interests of justice are key. The merits of the proposed appeal may also be taken into account.[8]

Should the notice of abandonment for the rape conviction appeal and murder sentence appeal be set aside?

[22] The following considerations are relevant to Mr Genge's application and in particular to the Court's assessment of whether it is in the interests of justice to set aside the notice of abandonment:

(a) the circumstances in which Mr Genge abandoned the appeal;

(b) the extent of the delay, the reasons for it and the impact of that delay; and

(c) the merits of the proposed appeal.

The circumstances in which Mr Genge abandoned the appeal

[23] Mr Tennet for Mr Genge argues that the circumstances in which Mr Genge abandoned his appeal are exceptional, at least in respect of the rape conviction appeal. This is because Mr Genge's decision to abandon this appeal was made within the context of a criminal legal aid and appeal system which the Privy Council in *Taito* later found to be deeply flawed. The general procedure this Court followed at the time when an appellant could not afford legal representation was summarised in *R v Smith* as follows:[9]

> [8] … In brief, the practice for the determination of criminal appeals varied according to whether the applicant was represented by counsel (either privately instructed or through grant of legal aid) or not. For most appellants the availability of representation depended upon whether legal aid was granted. No case on appeal containing the trial transcripts, summing up, and sentencing notes was made available to appellants unless they were represented by counsel. The power to grant legal aid was conferred by legislation upon the Registrar of the Court, but was in practice exercised by three Judges of the Court who each considered the file separately. Where legal aid was declined and the appellant was not legally represented by privately retained counsel, the appeal was decided ex parte, without the

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8 *McCready v R* [2010] NZCA 596 at [13].
9 *R v Smith* [2003] 3 NZLR 617 (CA).

> appellant being present and on the papers. In effect, the opinions of the three Judges who considered the legal aid application on the papers became the decision of the Court on the substantive appeal. If written submissions had been received, a written ex parte judgment was prepared, usually by one of the Judges who had earlier declined legal aid and in the names of the three Judges who had considered legal aid. It was read out in Court, but the Bench did not necessarily include all or even any of the three legal aid Judges. If no written submissions were received, no written judgment or reasons were given. In that case, the appeal was formally dismissed at a sitting of the Court which did not necessarily include all or any of the legal aid Judges.

[24] In *Taito* the Privy Council held that the Crimes Act (the legislation under which criminal appeals were brought at the time) contemplated the preparation and forwarding of a case on appeal to each appellant, that the appellant was entitled to an oral hearing of the appeal, and that there would be a judgment by and in accordance with the opinion of the judges who had heard the appeal.[10] The Privy Council identified many deficiencies in the procedure followed by the Court. These included that there was no oral hearing of the appeal. Unrepresented appellants were not provided with the materials before the judges. The judges deciding the case often had little information, and in some cases the judges had already considered and determined the merits in the course of recommending the refusal of legal aid. The Privy Council referred to the process as "tabulated legalism" which discriminated against the unrepresented and was contrary to basic concepts of fairness and justice. It said it was not authorised by the legislation.[11]

[25] The Privy Council also commented on the processes followed in the Court in respect of applications for legal aid, at the time regulated by the requirements of the Legal Services Act 1991. The Board noted that s 15(1) of the Act did not entrust a dispositive decision to a judge of the Court of Appeal, but rather left the decision with a non-legally-qualified registrar who merely had to take into account the views of the judge.[12] The role of the three judges in advising that a legal aid application should be refused was not authorised by the statute and was at variance with the express provisions and scheme of the legislation.[13] The Board noted further that the practice of seeking the advice of three judges was inconsistent with the legislation because the role of the three judges of the Court of Appeal undermined the value of

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10 *R v Taito*, above n 2, at [12].
11 At [12].
12 At [15].
13 At [15].

the right of an appellant to seek a review by a single Court of Appeal judge of the decision to refuse legal aid.[14] In addition, no reasons were given for refusing legal aid.[15] The prospects of a single judge of the Court of Appeal upholding an application for review in the face of a unanimous view in favour of a refusal of legal aid by three Court of Appeal judges "must be minimal".[16]

[26] In *R v Smith* this Court addressed the implications of *Taito* for those whose appeals had been affected by the processes described.[17] This Court said it has inherent power to revisit its decisions in exceptional circumstances when required to do so by the interests of justice. It said that such power is part of the implied powers necessary for the Court to "maintain its character as a court of justice".[18] But recourse to that power must not undermine the general principle of finality:[19]

> It is available only where a substantial miscarriage of justice would result if fundamental error in procedures is not corrected and where there is no alternative effective remedy reasonably available.

