ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF WITNESS NT PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA623/2015
[2016] NZCA 623

BETWEEN	TROY VINCENT MCHUGH Appellant
AND	THE QUEEN Respondent

Hearing:	9 November 2016
Court:	Asher, Dobson and Ellis JJ
Counsel	N Levy for Appellant C A Brook for Respondent
Judgment:	19 December 2016 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B Order prohibiting publication of name, address, occupation or identifying particulars of witness NT pursuant to s 202 of the Criminal Procedure Act 2011.

REASONS OF THE COURT

(Given by Asher J)

Introduction

[1] The Crown case against the appellant, Troy McHugh, was straightforward. On 19 April 2014 Mr McHugh went into a room where the victim, Douglas Witeri, and his friend, Jermaine Whatuira, were sitting watching television. Mr McHugh's intention was to rob Mr Whatuira of drugs and cash. He knew Mr Whatuira was a drug dealer.

[2] Mr McHugh was wearing a partial disguise, including a beanie. He was known to Mr Whatuira and Mr Witeri who recognised him immediately when he entered the room. Mr McHugh was carrying a Ruger .22 rifle fitted with a telescopic sight and suppressor. As soon as he entered the room he fired a shot that travelled to the couch upon which Mr Whatuira was lying, and demanded drugs and money. Mr Whatuira was frightened and threw a tin of methamphetamine towards Mr McHugh. Mr Witeri in contrast did not appear to be perturbed. He looked at Mr McHugh and said "What are you up to Troy? Are you really going to point that gun at me Troy?"

[3] It was the Crown case that Mr McHugh pointed the gun at Mr Witeri, mimicked what Mr Witeri had said and then pulled the trigger, shooting him in the forehead between his eyes. Mr McHugh then pointed the gun at Mr Whatuira and again asked for drugs and money. Mr Whatuira flipped over the couch on which he had been lying, retrieved a bundle of cash from underneath it and threw it on the floor by Mr McHugh's feet. While Mr McHugh was looking down at this, Mr Whatuira, fearing for his life, threw himself outside through a nearby window and escaped to a neighbouring property where the police were called. Mr Witeri died in hospital shortly after.

[4] Mr McHugh was in due course arrested. After a jury trial before Lang J he was convicted of murder. Mr Whatuira was the primary Crown witness and gave the account of events that we have set out. Mr McHugh appeals his conviction. There is no appeal against his sentence of life imprisonment with a minimum non-parole period of 19 years.[1]

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1 *R v McHugh* [2015] NZHC 2389.

[5] There was an unusual development after Mr McHugh's arrest. After Mr McHugh was remanded in custody he met Rangi Wickliffe who occupied the cell adjacent to his. He offered a sum of money to Mr Wickliffe if he would take responsibility for shooting Mr Witeri. Mr Wickliffe agreed. A week before Mr McHugh's trial was due to begin Mr Wickliffe made a statement to his lawyer claiming that it was he who had shot Mr Witeri. He directed him to give this statement to Mr McHugh's lawyer. Mr McHugh subsequently instructed his lawyer to provide the statement to the Crown and to the Court and to give notification that Mr Wickliffe would be called as a defence witness at the impending trial. This happened and the trial was adjourned so that counsel could consider this turn of events and make enquiries. Eventually another prisoner who had been privy to the arrangement between Mr McHugh and Mr Wickliffe contacted the police. When Mr Wickliffe was interviewed by the police he became uncomfortable with his statement. When the details were examined the police discovered that Mr Wickliffe would have had great difficulty in being at the place of Mr Witeri's murder at the relevant time. Ultimately Mr Wickliffe withdrew his statement.

[6] He and Mr McHugh were charged with conspiring to pervert the course of justice.[2] Mr Wickliffe pleaded guilty to this charge. The charge against Mr McHugh was tried together with the murder charge.

[7] Mr McHugh's principal defence to the murder charge was that he was not the person who shot Mr Witeri. The jury were not told of Mr Wickliffe's plea of guilty to the perverting the course of justice charge[3] and Mr Wickliffe was not called, although his confessional statement, consistent with Mr McHugh's innocence, was produced as an exhibit. Another statement from Mr Wickliffe, about what he did when he allegedly shot Mr Witeri, was produced by Mr McHugh's lawyer, and was read to the jury by consent. In that statement Mr Wickliffe, while asserting that he was the person who burst in and shot Mr Witeri, denied that there had been a deliberate shooting:[4]

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2 Mr McHugh was also charged with and convicted of dishonest use of a document in relation to a false insurance claim to provide the money to pay Mr Wickliffe for the statement.

