IN THE COURT OF APPEAL OF NEW ZEALAND C.A.212/96

THE QUEEN

v

WING CHIU LEE

Coram: Gault J
Tompkins J
Heron J

Hearing: 22 August 1996

Counsel: J R F Fardell and K J Crossland for Appellant
J C Pike for the Crown

Judgment: 22 August 1996

JUDGMENT OF THE COURT DELIVERED BY TOMPKINS J

The appellant was charged that on or about 12 March 1992 at Auckland, he wilfully set fire to a building namely the second floor of the Commercial Building situated at 19 Great South Road, Newmarket, and he was further charged that on or about 13 March 1992 with intent to defraud, he used an NZI claim for the purposes of obtaining for himself a pecuniary advantage. Following a trial before a jury in the District Court at Auckland, he was, on 21 July 1995, found guilty of both counts. On 8 September 1995 he was sentenced to terms of imprisonment of two and a half years on the first count and one and a half years on the second and also sentenced to make reparation of $50,000. He was released on parole on 5 August 1996. The reparation has not been paid.

On 17 June 1996 the appellant applied for leave to appeal against his conviction out of time. He has also applied for leave to call evidence from Mr C R Barnett and Mr R Chan in support of the appeal.

The appellant is a Hong Kong Chinese immigrant. He does not speak English. He came to New Zealand with his family, including his son Roger Lee, on 13 March 1991. Roger Lee was aged 18 at the time of the trial.

The appellant commenced and was operating a radio paging business, Jets Radio Paging Ltd, from the second floor of 19 Great South Road, Newmarket. Sometime in late February or early March 1992, he arranged insurance over the premises of the business through Mr Richard Chan an insurance broker who was known to the appellant through the appellant's sister being employed by Mr Chan's company, Eastrain Insurance Brokers Ltd. Early in March a further loss of profits insurance was arranged through Mr Chan. On 12 March 1992 a fire broke out in the premises of Jets Radio Paging Ltd causing substantial damage. On 13 March 1992 the appellant made a claim on the NZI Insurance Co in reliance on the contracts of insurance that had earlier been arranged.

It was the Crown case that the appellant or somebody on his behalf had deliberately lit the fire and had fraudulently made a claim for insurance. The Crown case was circumstantial in the sense that there was no direct evidence to establish that the appellant had lit or had caused to be lit, the fire. In general terms, the circumstantial evidence was that the appellant's business was in financial difficulty, it had only 50 subscribers, computer equipment had been moved into the room where the fire commenced, there were a large number of toilet rolls which caught fire (they were against an uncovered air conditioning

unit), the fire insurance had been arranged 13 days before the fire and loss of profits insurance sooner, and smoke was observed coming from the premises shortly after the appellant had left it.

At the trial the appellant was represented by Mr Simon Lockhart QC and Mr Graeme Newell.

The Crown called evidence from Mr Merritt, a self employed investigator who had previously been a senior claims investigator and then chief fire and general assessor for the NZI Insurance. In those positions he had been investigating fires on a regular basis for some 17 years. He gave detailed evidence that supported a conclusion that the fire had been deliberately lit. Other evidence was called that tended to support this conclusion. We do not find it necessary to review this evidence in detail.

Mr Barnett is a consulting engineer and a director of an engineering firm. He has specialised as a professional fire engineer for 22 years. His evidence is that he was asked on 20 March 1996 to carry out a detailed study of the case and to express an opinion on the possible causes of the fire. In his detailed affidavit he challenges Mr Merritt's conclusion that the fire had been deliberately lit. It is Mr Fardell's submission that if this evidence had been before the jury, it may at least have caused the jury to have a reasonable doubt on whether the appellant had lit the fire.

The other evidence sought to be admitted is that of Mr Chan, the insurance broker who arranged for the insurances to which we have referred. The essence of his evidence is that neither he nor anyone in his office had confirmed to the appellant that the insurance proposal with the NZI had been accepted. This

evidence contradicts evidence given by Mr Davison, the assistant manager Auckland at the NZI, that the insurance was in place at the time of the fire. This evidence goes to an important issue, namely whether the appellant had a motive for deliberately lighting the fire.

The appellant's explanation for the delay in appealing is that it was, as he put it in his affidavit sworn on 26 June 1996, "only recently" that a member of the Hong Kong Chinese community took up the case and instructed a law firm with Cantonese speaking lawyers. It was following these instructions that the detailed report from Mr Barnett was obtained and some further information obtained from Mr Chan.

The principles upon which an application to call further evidence on an appeal are to be considered are not in doubt. The overriding consideration is the interests of justice. In general the evidence must be new or fresh in the sense that it was not available at the trial, relevantly credible and of a nature that if given with the other evidence adduced, might reasonably have led the jury to return a different verdict: *R v Fryer* [1981] 1 NZLR 748, 753.

