COURT OF APPEAL OF NEW ZEALAND

THE QUEEN V DAVID CULLEN BAIN

CA312/2008
CA571/2008
CA572/2008
CA352/2008
CA672/2008
CA727/2008
CA769/2008

CASE SUMMARY

This summary is provided to assist in the understanding of the Court's judgments. It does not comprise part of the reasons for those judgments. The full judgment with reasons is the only authoritative document. The full text of the judgments and reasons can be found at Judicial Decisions of Public Interest
http://www.courtsofnz.govt.nz/from/decisions/judgments.html
Letters have been used to describe witnesses whose names were suppressed in the High Court.

David Bain filed six applications for leave to appeal against a number of pre-trial rulings by Panckhurst J. The Crown filed one application for leave to appeal against a pre-trial ruling of Panckhurst J. These applications were heard together with the proposed appeals in three separate hearings in late 2008. The Court of Appeal (William Young P, Chambers and O'Regan JJ) released three judgments prior to the commencement David Bain's retrial. Orders were made prohibiting their publication until final disposition of the retrial.

In *R v Bain* [2008] NZCA 455 the Court heard an application for leave to appeal against the Panckhurst J's refusal to recuse himself from the trial. The Court found it had no jurisdiction, and dismissed the appeal. The Court said David Bain would have a right of appeal on this basis if he was found guilty, but observed that in any event there was no merit in the recusal grounds.

In *R v Bain* [2008] NZCA 585 the Court held that the Evidence Act 2006 applied to the retrial. The Court then considered whether a transcript of the evidence that David Bain gave at the first trial was admissible in the retrial under the Evidence Act 2006. The Court held that, as the transcript was relevant and it was not unfair for the Crown to rely on the transcript, it should not be excluded. The Court also considered whether a document prepared by David Bain's counsel at the first trial, which contained a hand-written notation by David Bain to the effect that he had heard Laniet Bain gurgling when he went into her room in the morning of the murders, was admissible. David Bain had signed a waiver of solicitor-client privilege to facilitate his petition to the Governor-General to exercise the royal prerogative of mercy. The document was later adduced in evidence at the Privy Council hearing and recorded as a matter

of public record. The Court held that as a result there was a loss of confidentiality in the document and it was therefore admissible.

In its third judgment, *R v Bain* [2009] NZCA 1, the Court considered numerous appeals against pre-trial rulings of Panckhurst J regarding the admissibility of evidence. The challenges, some of which were successful, are outlined below.

Panckhurst J held that the Crown could lead the evidence of Marjory McCormick, a Victim Support officer as to David Bain's demeanour in the period after the killings. The Court overturned this ruling on the basis that the Judge should have given a direction, under s 69 of the Evidence Act 2006, that the communication between David Bain and Ms McCormick was confidential and should not be disclosed.

Defence counsel challenged the admissibility of the statement David Bain gave to the Police on 24 June 1994. The challenge was made on the basis that the statement was obtained in breach of the rights of a person arrested or detained under the New Zealand Bill of Rights Act 1990, and in breach of the Judges' Rules. The Court found that David Bain was not arrested or detained when he made the statement, and therefore the New Zealand Bill of Rights Act did not apply. The Court also rejected that the Judges' Rules had been breached as the interview could be not characterised as oppressive or a cross-examination, the propositions put forward in the questions were fair, and the interview was properly recorded.

The Crown sought to lead evidence that David Bain told two high school friends, Mark Buckley and Gareth Taylor, of his sexual interest in a young female jogger and how he could commit a sexual offence against her and use the timing of the paper round to exculpate himself. Mr Taylor later told his wife, Greer Taylor, of this conversation. Panckhurst J had ruled that the evidence of Mr Buckley was admissible, but the evidence of Mr Taylor was not. The Crown sought leave to appeal against the inadmissibility of Mr Taylor's evidence and the defence sought leave in relation to the admissibility of Mr Buckley's. The Court accepted the defence contention that there was limited probative value in Messrs Buckley and Taylor's evidence and this was outweighed by the risk of illegitimately prejudicing David Bain. As a result the Court ruled that the evidence was inadmissible.

Panckhurst J admitted evidence from police officers who re-enacted David Bain's paper round to produce outside parameters as to the time it would take to the complete the round. The defence challenged these evidence on the basis it was inadmissible opinion evidence of non-experts, irrelevant, unreliable and that its probative value is slight, by comparison to its unfairly prejudicial effect and tendency to needlessly prolong the hearing. The Court dismissed these objections as case law has established that pre-trial experiments are admissible provided they meet the standard legal requirements of admissibility, which the re-enactment did.

Defence counsel opposed the admission of a recording of the 111 emergency call made by David Bain which was remastered after the Privy Council decision. The recording included a series of disputed sounds, which can be construed as an inculpatory sentence. A number of experts listened to the tape to determine the whether the disputed sounds are speech or simply an audible out-breath that appears to sound like speech. The objection to this evidence is based on the recording being inauthentic and potentially prejudicial. The Court did not accept the alleged inauthenticity of the recording, and concluded it was relevant. However to minimise the risk of undue prejudice the Court accepted that the recording should be played to

the jury before they had been primed as to the existence of the disputed sounds. On appeal, the Supreme Court overturned this aspect of the Court of Appeal decision: *R v Bain* [2009] NZSC 49.