[27] The Court acknowledged that those whose appeals were dismissed following the above procedure deserved to have their cases reopened:

> [69] The failure in procedure now accepted is unprecedented. What has happened needs to be confronted and set right. The Court must accept responsibility to do what it reasonably can in contacting those affected to advise them of their right to seek rehearing.

Mr Genge's 1995 appeal

[28] In November 1995 Mr Genge applied for legal aid and received the following advice:

> Your application for Criminal Legal Aid an appeal against conviction has been refused.
>
> Section 7 of the Legal Services Act 1991 provides that aid may be granted if it appears desirable in the interests of justice that it be granted. Section 15 requires the Registrar of this Court to consult with a Judge for the purpose of determining whether that condition has been met. After consideration by

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14 At [15].
15 At [18].
16 At [15].
17 *R v Smith,* above n 9.
18 At [36].
19 At [36].

> three Judges of the Court of Appeal it has been decided that in your case it has not been. This is because the grounds you wish to put forward are not substantial enough to justify the expense of a grant of legal aid and the costs of an appeal.
>
> You have 28 days in which to make written submissions in support of your appeal against conviction.
>
> Your application for legal aid for your appeal against sentence has been granted. Mr Ruth has been assigned as counsel.
>
> Both appeals will be heard by the Court on Tuesday 20 February 1996.

[29] On 7 February 1996 Mr Genge's lawyer advised the Court that Mr Genge no longer wished to pursue his appeals. On 12 February 1996 the Registry sent a notice of abandonment form to Mr Genge to complete, which he duly did. On 20 January 1996 the Court of Appeal gave judgment that "Notice of abandonment having been filed the appeal is deemed to be dismissed".

Exceptional circumstances?

[30] Mr Tennet argues that because Mr Genge was declined legal aid for his appeal against his rape conviction under the flawed *Taito* process, he is entitled to have his appeal reinstated under the principles stated in *Smith*. Further, had he not abandoned his appeal, it was almost certain his appeal against conviction would have been dismissed. This is therefore a clear case for the Court to grant his application to withdraw his notice of abandonment and to allow a re-hearing of the appeals.

[31] The substance of Mr Tennet's argument was that Mr Genge only has to establish that his 1995 appeal was processed using the system ruled unlawful in *Taito* for him to succeed with his application to set aside the notice of abandonment. We do not accept that is so. Mr Genge is not in the position of the appellants addressed in *Taito* and *Smith* whose appeals were dismissed after they were deprived of a hearing of their appeal because of fundamentally flawed processes. Mr Genge chose to abandon his appeal. He does not claim to have abandoned his appeal because he knew that dismissal of his appeal was inevitable.

[32] There is another aspect to Mr Genge's situation which must be addressed. It is this: the decision declining Mr Genge legal aid was affected by the improprieties

identified in *Taito*. Three judges were consulted, a procedure not allowed for in the relevant Act, and no reasons were given for the refusal — other than a failure to meet the statutory threshold. This rendered the decision refusing legal aid unlawful. However, it is not clear to us that Mr Genge was actually adversely affected by these deficiencies. He did not seek to review the decision and, as the Privy Council observed in *Taito*, it was on review that the departure from the statutory scheme in the Court of Appeal processes became truly problematic.[20] Nevertheless, we accept that a defective decision in connection with legal aid is a matter that Mr Genge can point to in support of his application.

[33] As to the sentence appeal, we have the advantage of the original notice of application filed by Mr Genge and his evidence as to the reasons for his abandonment. In his notice of application Mr Genge says that his lawyer filed the original appeal without his request and that he, Mr Genge, then "turned it down". He said his "co-offenders" convinced him he could abandon his appeal until a later date.

