ORDER PROHIBITING PUBLICATION OF THE JUDGMENT AND ANY PART OF THE PROCEEDINGS (INCLUDING THE RESULT) IN NEWS MEDIA OR ON THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF RETRIAL. PUBLICATION IN LAW REPORT OR LAW DIGEST PERMITTED.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA188/2017
[2018] NZCA 79

BETWEEN	RHYS FALWASSER Appellant
AND	THE QUEEN Respondent

CA192/2017

BETWEEN	ANTHONY KEITH STOWELL Appellant
AND	THE QUEEN Respondent

Hearing:	28 February 2018
Court:	Gilbert, Simon France and Whata JJ
Counsel:	R M Plunket for Appellant in CA188/2017 G R Tomlinson for Appellant in CA192/2017 Z R Johnston for Respondent
Judgment:	10 April 2018 at 11.30 am

JUDGMENT OF THE COURT

A The applications for extensions of time to appeal are granted.

B The applications to adduce further evidence are declined.

C Mr Falwasser's appeal against conviction is allowed. His conviction is set aside and the associated "three strikes" warning is cancelled.

E A retrial on the charges against Mr Falwasser is ordered. Any question of bail is to be dealt with in the District Court.

F Mr Stowell's appeal against conviction is dismissed.

G Order prohibiting publication of the judgment any part of the proceedings (including the result) in the news media or on the internet until final disposition of retrial. Publication in law report or law digest permitted.

REASONS OF THE COURT

(Given by Gilbert J)

Introduction

[1] Following a trial by jury in the District Court at Tauranga, Mr Stowell and Mr Falwasser were each found guilty of wounding the complainant with intent to cause him grievous bodily harm. Mr Stowell was the principal offender and Mr Falwasser was found guilty as a party. They were both convicted and sentenced by Judge Mabey QC to seven years and three months' imprisonment.[1]

[2] The appellants appeal against their convictions contending that the Judge misdirected the jury on the reliability of the evidence given by an eye witness called by the Crown, Isaac Broughton, who admitted in cross-examination that he was a methamphetamine addict and had consumed methamphetamine shortly prior to witnessing the assault. The appellants contend that the Judge erred by directing the jury in his summing up that they should "not be sidelined by the spectre of drugs when it comes to criticising Mr Broughton" because there was no evidence that methamphetamine usage affects "a person's ability to see things or to remember things"

[3] The appellants apply to introduce evidence from Susan Schenk, a professor of psychology at Victoria University of Wellington, as to the detrimental effects on memory of long-term heavy use of methamphetamine. While Professor Schenk can give evidence of a general nature about the cognitive deficits likely to be experienced

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1 *R v Stowell* [2017] NZDC 8309.

by long-term heavy users of methamphetamine, she acknowledges that without neuropsychological testing, it is not possible to assess the extent to which Mr Broughton suffered from any such deficits.

[4] The Crown opposes the application arguing that the proposed evidence is not substantially helpful and is therefore not admissible. Alternatively, the Crown argues that the evidence is neither fresh nor cogent and should not be admitted.

[5] The notices of appeal were filed late but the delay has been explained and there is no opposition to the applications to extend time for filing the appeals. We are satisfied that it is appropriate to grant extensions of time accordingly.

[6] The issues are:

(a) Is the proposed evidence of Professor Schenk substantially helpful and therefore admissible?

(b) If so, is there a risk of a miscarriage of justice if the evidence is not admitted?

(c) Did the Judge misdirect the jury?

(d) If so, has this resulted in a miscarriage of justice?

[7] It is convenient to set the context before addressing these issues. We commence by summarising the Crown's case and those aspects of the evidence, defence closings and the Judge's summing up that are relevant to the appeals.

Crown case

[8] The Crown's case was that the appellants, who are cousins, had been drinking with the complainant and his brother-in-law at the latter's residential address. The appellants' discussions with the complainant were initially cordial but tensions rose later in the evening, apparently because of their rival gang affiliations. The complainant left around midnight and started walking down the driveway.

Mr Falwasser followed him and punched him in the face, knocking him to the ground. The complainant momentarily lost consciousness. When he came to, Mr Falwasser was standing over him. When he tried to get up Mr Falwasser punched him two or three more times in the face, rendering him unconscious a second time. While the complainant was lying unconscious on the ground, Mr Falwasser kicked him and Mr Stowell hit him on the head a number of times with a spade.