3 It was inadvertently referred to by counsel in closing but the jury were directed to disregard it.

4 The statement was in the form of his lawyer's notes from the meeting.

> I just wanted the money. The guy on the couch lifted the whole couch up and threw the money at me. While I was after the meth too, I didn't get that far, b/c he threw the $ at me, I went down to get it, and he attacked me, grabbed the gun, and we struggled. This went on for like 30s I was trying to get him off, and during the struggle I wasn't aware what the other guy was up to.
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> Gun went off. He pushed me over + jumped through the window (closed). Tried this twice. I was trying to get up at this point. By time I got the gun up, he was gone.
>
> I hadn't noticed that the guy on the couch had been hit in the middle of the head. I didn't know that he'd been hit at all, let alone in the head, until Troy told me about the shot to the head.
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> He was still sitting unmoving on the couch holding a P pipe. I grabbed the cash, about $300, and a bag, and took off before any cops might arrive.

First ground of appeal — admissibility of Mr Wickliffe's "confession"

Background

[8] As noted above, Mr Wickliffe did not give evidence at Mr McHugh's trial, but his statement that he had carried out the home invasion was admitted by consent. Because Mr McHugh's lawyer had given the statement to the police on Mr McHugh's instructions, it was admissible both for and against Mr McHugh. The statement was obviously relevant to the charge of conspiring to pervert the course of justice by preparing a false statement. It was the alleged false statement.

[9] Mr McHugh gave evidence denying his presence at the murder scene, claiming he was elsewhere. He gave evidence that his gun, which was shown to be the gun that fired the fatal bullet, had been lent by him to Mr Wickliffe for hunting. To the extent that it could be given any weight, the statement of Mr Wickliffe corroborated that assertion. When it was put to Mr McHugh in cross-examination that he had helped draft the Wickliffe statement, he categorically denied it. Indeed, when he was cross-examined by the Crown on inconsistencies in the statement he steadfastly denied any knowledge of its contents, save what he had heard or read in Court.

[10] Mr McHugh's counsel, Mr Sainsbury, said in closing that the "key issue" was whether the Crown had "proved beyond reasonable doubt that Troy McHugh was there". This was the main focus of his closing. However, in a somewhat oblique

manner he put forward the alternative theory of an accidental shooting to the jury. Later in his closing he said "for all the nonsense in [Mr Wickliffe's] statement, I suggest that had something to it". He discussed the way in which the couch was found to be positioned in the scene examination, where the blood stains were and the nature of those stains, and suggested they showed the couch was flipped before the shooting, and that the shooting occurred accidently in the course of a struggle. He suggested that Mr Whatuira was lying in giving evidence of the deliberate shot to the head. He alleged Mr Whatuira was covering up for his involvement in a struggle with the gunman that led to the gun going off.

[11] In the course of his closing Mr Sainsbury suggested that this theory was not inconsistent with Mr Wickliffe's statement. He did not explicitly say that if the jury were satisfied Mr McHugh was at the scene (contrary to his evidence) then it was an accidental shooting in the way Mr Wickliffe had outlined but with Mr McHugh as the shooter and not Mr Wickliffe. He was, according to the submissions of Ms Levy for Mr McHugh, implying that if Mr Wickliffe's statement was false, he was put up to it and informed by Mr McHugh about what had happened, and so the jury were entitled to infer the statement contained a truth about how the shooting occurred. Mr Sainsbury did not go so far as to say that, though we agree he broadly implied an accidental shooting narrative. To that extent, Lang J, who presided at the trial, put the alternative theory to the jury.

[12] However, the Judge directed the jury in his summing-up that Mr Wickliffe's statement could not be used by the jury if they rejected the evidence given by Mr McHugh that he was not present at the house. Lang J said to the jury, that if they got to the point that they were considering an accidental shooting, "you cannot take into account the statement given by Mr Wickliffe because that is Mr Wickliffe's version of events, not Mr McHugh's — and Mr McHugh of course says he was never in the house". There was no objection to this at the trial.

[13] Nevertheless, Ms Levy now argues that this direction was wrong, relying on the often-quoted statement in *Hart v R* that under the Evidence Act 2006 "evidence

is either admissible for all purposes or it is not admissible at all".[5] She submitted that the Judge was in error to say that the jury could not use it as proof of an accidental shooting if they found that Mr McHugh was at the scene.

[14] The comment in *Hart v R* must be seen in the context of s 35(2), to which it applied. As this Court observed in *Pegler v R*, care must be taken not to transform the statement in *Hart* into a general and rigid principle.[6] The Evidence Act itself provides for limited admissibility in some circumstances.[7] But there is also a much more basic point. The question was simply whether a statement that Mr Wickliffe accidentally shot Mr Witeri (and that Mr McHugh was not present) could be relevant to, and probative of, the alternative defence theory that Mr McHugh accidentally shot Mr Witeri. We do not think that it was, for the reasons that follow.