[34] In his affidavit in support sworn some time after the application was filed Mr Genge says:

> Because Legal Aid were not paying for my conviction appeal I abandoned my sentence appeal. This was done in prison without talking to David Ruth [his lawyer], the prison staff involved, who helped me sign the Abandonment papers said I could appeal at a later date with a different lawyer. Because I was dissatisfied with David Ruth's representation and conduct I thought that was my best choice.

[35] There is a suggestion in this evidence that Mr Genge's decision to abandon his sentence appeal was linked to the refusal of legal aid for the conviction appeal. We do not, however, see any logical link between a refusal of legal aid on one and abandonment of the other.

[36] Mr Genge also links the abandonment to dissatisfaction with counsel and his belief he could pursue an appeal at a later date with new counsel. Mr Genge gave evidence before us that he was told by the prison officer who witnessed his signature that he could appeal at a later date if he abandoned his appeal. He was challenged on

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[20] *R v Taito*, above n 2, at [15].

this account under cross-examination, on the basis that the notice of abandonment he signed contained the statement:

> [I] do hereby give you notice that I do not intend further to prosecute my appeal, and I hereby abandon all further proceedings in regard thereto as from the date hereof.

[37] It may well be that Mr Genge abandoned his appeal because he was unhappy with his counsel, but we are not satisfied that he did so in the mistaken belief that he could revive it at a later time. The chronology reveals that he was still represented by counsel at the time he decided to abandon the appeals as it was counsel who conveyed this information to the Court. Mr Genge signed a document containing a clear statement as to its final effect. The notice of abandonment is not a lengthy document and there is nothing in the evidence before us to suggest that Mr Genge had, at the time, any difficulty in reading and comprehending documents such as this. Although he says he did not get School Certificate until he was in his thirties, he accepted on cross-examination that he was attending a polytechnic course at the time of the offending. We are satisfied that, having read that form and signed it, Mr Genge would have understood the effect of what he was doing was to bring to an end his ability to challenge his murder sentence and rape conviction.

[38] We draw support for this conclusion from Mr Genge's failure to follow through on his claimed intention to bring another appeal until the present application filed nearly 21 years later. Mr Genge says he cannot remember when he first tried to appeal, but he has been "asking for trial paperwork for more than 10 years". Given the time that elapsed between the abandonment and this application, we infer that there was lengthy delay before he took any steps to pursue a further appeal.

The extent of the delay and the reasons for it

[39] The delay in this case has been extreme. Mr Genge's explanation for the delay is his difficulty in instructing counsel to assist him with his appeal, and also the difficulty he had in assembling material because of the passage of time.

[40] While the Crown fairly concedes it is difficult for serving prisoners to engage and instruct legal counsel, in our view those difficulties justify a delay in the order of

months — not a delay to be measured in decades. Nor does the absence of legal assistance explain the delay in at least filing a notice of appeal or, in this case, a notice of application to set aside the abandonment. Ultimately Mr Genge did just that. He filed the notice himself. There is no indication why he could not have done so some 21 years earlier.

[41] Delay is a relevant consideration because of the principle that there should be finality in proceedings and because of the prejudice that delay causes to the due administration of justice. We accept Mr Tennet's point that delay is a much lesser consideration in connection with sentence appeals, as there is no question of a witness giving evidence again. But the impact of delay in this case is particularly potent in connection with the conviction appeal. A delay of 21 years would, we consider, cause prejudice to any renewed prosecution. Part of the Crown case relied upon eyewitness evidence. We do not accept Mr Tennet's contention that the ability for a witness under the Evidence Act 2006 to refresh their memory from earlier evidence is a complete answer to this prejudice.

Merits of the proposed appeal

Sentence — minimum period of imprisonment

[42] Mr Tennet accepts that Mr Genge has now served more than the minimum period of imprisonment of 15 years. Nevertheless he says the proposed appeal is not moot, as the impact of the minimum period of imprisonment continues to provide context when Mr Genge applies for parole. That may be so, but we do not treat the minimum period as operating directly to constrain Mr Genge's liberty.

[43] The Crown says that whilst the minimum period was stern in the context of the time, given the exceptionally cruel nature of the offending it was appropriate and there is no basis for an appellate court at this distance from the offending to depart from it.