[9] The complainant sustained various injuries during the attack which were covered by formal admissions of fact pursuant to s 9 of the Evidence Act 2006. These were a laceration to the top of the complainant's scalp, a laceration to the back left of his head, tenderness and swelling to his nose and sinuses, fractures to both the left and right maxillary sinus bones and a fracture to his right eye socket. The complainant was taken to hospital where he was treated over the following three days. He continues to suffer ongoing problems with memory loss.

[10] The Crown's case was that Mr Stowell wounded the complainant with the spade intending to cause him grievous bodily harm. The Crown claims that Mr Falwasser was a party to Mr Stowell's offending because he knowingly assisted or encouraged him in three ways. First, the Crown claimed that by assaulting the complainant at the same time, Mr Falwasser prevented him from resisting or escaping. Second, Mr Falwasser encouraged Mr Stowell simply by his presence. Third, Mr Falwassser assisted Mr Stowell by confronting Mr Broughton when he tried to intervene.

The evidence at trial

[11] Both appellants agreed to be interviewed by the police and video recordings of their interviews were played to the jury as part of the Crown case.

[12] Mr Stowell admitted on numerous occasions during his interview that while the complainant was lying on the ground, he kicked him repeatedly, including on his head, and he hit him on the head with the spade. He also said that the spade handle snapped when he did so.

[13] In his interview, Mr Falwasser admitted punching the complainant but he denied seeing Mr Stowell hit the complainant with the spade. Mr Falwasser was not asked whether he kicked the complainant and there was no mention of this. Mr Falwasser said that he stopped when he was distracted by the arrival of another male (Mr Broughton) and that he only found out about Mr Stowell's use of the spade when the police told him about it.

[14] Mr Broughton's evidence at trial was that he arrived at the address at the time the attack was taking place. He described seeing both appellants attacking the complainant while he was lying on the ground. He said that Mr Falwasser was kicking the complainant and at the same time Mr Stowell was hitting him with the spade. He estimated that the complainant was hit with the spade four or five times. Mr Broughton said that it was dark at the time but the neighbouring house had Christmas lights on around the whole house.

[15] Four points emerged during Mr Broughton's cross-examination. First, he readily acknowledged that he must have been mistaken about the Christmas lights. He said that he recalled that the lights were left up for a while after Christmas but he accepted that he was mistaken in thinking they were still up at the time the incident occurred on 17 February 2016. Second, Mr Broughton said that he did not see the spade handle break. Third, he confirmed that he was not spoken to by the police about the incident until 5 August 2016, nearly six months after the incident. Fourth, he confirmed that he was addicted to methamphetamine and had consumed methamphetamine that evening. Because of its central importance to the appeal, we set out in full the relevant part of his evidence about this:

> Q. So he invited you round to have a couple of drinks, didn't he?
> A. Oh, just to catch. I didn't have any drink.
> Q. What about take drugs?
> A. Yeah.
> Q. And what, methamphetamine?
> A. Yeah.
> Q. You'd had some that night, hadn't you?
> A. Yeah.
> Q. And it was closer probably to around about 12.30 am?
> A. Ah, yeah.
> Q. So you would've been high?
> A. Ah, kinda like I'm addicted to it so I'm sort of immune to it. So it takes a lot for me to get high so I'm just like smoking a joint.

Q. Well —
A. — just mellow not high, high, high off your head.
Q. So not high, as in going mental?
A. No.
Q. Just kind of —
A. Yeah.

[16] Both appellants gave evidence at the trial. Mr Stowell said that he saw Mr Falwasser punch the complainant. He said that he was concerned that "things looked like they were getting out of hand" so he picked up the spade and swung it down at the complainant but he did not hit him and did not intend to do so. He estimated that the spade struck the ground approximately 40 centimetres away from where the complainant was lying and the handle broke when the spade hit the ground. Mr Stowell said that he did not kick the complainant. He said that he lied to the police during his video interview about striking the complainant on the head with the spade and kicking him while he was lying on the ground. He said that he lied because he was trying to protect Mr Falwasser.

[17] Mr Falwasser admitted in his evidence at trial that he punched the complainant three times, including while he was lying on the ground. Mr Falwasser said that he did not see Mr Stowell at any stage during the attack and did not see him use the spade.