Analysis

[15] As noted above, the statement of Mr Wickliffe was obviously relevant to the charge that Mr McHugh faced of conspiring to pervert the course of justice. The Crown called NT, who was a fellow prisoner who gave evidence about Mr McHugh and Mr Wickliffe developing a dishonest scheme for Mr Wickliffe to take the responsibility for the shooting by giving false evidence of his involvement. The Wickliffe statement was also relevant to the murder charge, although its status as a hearsay exoneration of Mr McHugh was not ruled upon. It was a document that on its face was consistent with Mr McHugh's innocence.

[16] It followed that Mr Wickliffe's statement was entirely unreliable and of no probative value if the jury were satisfied beyond reasonable doubt that Mr McHugh was at the scene. The jury at that point would have been satisfied beyond reasonable doubt that Mr Wickliffe's statement was a lie. It could have no value, absent any evidence to the contrary. There was no evidence to the contrary. Mr McHugh denied being involved in the drafting of the statement. Mr Wickliffe was not called. There was therefore no evidential basis for it to be taken into account as a statement in which Mr McHugh had dictated a true account about an accidental shooting.

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5 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1 at [54].
6 *Pegler v R* [2015] NZCA 260 at [23]–[32].
7 See, for example, ss 27(1), 31, 32 and 34(2) of the Evidence Act 2006.

[17] Indeed, such a proposition was not put forward by Mr Sainsbury in his closing. He tiptoed around it, perhaps hoping that the jury might infer it. He never said to the jury that the accidental shooting part of the statement might have been a truth expressed by Mr McHugh when he got Mr Wickliffe to lie about being the shooter. He could not, as it would damage his key defence. But now on appeal we are asked to conclude that the Judge was in error in not allowing the statement to be used as evidence of a defence that the defendant had disavowed, and for which there was no evidence.

[18] In our view Lang J was entirely right to say to the jury that if they found that Mr McHugh was the person who shot Mr Witeri, they could not take the statement into account. If Lang J had allowed it to be used, how were the jury to do so? The Judge could not leave its relevance as a floating issue for the jury to work out. He had a duty to direct on how evidence could be used, and to do so he would have had to put forward a hypothesis not supported by evidence or the submission of counsel.

[19] Mr McHugh's defence was that he was not there. It is not up to a judge in summing up to assist in an alternative and undeveloped defence proposition. There was no credible narrative to support an accidental shooting by Mr McHugh. These factors meant that no reasonable jury could entertain the possibility of an accidental shooting by Mr McHugh.

Other appeal points

[20] Ms Levy argued that the Judge misstated the burden of proof when he directed the jury in relation to the accident theory alluded to by Mr Sainsbury that "you will have to consider whether you are prepared to conclude from the blood staining that this is a situation in which … Mr Witeri was shot, and shot accidentally".

[21] However, elsewhere in his summing-up the Judge repeatedly referred to the burden and standard of proof, and that if any defence scenario was a reasonable possibility then they should accept it. It was very clear from the Judge's summing-up viewed as a whole that the possibility of an accidental shooting had to

be excluded beyond reasonable doubt. Further, the burden and standard of proof were reflected in the question trails.

[22] Ms Levy also submitted that the Judge erred in directing that questions that were put to a witness did "not mean that they are evidence that they happened unless [the witness] agrees with them". This was an entirely unexceptional direction, and we do not accept Ms Levy's criticism that it went too far.

[23] She appeared to suggest that the Judge should have told the jury that there were shortcomings in Mr Whatuira's evidence that meant that he might have been involved in covering up an accidental shooting. She appeared to suggest that there was a possible hypothesis of Mr Whatuira being involved in a struggle, with part of Mr Wickliffe's statement, if the jury were prepared to transpose Mr Wickliffe for Mr McHugh, supporting this hypothesis. As we have said, what she now proposes goes further than what Mr Sainsbury put to the jury. It can be assumed Mr Sainsbury did not put forward a detailed accidental shooting by Mr McHugh and the partially false statement hypothesis for the very good reason that in doing so he would have had to accept for the purposes of that submission that Mr McHugh had perjured himself in Court and had persuaded Mr Wickliffe to make a false statement.

[24] There will be occasions when judges should put alternative scenarios to a jury. For instance, the need could arise in a rape case, where a judge may put the possibility of consensual sex in a case where the defendant denies sexual contact. However, that will only arise where there is a credible narrative capable of supporting such a theory.[8] In this case, for reasons that we traversed earlier, there was no credible narrative that the statement was a partially true account of an accident. Despite this, the Judge did put forward the accident theory as it was propounded by Mr Sainsbury. The jury had it before them. His summing-up was entirely fair.

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[8] *Christian v R* [2016] NZCA 450 from [45]. See especially [72].

Result

[25] The appeal is dismissed.

[26] In order to protect witness NT from the risk of undue hardship from the publication of his identity, we make an order prohibiting the publication of his name, address, occupation or identifying particulars pursuant to s 202 of the Criminal Procedure Act 2011.

Solicitors:
Crown Law Office, Wellington for Respondent