[44] The minimum sentence was imposed under s 80 of the Criminal Justice Act 1985, although the particular provision was added in to the Act in 1993. At the relevant time s 80 provided:

80 Minimum periods of imprisonment

(1) Subject to subsections (2) and (3) of this section, where a court sentences an offender to an indeterminate sentence, it may, at the same time, order that the offender serve a minimum period of imprisonment of more than 10 years.

(2) The court shall not impose a minimum period of imprisonment under subsection (1) of this section unless it is satisfied that the circumstances of the offence are so exceptional that a minimum period of imprisonment of more than 10 years is justified.

(3) Where the court imposes a minimum period of imprisonment under subsection (1) of this section, the duration of the period imposed shall be the minimum period that the court considers to be justified having regard to the circumstances of the case, including those of the offender.

(4) Where a court sentences an offender to a term of imprisonment of more than 2 years for a serious violent offence, it may, at the same time, order that the offender serve a minimum period of imprisonment.

(5) The court shall not impose a minimum period of imprisonment under subsection (4) of this section unless it is satisfied that the circumstances of the offence are so exceptional that the imposition of a minimum period of imprisonment that is longer than the period otherwise applicable under section 89 or section 90 of this Act, as the case may be, is justified.

(6) The duration of the period imposed under subsection (4) of this section shall be the minimum period that the court considers to be justified having regard to the circumstances of the case, including those of the offender, but in no case shall the period exceed—

(a) The period beginning on the commencement of the sentence and ending 3 months before the sentence expiry date; or

(b) Ten years,—

whichever is the lesser.

(7) Where the court makes an order under this section, it shall give the offender written reasons for so doing and the offender may appeal against the imposition of the minimum period of imprisonment in the same manner as he or she may appeal upon conviction against the sentence or sentences imposed.

[45] The proposed grounds of appeal state that the sentence was manifestly excessive and not justified under s 80. In his notice of application, Mr Genge links this point to the minimum periods of imprisonment imposed on offenders who have killed multiple victims, and to the fact that neither of his co-offenders received a

minimum period.[21] He also says the Judge was wrong to describe him as a ringleader. In submissions before us Mr Tennet took the matter no further.

[46] The Judge who sentenced Mr Genge, Fraser J, was satisfied that the circumstances of the case were so exceptional that a minimum period of imprisonment of 15 years was justified.[22] The Judge had the advantage of sitting through the trial and hearing all of the evidence and so was well placed to form a view as to this. On our assessment of the offending, he was correct to so characterise it.

[47] The Judge did distinguish between Mr Genge and the other offenders on the grounds that Mr October and Mr Kirner were only convicted as parties in respect of the murder. As noted, he did not impose a minimum period on the co-offenders. The Judge cannot be faulted in his approach. On the facts it was clear that Mr Genge was the principal offender in respect of the charge of murder. In his evidence he admitted he was responsible for the injuries caused.

[48] The ability to impose a minimum period of imprisonment upon an offender sentenced to an indeterminate sentence was only introduced in September 1993. There are therefore not many sentencing decisions in connection with that provision, which was replaced by s 103 of the Sentencing Act 2002. The Crown drew our attention to the case of *R v Wilson*, in which this Court reduced a minimum period of imprisonment from 15 years to 13 years.[23] But in that case the Court found that the sentencing Judge had given too much weight to the risk the offender presented to others, in the absence of any background indicating an underlying potential danger to other persons.[24] That is not a deficiency that can be pointed to in this case. We do not see *R v Wilson* as assisting Mr Genge.

[49] To conclude on this point, we consider that the proposed appeal against the minimum period of imprisonment is without merit. Moreover, the minimum period has expired. These are factors we see as weighing against the grant of leave.

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21 Sentencing notes, above n 1, at 2.
22 At 2.
23 *R v Wilson* [1996] 1 NZLR 147 (CA).
24 At 152.

Rape conviction

[50] In relation to the proposed grounds of appeal in connection with the rape conviction, Mr Tennet submits simply that the jury verdict was unreasonable. He says this because of Mr Genge's evidence at trial that he admitted having sex with the victim and his claim that it was consensual.