Defence closings

[18] Ms Plunket closed first for Mr Falwasser. She cautioned the jury about the reliability of Mr Broughton's evidence. She referred to Mr Broughton's acknowledged use of methamphetamine, his error about the Christmas lights, the fact that it was dark at the time and that he was not spoken to by the police until nearly six months after the event. Ms Plunket suggested that Mr Broughton's view of the incident may have been obscured by the presence of a car and a van in the driveway and emphasised that Mr Broughton claimed to have observed four or five strikes to the complainant's head with the spade and yet there were only two lacerations. She also noted that Mr Broughton did not see the handle of the spade break. Ms Plunket submitted that the Crown could not negate the reasonable possibility of "a swing and a miss".

[19] Mr Tomlinson, for Mr Stowell, invited the jury to put Mr Broughton's evidence to one side for similar reasons:

> Isaac Broughton, well he does not describe the spade man, not even asked to pick him from a photo and his actions and his claim differ from the others. The spade never broke yet there it is, it's broken and he leaves with [the complainant]. So what gives? Using meth, not spoken to for six months, claims there's four to five downward strikes all hitting the head yet we have only two lacerations and non existing Christmas lights. Nah, nah, nah, unreliable witness, put him to one side as well.

Judge's summing up

[20] In his summing up to the jury, the Judge summarised the submissions made by defence counsel about the factors potentially undermining the reliability of Mr Broughton's evidence. The Judge then gave the following direction regarding Mr Broughton's use of methamphetamine:

> Mr Tomlinson talked to you about the use of methamphetamine affecting Mr Broughton. I need to make a comment on that also. We do not know if methamphetamine affects a person's ability to see things or to remember things. We have not heard any evidence about that. So the spectre of drugs has been raised. Mr Broughton was using P, methamphetamine, and subsequently before he gave his statement and that is true but to the extent that it has been raised to challenge what he saw and can remember. I only comment that I do not know if methamphetamine affects what you see or what you remember. There has been no evidence of that. So do not be sidelined by the spectre of drugs when it comes to criticising Mr Broughton. There has been no evidence of the effect of that drug on a person's recall memory or ability to see.

Is the proposed evidence of Professor Schenk substantially helpful and therefore admissible?

[21] Professor Schenk states that episodic memory is disrupted by repeated and chronic methamphetamine abuse, similar to the disruption caused by normal aging. She refers to a study published in 2000 as being particularly relevant because it reported the cognitive profile of a group of subjects who were currently using and addicted to methamphetamine.[2] The majority of these subjects smoked methamphetamine daily, most using the drug between one and five times a day.

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[2] Sara L Simon and others, "*Cognitive Impairment in Individuals Currently Using Methamphetamine*" (2000) 9 AM J Addict, 222 at 222–231.

The subject group had been using methamphetamine for an average of 135 months with heavy use for an average of 74 months. Professor Schenk states that these methamphetamine addicts would be expected to have comparable use patterns to Mr Broughton. However, this assumption is solely based on Mr Broughton's admission that he is addicted to methamphetamine. The study showed that these long-term high users performed significantly worse than non-users on a range of cognitive tasks, indicating a generalised impairment. Professor Schenk concludes that the effects of:

> compulsive high dose methamphetamine use and the resulting deficits in brain and behaviour suggest that the ability to accurately recall the specific events that occurred 6 months prior might have been compromised or confused with other events.

[22] Professor Schenk acknowledges that "[w]ithout neuropsychological testing it is not possible to know the extent to which [Mr Broughton] suffered from any of these deficits".

[23] An expert's opinion is only admissible if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding.[3] Questions as to the reliability of a witness's memory are ordinarily treated as coming within the common knowledge of juries.[4] Nevertheless, we accept that the particular effects of methamphetamine use on a witness's ability to recall episodic events is likely to fall outside the common knowledge of juries and we do not exclude the possibility that expert opinion evidence about this could be substantially helpful in some cases. However, for the reasons that follow, we are not persuaded that this is such a case.

[24] The jury was aware of the factors that could have limited Mr Broughton's ability to identify accurately what occurred during the incident — it was dark, there was a car and a van in the driveway and he accepted that he was affected by his consumption of methamphetamine which he described as being "like smoking a joint". The jury was also aware of the factors that may have limited his ability to recall

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3 Evidence Act 2006, s 25(1).

4 *M (CA68/2015) v R* [2017] NZCA 333 at [27]; and *Chetty v R* [2017] NZCA 586 at [32].

accurately the precise details of these events when he came to give evidence about them nearly 12 months later — he was not spoken to by the police until six months after the incident; and he had continued to consume methamphetamine in the interim. Mr Broughton's recall was tested in cross-examination, including by reference to other evidence, and shown to be inaccurate in some respects — he claimed to have seen four or five blows to the head with the spade and yet it was an agreed fact that there were only two lacerations on the complainant's head; he did not see the spade handle break but photographic evidence showed that it did; and he was wrong about the Christmas lights. The jury was well placed to assess the reliability of his evidence taking all of these factors into account.