Counsel for David Bain also appealed against the admissibility of aspects of the following evidence:

- Observations made by three ambulance officers and two police constables regarding the state and appearance of David Bain on the morning of the murders. Defence counsel argued that the evidence was inadmissible opinion evidence, that parts of the evidence were unreliable, and that some of the evidence was more prejudicial than probative. The Court held that the evidence was admissible opinion evidence and was not unduly prejudicial, provided that any expertise claimed by the officers was qualified at trial. The Court also rejected an argument that evidence that differs in part from evidence given at an earlier trial is so unreliable that it must be excluded. However, the Court noted that this might affect the weight and reliability given to the evidence by the jury.

- The evidence given by Dr Pryde at the first trial, which Panckhurst J ruled could be read at the retrial as Dr Pryde has since died. Dr Pryde was a police doctor who checked the deceased for signs of life and also examined David Bain. The objections related to an assessment made by the doctor as to the age of bruising on David Bain and an observation that David Bain did not respond when asked how the injuries occurred breach a principle set out in *R v Halligan* [1973] 2 NZLR 158. The Court dismissed these objections on the basis that the doctor was qualified to make an assessment as to the age of bruising and that *R v Halligan* was not engaged in these circumstances. The Court noted that it was open to the defence to place before the jury the cross-examination of the doctor from the first trial.

- Evidence from Thomas Samuel, a prison officer who attended David Bain when he first arrived in prison. Mr Samuel gave evidence of David Bain's demeanour, marks on his body, and his failure to respond when questioned about the marks. Defence counsel challenged the evidence on the basis it was were inadmissible opinion evidence, unreliable, unduly prejudicial and breached the *R v Halligan* principle. The Court held that since Mr Samuel had no medical expertise evidence as to the age of the bruising was inadmissible. The Court also upheld defence counsel's objection to a statement as to David Bain's nervousness on the basis that it lacked probative value. However the Court held that the remainder of the evidence was admissible.

- Evidence from William Christie, a registered nurse who knew Robin Bain, that Robin Bain was not suffering from depression. Counsel for David Bain objected that Mr Christie was not qualified to give this evidence and that the Crown was not entitled to introduce evidence that focused on Robin Bain. The Court held Mr Christie appeared to be qualified to give evidence on depression and that the evidence was relevant to eliminating the possibility that Robin, not David, who was responsible for the murders.

- Evidence from Ingrid Dunckley, a registered psychologist, on the basis that she was not qualified to give the opinion evidence as to Robin Bain's demeanour and that her evidence about another psychologist amounted to rebuttal evidence. The Court held that Ms Dunckley was qualified to give opinion evidence but that her evidence relating to the psychologist should be deferred and led as rebuttal evidence if the other psychologist gave evidence for the defence.

- Evidence from John Mouat, who attended a choral workshop with David Bain a few before the murders. Defence counsel objected that the evidence was irrelevant, inadmissible opinion and propensity evidence. The Court concluded the evidence was neither opinion nor propensity evidence as defined by the Evidence Act 2006, and was relevant.

- Evidence from university friends of David Bain, Ms A and Ms B relating to intense conversations each had had with David Bain in the week prior to the murders. The Court rejected the submission that the evidence was irrelevant and unreliable, concluding that evidence as to David Bain's state of mind was relevant and that differences between witness briefs and evidence given at an earlier trial were jury matters. In relation to Ms A, the Court also rejected that the conversations were rebuttal evidence. The Court rejected defence counsel's objection that evidence from Ms B that David Bain had lied about having a tattoo was inadmissible propensity evidence. However, the Court encouraged counsel to confer as whether the crucial aspects of the evidence could be led without referring to the lie. The Court rejected the application of the *Halligan* principle to Ms B's evidence.

- Evidence from the Bain and Cullen family members on the basis it was unreliable, irrelevant and opinion evidence. The Court found the evidence was relevant as it related to the family relationships and apparent states of mind of Robin and David Bain, and that the issue of reliability was a jury matter. The Court held that while part of the evidence was admissible opinion evidence, counsel and the trial Judge were to prevent inappropriate opinion evidence being led at trial.

- Evidence from Billie and Wayne Marsh, neighbours of the Bain family. Defence counsel objected that this evidence was inadmissible propensity and opinion evidence. The Court accepted that the evidence should be restricted as to what the neighbours actually saw and heard, and exclude inferences drawn from those observations. However the Court concluded that the evidence was not propensity evidence under the Evidence Act 2006.

- Evidence from Ms C, a friend of Laniet and Arawa Bain. Objections were raised on the basis that the evidence was unreliable as Ms C had not given evidence at the first trial. The Court observed that evidence is not inadmissible simply because it was not heard at an earlier trial. Defence counsel also argued the evidence was speculative and contained assertions of guilt, and implied there was an inappropriate sexual relationship between Laniet and David Bain. The Court rejected these arguments on the basis that the evidence recounted conversations that Ms C had had with Laniet Bain, without any speculative or inferential comments, and that these conversations were relevant to the nature of the relationship between Laniet and David Bain.