[51] As the Crown submits, there is no attempt by Mr Tennet to articulate in what respect the verdict is unreasonable and, in particular, in what respect there was a deficiency in evidence. His argument seems to be no more than that the jury could not reasonably convict in light of Mr Genge's evidence that the sexual intercourse was consensual.

[52] The test for an appeal based upon the ground that the jury's verdict was unreasonable (under s 385(1)(a) of the Crimes Act) was clarified by the Supreme Court in *R v Owen*:[25]

> [A] verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.

[53] On our review of the evidence it is clear that threshold is not met. In fact, this was a strong Crown case. The jury was not bound to accept Mr Genge's evidence on the point of consent. Mr Genge's evidence was challenged in cross-examination. The jury also heard evidence which was strongly probative of an absence of consent. There was evidence from an eyewitness who, on the night of the offending, saw three men with Ms Ellens. One of the men was restraining her by the wrists whilst she appeared to be trying to pull away. Ms Ellens was brutally assaulted sometime after that. That assault lead to her death. This evidence provided critical context for the post-mortem evidence of the pathologist that he found injuries three centimetres into Ms Ellens' vaginal canal which "[had] to be associated with a penetrative injury". He described injuries consistent with Ms Ellens being restrained during intercourse. There was also evidence of bloody marks in her groin area, consistent with her being assaulted before or during intercourse.

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[25] *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

Conclusion on application for leave to set aside notice of abandonment

[54] We accept that Mr Genge's application for legal aid was dealt with in accordance with procedures which have previously been found to be outside the legislative scheme of the Legal Services Act. We do not consider that he was prejudiced by the non-compliance with the scheme beyond the simple fact of non-compliance in and of itself. Nevertheless we accept that a decision, unlawful and outside the statutory scheme, may have had some impact on his decision to abandon his conviction appeal.

[55] We are satisfied that Mr Genge knew the effect of abandoning the appeal and that he did not do so under a misapprehension as to his rights.

[56] We have concluded that, notwithstanding the issues in connection with the 1995 processing of Mr Genge's legal aid, it is not in the interests of justice that he be granted leave to withdraw the abandonment to enable him to pursue those same appeal rights. The delay in this case has been extreme, and Mr Genge has no excuse for it. The grant of leave in such circumstances would undermine the principle of finality in litigation. But most telling against the grant of leave is Mr Genge's failure to identify any viable ground of appeal that he wishes to pursue.

Should leave be granted to bring the proposed (murder) conviction and (rape) sentence appeals out of time?

[57] Mr Tennet conceded, and the Crown agreed, that Mr Genge had an insurmountable obstacle in respect of the proposed sentence appeal. Mr Genge was sentenced to 12 years in respect of the rape charge. That sentence has well and truly expired. Both counsel submitted that s 383(3) of the Crimes Act precludes such an appeal because of the expiry of his sentence.

[58] However, they are both wrong in this as that limitation only applies to appeals brought by the Solicitor-General. The fact that the sentence no longer operates to deprive Mr Genge of his liberty is of course material when considering where the interests of justice lie.

[59] Nevertheless we consider two factors weigh strongly against the grant of leave. The first is that Mr Genge has served the sentence, so that the appeal does not have implications for his liberty. Nor has it impacted on his liberty in the past as it was served concurrently with the minimum sentence of 15 years for murder. Second, no appeal was filed in respect of the sentence for rape, which strongly suggests that trial counsel did not identify any error in the sentence imposed.

[60] As to the appeal points in respect of the proposed murder conviction appeal, they read as follows:

(a) Mr Genge pleaded guilty after a wrong ruling or inadequate advice from counsel against the fact that he had a defence;

(b) Mr Genge was tricked into giving a DNA sample which should not have been admitted;

(c) Mr Genge should have had a separate trial because of the out-of-court statements of his co-defendant Mr Kirner; and

(d) the Judge substantially misdirected on intoxication, recklessness and intent.

[61] We accept the Crown's submission that none of these points are arguable. Mr Genge did not plead guilty, a fact now accepted by his counsel Mr Tennet. Mr Genge pleaded not guilty to the charge of rape and murder, gave evidence, and the jury entered verdicts of guilty against him.