[25] In these circumstances, we do not consider that it would have been substantially helpful to the jury to hear evidence from Professor Schenk that Mr Broughton's "ability to accurately recall the specific events that occurred 6 months prior might have been compromised". The jury must have understood this.

[26] The evidential foundation required for Professor Schenk's opinion to be substantially helpful is also lacking. Mr Broughton simply acknowledged that he "had some that night" and he is "addicted to it". This evidence is plainly insufficient to enable any accurate assessment of how Mr Broughton would compare with the study group who, on average, had been using the drug for more than 11 years, with heavy use for over six years. Importantly, Professor Schenk accepts that she would not be able to assist the jury on the extent to which Mr Broughton's memory was affected by his methamphetamine consumption. She acknowledges that "[w]ithout neuropsychological testing it is not possible to know the extent to which [Mr Broughton] suffered from any of these [cognitive] deficits".

[27] We conclude that Professor Schenk's evidence is not admissible because it is not substantially helpful. The application to introduce this evidence must accordingly be declined.

Did the Judge misdirect the jury?

[28] We have set out the relevant passage from the Judge's summing up at [20] above. The Judge effectively instructed the jury to ignore the potential effects of methamphetamine use on Mr Broughton's memory because there was no evidence at the trial that use of the drug affects "a person's recall memory or ability to see". We accept the appellants' submission that this was an error. While the Judge was correct that there was no evidence about the general effects of methamphetamine use on memory, the question as to whether Mr Broughton's consumption of methamphetamine may have affected the reliability of his evidence was a matter that ought to have been left to the jury. It would have been within the common knowledge of the jury that a person's perception can be affected if they are under the influence of drugs and memory can also be affected by prolonged drug abuse. Mr Broughton himself acknowledged that he was affected to some extent by his consumption of methamphetamine on the night, likening the effect to having smoked a joint. The jury should not have been instructed to disregard this factor when assessing the reliability of Mr Broughton's evidence and the weight that should be given to it. Ms Johnston, for the Crown, responsibly accepted this.

Did the misdirection result in a miscarriage of justice?

[29] Mr Broughton was a key witness. The Crown placed particular reliance on his evidence as establishing that Mr Falwasser was a party to Mr Stowell's offending. The witness said he saw Mr Falwasser assaulting the complainant at the same time Mr Stowell was attacking him with the spade. Both Mr Falwasser and Mr Stowell denied this in their interviews and in their evidence at the trial. Mr Broughton's evidence was accordingly of central importance to the case against Mr Falwasser. We are unable to conclude that Mr Falwasser's conviction as a party to Mr Stowell's offending was inevitable. There is in our judgment a real risk that the outcome of the trial was affected by the misdirection concerning the reliability of Mr Broughton's evidence. Accordingly, we are satisfied that there has been a miscarriage of justice and Mr Falwasser's appeal against conviction must be allowed.

[30] Mr Stowell is in a different position. Mr Broughton's evidence was of limited assistance on the critical questions the jury had to determine when considering the charge against Mr Stowell — did Mr Stowell strike the complainant on his head with

the spade and, if so, did he intend to cause him grievous bodily harm? While Mr Stowell claimed at trial that he did not intend to hit the complainant with the spade and missed his head by approximately 40 centimetres, this evidence was irreconcilable with the two large lacerations to the back of the complainant's head and Mr Stowell's admissions when interviewed by the police that he deliberately struck the complainant on the head with the spade. The jury clearly rejected the evidence Mr Stowell gave at trial, preferring the account he gave to the police on the night. We consider that the Judge's misdirection concerning Mr Broughton's evidence would have had no material effect on the outcome of Mr Stowell's trial.

Result

[31] The applications for extensions of time to appeal are granted.

[32] The applications to adduce further evidence are declined.

[33] Mr Falwasser's appeal against conviction is allowed. His conviction is set aside and the associated "three strikes" warning is cancelled.

[34] A retrial on the charges against Mr Falwasser is ordered. Any question of bail is to be dealt with in the District Court.

[35] Mr Stowell's appeal against conviction is dismissed.

[36] Order prohibiting publication of the judgment any part of the proceedings (including the result) in the news media or on the internet until final disposition of retrial. Publication in law report or law digest permitted.

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