

IN THE SUPREME COURT OF NEW ZEALAND

SC 99/2015
[2016] NZSC 109

BETWEEN JOHN GRANT CUTHERS
 Applicant

AND THE QUEEN
 Respondent

Court: Glazebrook, Arnold and Ellen France JJ

Counsel: Applicant in person
 P D Marshall for Respondent

Judgment: 22 August 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant and an associate were convicted of murder. The Crown case was that they went to the victim's home intending to steal from him and left sometime later with a substantial quantity of his property. In the course of carrying out the theft, the applicant's associate severely beat the victim, inflicting injuries from which he ultimately died.

[2] Both the applicant and his associate appealed unsuccessfully to the Court of Appeal.¹ One of the issues raised in the applicant's appeal arose from Lang J's direction on s 167(b) and s 168(1)(a) of the Crimes Act 1961. The jury was asked to determine first whether they were sure that that the applicant had intentionally assisted or encouraged his associate to inflict the injuries that caused the victim's death. If the jury were so satisfied and had found the associate guilty of murder, the

¹ *Nicholson v R* [2015] NZCA 366 (Wild, Clifford and Dobson JJ).

jury were directed to consider whether they were sure that when providing that assistance or encouragement, the applicant knew that (i) the associate intended to cause the victim injury that the associate knew was likely to cause the victim's death (s 167(b)); or (ii) the associate intended to cause the victim really serious injury for the purpose of enabling the associate and/or the applicant to steal the victim's property (s 168(1)(a)). The Judge then told the jury that they did not have to reach a unanimous view on which of the two alternatives applied. Rather, it was sufficient that they all agreed that one or other of them applied – some might think (i) applied and the remainder that (ii) applied. The applicant argued that the jury had to be unanimous as to which of the alternatives applied. The Court of Appeal rejected this ground of appeal.²

[3] The applicant now seeks leave to appeal to this Court on this ground, and on a further ground not raised in the Court of Appeal. That ground is that the Judge was required to explain to the jury the difference between an intention to inflict “bodily injury likely to cause death” and an intention to inflict “serious bodily injury” and to make it clear that doubt about either of these two elements would likely mean doubt about the other.

[4] The applicant has asked for numerous extensions of time to file submissions in support of his leave application, which have been granted. The applicant applied for the extensions to enable him to obtain legal assistance. He has had legal assistance but the lawyers involved have sought leave to withdraw. In these circumstances, we ultimately gave the applicant a timetable with a deadline by which to provide submissions, and invited the Crown to provide submissions in accordance with the timetable whether or not the applicant provided any. In the event, the applicant has not provided any submissions.

[5] As to the first proposed ground of appeal, we do not consider that it raises any issue of general or public importance given the judgments of this Court in *Ashin v R*.³ Nor do we consider that there is any risk of a substantial miscarriage of justice. Each of the two alternatives identified in [2] above required that the

² At [54].

³ *Ashin v R* [2014] NZSC 153, [2015] 1 NZLR 493.

applicant know that his associate intended to cause serious bodily injury to the victim. While there is a difference between the alternatives in terms of the applicant's knowledge of his associate's purpose, the alternatives are simply different possible ways in which the applicant was involved in the victim's homicide. They are not separate transactions and do not involve any inherent inconsistency, so that no unanimity direction was required.

[6] As to the second ground, it was not raised in the Court of Appeal. As the Court has said previously, leave will rarely be given to pursue points not taken before the Court of Appeal.⁴ In any event, no question of general or public importance is raised, nor is there any risk of a substantial miscarriage of justice. The material provided to the jury and the Judge's summing up correctly identified the requirements of s 167(b) and s 168(1)(a) as to intention. No further explication was required.

[7] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁴ See, for example, *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643 at [2].