[62] Mr Genge also argues that a pre-trial ruling by Tipping J as to the admissibility of DNA evidence was wrong.[26] Even were that so, the significance of the DNA evidence was that the DNA on Ms Ellens' vaginal swabs matched Mr Genge's. But Mr Genge gave evidence that he had had consensual sex with Ms Ellens. It was therefore not in issue that the DNA was Mr Genge's.

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[26] *R v Genge* HC Christchurch T43/95, 28 August 1995 [Tipping J decision] at 22.

[63] As to the issue of severance, it was applied for but abandoned by counsel for Mr Genge at trial, Mr Ruth. Tipping J observed that Mr Ruth was right in taking that course of action. He said:[27]

> The Crown's case is that the three Accused were involved in a joint course of criminal activity. It is in these circumstances difficult for one accused to obtain an order severing his trial from that of another.

[64] The Judge was of course correct in those observations. As this Court held in *R v Fenton*:[28]

> … there is a substantial public interest in having a joint trial of those who are said to have jointly committed a crime. The reasons are primarily to avoid the risk of inconsistent verdicts, to have all aspects of a joint enterprise considered at one and the same time, and to prevent duplication of time and effort for witnesses and the court system generally. This public interest will ordinarily outweigh the interests of an individual accused in not having inadmissible evidence before the jury.

[65] In this case the prejudice that trial counsel had identified in the notice of appeal is the impact of the out-of-court statements of Mr Kirner implicating Mr Genge. However, Tipping J ruled out those parts of Mr Kirner's video interview where statements prejudicial to Mr Genge occurred.[29] Mr Tennet conceded that in light of that fact, this proposed ground of appeal had real difficulty.

[66] Lastly, it was submitted that the Judge was in error in failing to direct on intoxication and its impact on murderous intent, which in this case was run on the basis of recklessness. However, we accept the Crown submission that on the facts of this case, no intoxication direction was called for. In the course of cross-examination it was put to Mr Genge that Ms Ellens was "fairly intoxicated". To that he replied "no, just the same as us". Further clarifying this answer he went on to say "we all knew what we were doing".

[67] We have reviewed the evidence Mr Genge gave at trial. His account of the offending was specific and detailed. He did claim to have had some sort of blackout during the course of the assault, but did not attribute that to his intoxication.

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27 At 22.
28 *R v Fenton* CA223/00, 14 September 2000 at [25].
29 Tipping J decision, above n 26, at 22.

The defence he ran in connection with the murder charge was that he had no memory of what he was doing during the course of the assault, and therefore could not have had the requisite mens rea for recklessness — he did not appreciate that Ms Ellens' death was a likely consequence of his actions.

[68] Fraser J directed the jury in connection with Mr Genge's blackout defence. He said as follows:

> It is contended on his behalf, both in his evidence and elaborated on by Mr Ruth in submissions, that Genge lost control. It was only when he snapped out of some sort of state he was in that he realised what he had done. He did not turn his mind to intent or the consequences of his act. He did not have, or at least there is reasonable doubt, whether he had the necessary intent.
>
> If you think it is true or it is reasonably possible, that is, it might be true, that he did not have at least one of these intents, then you should acquit him of the charge of murder and find him guilty of manslaughter.

[69] As to the Judge's direction on recklessness, it was that "the issue is did the accused actually appreciate that death was a likely consequence of his acts and was willing to run the risk?" We are satisfied that this was an orthodox direction and there is no error in it.

[70] Finally, as we have already noted, the delay in progressing these proposed appeals is extreme and there is no explanation for it. There is the added consideration that, although Mr Genge was represented by counsel on his appeal in 1995, he did not then appeal against his conviction for murder and sentence for rape. Again, we consider that the prejudice to the Crown which would accrue on any retrial is a factor that weighs heavily against the grant of leave.

Conclusion in connection with application for extension of time

[71] We have concluded that Mr Genge's application for an extension of time to bring appeals in respect of his conviction for murder and sentence for rape should be declined. The delay in bringing the appeal is extreme, Mr Genge has no explanation for it, and he has not identified a viable ground of appeal.

Result

[72] The applications to withdraw the notice of abandonment and to extend time to appeal are declined.

Solicitors:
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