IN THE SUPREME COURT OF NEW ZEALAND

SC 38/2016
[2016] NZSC 64

BETWEEN	CECILIA VICTORIA UHRLE Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, William Young and Arnold JJ

Counsel: G N E Bradford for Applicant
K S Grau for Respondent

Judgment: 13 June 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant and three male co-accused were found guilty of murder following a jury trial. It is not necessary that we detail the events leading up to the victim's death, which were described by the Court of Appeal as "chaotic".[1] It is sufficient to say that the three males assaulted the victim, and his death resulted. Although the applicant went with the co-accused to the scene of the attack, she left at a comparatively early stage. In imposing sentence, the trial Judge, Cooper J, said that he thought it likely that the jury had convicted her by applying s 66(2) of the Crimes Act 1961.[2]

[2] The applicant seeks leave to appeal on the ground that the jury was misdirected on the issue of party liability. In relation to s 66(2), Cooper J relevantly instructed the jury that, before the applicant could be convicted of murder or

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1 *Uhrle v R* [2015] NZCA 412 (Winkelmann, Lang and Wylie JJ) at [4].
2 *R v Uhrle* [2013] NZHC 922 at [13].

manslaughter, the Crown had to prove beyond reasonable doubt that the commission of either murder or manslaughter was known to the applicant to be a probable consequence of prosecuting the common purpose. The applicant submits that such a direction is inconsistent with the decisions of the United Kingdom Supreme Court and the Privy Council in two appeals heard together, *R v Jogee* and *Ruddock v R*,[3] and accordingly, the applicant's conviction cannot stand.

[3] The basis for this submission is that the United Kingdom Supreme Court concluded in these two cases that the judgment of the Privy Council in *Chan Wing-Siu v R*[4] had laid down a new principle which was inconsistent with previous common law authority and with the fundamental precepts of criminal liability. That new principle was that if two people (A and B) set out to commit an offence (offence 1), and in the course of committing offence 1, A commits another offence (offence 2), B will be guilty of offence 2 if he or she foresaw offence 2's commission as a possibility, even if he or she did not intend it. The United Kingdom Supreme Court held that there must be an intention to commit the particular offence (that is, offence 2), rather than simply foresight of it as a possibility. Such foresight might be evidence of the requisite intention, but was not by itself sufficient to establish liability.

[4] However, in New Zealand the position is covered by s 66(2), as the Crown emphasises. Section 66(2) provides:[5]

> Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose *if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose*.

[5] The italicised words set out what the Crown must establish in New Zealand in relation to B and offence 2 in the example given at [3] above. The Crown must establish beyond reasonable doubt that B knew that the commission of offence 2 was a probable consequence[6] of undertaking offence 1 – an intention to commit offence 2

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3 *R v Jogee, Ruddock v R* [2016] UKSC 8, [2016] UKPC 7, [2016] 2 WLR 681.
4 *Chan Wing-Siu v R* [1985] AC 168 (PC).
5 Emphasis added.
6 In the sense of being something that might well happen.

is not required. The Court is not free to depart from the clear language of s 66(2). Moreover, the Court analysed s 66(2) in some detail in *Ahsin v R*,[7] and there is no justification for a reconsideration of that analysis. In the result, then, the proposed ground of appeal is unarguable.

[6] The application raises no issue of general or public importance. Nor do we see any risk of a substantial miscarriage of justice. The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[7] *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493. All the judgments noted that s 66(2) imposes liability where B in the example knows that offence 2 is a probable consequence of pursuing the unlawful purpose – see at [17] per Elias CJ, at [89] per McGrath, Glazebrook and Tipping JJ and at [222] per William Young J.