IN THE SUPREME COURT OF NEW ZEALAND

SC 101/2015
[2016] NZSC 15

BETWEEN	DEAN MICHAEL VINCENT Applicant
AND	THE QUEEN Respondent

Court: William Young, Arnold and O'Regan JJ

Counsel: R M Lithgow QC for Applicant
I R Murray and Y Moinfar for Respondent

Judgment: 23 February 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

The case

[1] The applicant was found guilty of wounding the complainant with intent to cause grievous bodily harm.[1] In issue at trial was whether he:

(a) could rely on self-defence; and

(b) intended to cause grievous bodily harm.

[2] The charge arose out of an incident in prison between two serving prisoners. In it, the applicant came up behind the complainant and stabbed him four times in the neck using a home-made implement consisting of a tooth-brush handle and metal blade of approximately 80 mm in length. The complainant's wounds were sutured in

1 *R v Vincent* DC Wellington CRI-2012-078-1364, 28 November 2013 (Judge Davidson).

hospital and he returned to the prison later the same day. No permanent injury was caused.

[3] At interview the applicant admitted the attack. He claimed that it was, in effect, a pre-emptive strike associated with prior bullying behaviour of the complainant towards the applicant and another prisoner. He said that it was not his intention "to destroy [the complainant] completely". Rather he "targeted some of the muscles in his neck, [to] cause some trauma … just to … prevent him from … pursuing his policy of antagonising and … exploiting my vulnerabilities".

[4] Four days before the attack there had been an altercation between the applicant and complainant in relation to concerns by the applicant that the complainant had been kicking a basketball towards him and the other prisoner. He claimed that the corrections officers were not doing anything to protect him and the other prisoner from the threat which the complainant posed to them.

[5] In his evidence at trial the applicant said that his intention had been "to immobilise him to a certain extent" so that "he would have to step back from his aggressive, energetically aggressive, behaviour."

[6] After the basketball incident, the applicant and complainant had been kept apart, but following discussions with both of them, the corrections officers allowed them to be in the same area together.

[7] The application for leave to appeal is addressed to four aspects of the trial:

(a) The withdrawal at trial by the Judge of self-defence from the jury.

(b) The directions of the trial Judge as to what constituted an intention to cause grievous bodily harm.

(c) The absence of an alternative (and lesser charge) and the Judge's refusal to give the jury the sections of the Crimes Act 1961 which deal with the hierarchy of offences of violence.

(d) Whether there was a sufficient evidential basis for the verdict.

The withdrawal at trial by the Judge of self-defence from the jury

[8] The Judge withdrew self-defence on the basis that on the most favourable view of the circumstances as perceived by the applicant, he could not be regarded as having acted in defence of himself or the other inmate. The Judge's decision to withdraw the defence was upheld by the Court of Appeal both on that ground and on the basis that the applicant's actions could not be regarded as reasonable in the circumstances as the applicant may have believed them to be.[2]

[9] That a judge is entitled to withdraw self-defence from the jury is well-established by the authorities.[3] Although the proposed appeal raises questions as to when self-defence is available in the case of a pre-emptive strike, the absence of immediacy in relation to the alleged threat and the alternatives available to the applicant were material considerations.

[10] In dealing with this part of the case, the Court of Appeal applied settled law. The proposed appeal raises no point of general or public importance and there is no appearance of a miscarriage of justice.

The directions of the trial Judge as to what constituted an intention to cause grievous bodily harm

[11] The Judge summed up on the issue on the basis that grievous bodily harm meant "really serious harm." During their retirement, the jury asked him this question:

> Are we the jury to define "serious harm" as Vincent's view of serious harm or on our own view of serious harm?

[12] The Judge's response to this question did not really directly engage with the problem that the jury was grappling with and they then put what was in substance the same question again:

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2 *Vincent v R* [2015] NZCA 201 (Randerson, Miller and Cooper JJ) at [30]–[34].

3 See for instance *R v Wang* [1990] 2 NZLR 529 (CA).

> In relation to our previous question, are we the Jury to consider Vincent's understanding of really serious harm or our the Jury's agreed understanding?

[13] This time the Judge responded more directly:

> The understanding is one fixed objectively. In other words, it is your understanding of the words "really serious harm" and their meaning which is critical. The Crown must prove beyond reasonable doubt that the accused intended really serious harm. Really serious harm is your objective understanding of those words.

[14] It is not tenable to argue that the Crown had to show that the applicant intended to inflict harm of a kind which he personally regarded as really serious. As the Court of Appeal pointed out at [48], the task for the jury was first to determine the type of injuries which the applicant intended to inflict and secondly to decide whether injuries of that character were really serious harm. The Court of Appeal was satisfied that the Judge made it sufficiently clear to the jury that they had to determine whether what the applicant intended to do amounted to really serious harm, as they assessed it.

[15] We do not see this aspect of the case as giving rise to a point which warrants leave to appeal being granted and there is no appearance of a miscarriage of justice.

The absence of an alternative (and lesser charge) and the Judge's refusal to give the jury the sections of the Crimes Act 1961 which deal with the hierarchy of offences of violence

[16] The charge of wounding with intent to cause grievous bodily harm was the only charge faced by the applicant. During their deliberations the jury asked to see the sections of the Crimes Act 1961 which identified "the charges above and below in seriousness of the current charges". The Judge declined to provide this to the jury and told them that they had to concentrate on the charge which the applicant faced. Counsel for the applicant complains as to the Judge's refusal to provide the jury with the hierarchy of charges and also, although not in a very particularised way, with the laying of a single charge.

[17] Had the Judge acceded to the jury's request, it would have invited questions well-removed from the jury's task and, as well, provided considerable scope for

confusion, given the extent of overlap between the crimes in question. We accept that it would have been open to the prosecution to lay alternative charges and, given the nature of the defence as to mens rea, perhaps better – or at least safer – if they had done so. That said, however, the jury would not have found the applicant guilty of the offence charged unless satisfied that he was guilty.

[18] Again, we see no point which would warrant leave to appeal being granted and no appearance of a miscarriage of justice.

Whether there was a sufficient evidential basis for the verdict

[19] In submissions which the applicant rather than his counsel prepared, there is a complaint that the "weight of evidence does not support the verdict". This point was not argued in the Court of Appeal and it does not raise an issue which would warrant leave to appeal being granted or a concern that there may have been a miscarriage of justice.

Result

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

Solicitors:
Crown Law Office, Wellington for Respondent