Mr Barnett's affidavit discloses that some time prior to the trial, a Mr Watson who had taken an interest in the appellant's case, spoke to Mr Barnett about it. Mr Barnett was handed a report, presumably from Mr Merritt, and some photographs. Mr Barnett "skim read" the report and looked at the photographs briefly. He expressed the view to Mr Watson that the conclusion drawn in the report seemed to be reasonable. He informed Mr Watson that only a detailed study of the evidence and photographs could reveal if different conclusions could be reached. He was not engaged to do any work on the case. No fee was charged. He said this took about 5 to 10 minutes.

Mr Lee in his affidavit says in relation to this issue:

> "I was aware that before the trial the report of Mr Merritt, the main Crown expert, and some photographs had been shown by a family friend, Mr Watson, to a friend of his who was a consulting engineer. I learnt that as a result of that contact Mr Lockhart did not consider an expert could be called tousefully rebut Mr Merritt's report. Because of this I decided not to have an expert called on my behalf. This decision was also affected by the fact that I could not understand Mr Merritt's evidence and so I did not appreciate at the time its full importance and the need to have it properly assessed and rebutted."

Mr Fardell in his submissions made it clear that he did not submit that there was any failure by Mr Lockhart as counsel for the appellant in the preparation or presentation of the appellant's defence. It is his submission that Mr Barnett's evidence was not available at the trial because the appellant, partly through his inability to understand English, failed to appreciate the significance of the evidence that Mr Barnett could have given had he been properly instructed, and therefore the appellant instructed Mr Lockhart that no such expert evidence should be called.

We are not able to accept this submission. There is no evidence from Mr Lockhart concerning these events. Nor has there been provided to the Crown a waiver of professional privilege to enable the Crown to obtain evidence from Mr Lockhart. We have no knowledge of what factors Mr Lockhart considered in relation to the evidence he knew was to be given by Mr Merritt. It appears that he may have been made aware of Mr Barrett's preliminary opinion that Mr Merritt's conclusions appeared to be reasonable, but we are not aware whether he was also told of Mr Barnett's view that a detailed study of all the evidence would be necessary to determine whether a conclusion different from that of Mr Merritt's could properly be reached, or for that matter whether he obtained expert

evidence from some other source. In any event, it is obvious that Mr Barnett's evidence was not new or fresh. It was available at the trial had the defence elected to obtain a detailed opinion from him.

The same conclusion is inevitable in respect of Mr Chan's evidence. Mr Chan was not called by the Crown. It was of course well known to the appellant and his advisors that it was Mr Chan who was responsible for arranging the insurances. The evidence of Mr Davison that the insurances had been completed would have been known to the defence. Obviously, if his evidence were to be rebutted, it would be necessary to call Mr Chan. Again, in the absence of any evidence from Mr Lockhart, we have no material about why he was not called, except for a reference to Mr Chan meeting the appellant in the Georgie Pie Restaurant at Greenlane when the appellant apparently was angry with Mr Chan because he thought Mr Chan was going to give evidence adverse to his case. Again, Mr Chan's evidence was not new or fresh. It was available at the trial had the defence elected to call it.

Nor do we consider that this evidence should be admitted at this stage in the interests of justice. No convincing explanation has been given for the delay in commencing the proceedings. If the appellant or his advisors thought there had been a miscarriage of justice, we would have expected action on their behalf far more promptly than was the case. Further, the evidence of Mr Barnett is not conclusive. We do not propose to review it in detail. He was suffering under a considerable disadvantage because he did not have any opportunity to inspect the scene after the fire. Further, some of the conclusions that he has reached, for example relating to the possibility that the fire was caused through fluorescent lighting, must inevitably involve an element of conjecture. With reference to his view that the failure of a capacitor in the fluorescent lighting was the cause, his

comment is that "it is not inconceivable that a similar failure" could be the cause. Further, his conclusion that the fluorescent light may have been the cause appears to be contrary to the evidence of Mr Oust a consulting engineer who is a principal of a firm of electrical and mechanical consulting engineers, who inspected the premises the day after the fire. He described that inspection in detail. He said that he looked very carefully over a period of two days and could find no evidence of any electrical cause for the fire.

The appellant also relied on what he claimed to be difficulties with interpreters. Before his trial he had some ten meetings with Messrs Lockhart and Newell. At the first meeting it was decided that an interpreter should be obtained. Mr Lockhart obtained an interpreter for the second meeting. The appellant concluded that he thought that this interpreter's Cantonese was bad. At this meeting and at subsequent meetings there was no interpreter and Mr Lockhart used the appellant's son Roger to do the interpreting. Roger said to the appellant that Mr Lockhart believed that Roger's English was good enough for this. The appellant accepted this assessment. He now doubts whether Roger's English was really sufficient to communicate adequately between them.

Again we are unable to accept this evidence as a convincing reason for allowing further evidence to be given in the absence of Mr Lockhart's account of these interviews. If there were any real difficulties in Roger interpreting for the purpose of these meetings, those difficulties would have been apparent to Mr Lockhart. In that event we would have expected evidence from Mr Lockhart to that effect.

We are satisfied that no sufficient grounds have been made out to admit this further evidence. It follows that the application for leave to bring the appeal out of time and the application for leave to call further evidence are both dismissed.

Solicitors:
Russell McVeagh McKenzie Bartleet and Co, Auckland for Appellant
Crown Law, Wellington for Crown