

Reference to the Court of Appeal of the Question of the Convictions of Wayne Gary Montaperto for Kidnapping and Doing an Indecent Act with Intention to Offend

PATSY REDDY, Governor-General

ORDER IN COUNCIL

At Wellington this 23rd day of October 2018

Present:

HER EXCELLENCY THE GOVERNOR-GENERAL IN COUNCIL

Her Excellency the Governor-General, acting under section 406(1)(a) of the Crimes Act 1961 and on the advice and with the consent of the Executive Council, refers to the Court of Appeal the question of the following convictions of Wayne Gary Montaperto, entered in the High Court at Wellington on 23 August 1988:

(a) 4 counts of kidnapping contrary to section 209 of the Crimes Act 1961; and

(b) 1 count of doing an indecent act with intention to offend contrary to section 126 of the Crimes Act 1961.

The background to, and reason for, the reference appear in the Schedule.

Schedule

1. Interpretation

In this Schedule, **applicant** means Wayne Gary Montaperto.

Background

2. Trial and Appeal

(1) On 23 August 1988, the applicant was convicted in the High Court at Wellington of the following offences:

(a) 4 counts of kidnapping contrary to section 209 of the Crimes Act 1961; and

(b) 1 count of doing an indecent act with intention to offend contrary to section 126 of the Crimes Act 1961.

(2) The applicant's convictions arose from an incident in the Hastings suburb of Flaxmere on 21 June 1986.

(3) Four children were at a birthday party at a Flaxmere household. In the late afternoon, they left the party to walk to the shops. On the way, they came across a man trying to start his car. After discussion, they got into the car with the man, who, instead of giving them a ride home, drove them to the riverside after stopping at a service station. The children said that the man gave them beer and offered them money in exchange for sex but they refused. The man drove the children back to Flaxmere in the early evening and dropped them off.

(4) The Police interviewed the children and took descriptions of the man and the car the man drove. They also interviewed the service station attendant. The investigation focused on locating the driver of a green and white 1962-63 Holden Premier. A number of owners were identified and interviewed, including the applicant, but no one was charged.

(5) Police interest in the Flaxmere incident was renewed after the abduction, rape, and murder of a young child in mid-1987. The applicant was interviewed by the Police in connection with the inquiry into the homicide and emerged as a suspect. The applicant was not charged in relation to the homicide inquiry; however, the applicant remained a suspect. Another person was convicted of the homicide several years later.

(6) Police re-interviewed the service station attendant and 1 of the children about the Flaxmere incident in December 1987. The applicant was arrested and charged on 31 December 1987 in relation to the Flaxmere incident.

(7) In June 1988, the applicant's counsel applied for a change in trial venue because of publicity in the Hawke's Bay area linking the applicant to the mid-1987 homicide case. Justice Jeffries granted the application for change of venue in a decision dated 1 July 1988.

(8) The applicant stood trial in the High Court at Wellington in August 1988. The Crown case depended substantially on the identification evidence of the 4 children, supplemented by evidence from the service station attendant. The defence case was that it was a case of mistaken identification. The jury accepted the evidence of the Crown witnesses and returned guilty verdicts on the charges in subclause (1). On 9 September 1988, the applicant was sentenced to concurrent terms of 3 years' imprisonment on the kidnapping charges and 6 months' imprisonment on the indecency charge.

(9) The applicant appealed against these convictions to the Court of Appeal on the basis that a miscarriage of justice had occurred because not all evidence favourable to the applicant was put before the jury, and that the Crown's opening address was unfair. On 8 September 1989, the Court of Appeal dismissed the applicant's appeal.

3. Application for Exercise of Royal Prerogative of Mercy

- (1) On 20 February 2014, the applicant applied to the Governor-General for the exercise of the Royal prerogative of mercy in respect of the convictions described in clause 2(1).
- (2) The applicant submitted, among other matters, that the jury at the applicant's trial had been provided with prejudicial information about the applicant and that this information had not been before the jury by way of evidence.
- (3) The applicant said the disclosure to the jury was not known at the time of the applicant's trial or appeal.

4. Evidence Arising After Trial and Appeal

- (1) In support of the applicant's application for the Royal prerogative of mercy, the applicant provided an affidavit from Stephen Bonnar, QC, dated 2 March 2012.
- (2) Mr Bonnar deposed that:
- (a) a juror had contacted the applicant's lawyer indicating that the juror had relevant information; and
 - (b) the applicant's lawyer had asked Mr Bonnar to interview the juror; and
 - (c) the interview took place on 17 June 2008; and
 - (d) the juror told Mr Bonnar that, during the course of the trial, the juror had been told by someone who knew that the juror was on the jury that the applicant was a prime suspect in the 1987 homicide inquiry (referred to in clause 2(5)); and
 - (e) the juror said this information was not before the jury by way of evidence; and
 - (f) the juror told Mr Bonnar that the juror had told other jurors about this information and, in the juror's opinion, the jury was influenced by this information in reaching its decision.

Reason for Reference

5. Reason

The reason for the reference is that the information referred to in clause 4 indicates that evidence is now available (since the applicant's trial and appeal against conviction) that could lead the Court of Appeal to conclude that a miscarriage of justice may have occurred.

MICHAEL WEBSTER, Clerk of the Executive Council.