IN THE SUPREME COURT OF NEW ZEALAND

SC 54/2016
[2016] NZSC 85

BETWEEN	WHETU SONNY JAMES WAIWAI Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Arnold JJ

Counsel: N P Chisnall for Applicant
A Markham for Respondent

Judgment: 13 July 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant, Mr Waiwai, was convicted at a retrial before Judge Adeane and a jury of one count of injuring with intent to cause grievous bodily harm and was sentenced to five years' imprisonment.[1] The victim was a gang member who was set upon by four members of a rival gang. Two of the assailants entered guilty pleas. The Crown case was that Mr Waiwai was another assailant; the fourth was never identified.

[2] Mr Waiwai's appeal against conviction was dismissed by the Court of Appeal.[2] He now seeks leave to appeal to this Court on two grounds. He argues first, that the jury's verdict was unreasonable and second, that evidence from one of the co-offenders, who had pleaded guilty and was called by the Crown but was

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1 *R v Waiwai* [2015] NZDC 20761.
2 *Waiwai v R* [2016] NZCA 167 (Ellen France P, Keane and Dobson JJ).

declared to be hostile, had resulted in a miscarriage of justice. These grounds were considered and rejected by the Court of Appeal.

[3] There is no dispute that Mr Waiwai was in the general area where the assault occurred before it began. The case against him was based largely on an identification of him by a police officer, who knew Mr Waiwai as a result of having dealings with him over a number of years and had a clear view of the assault. He had seen Mr Waiwai earlier in the evening with some associates and gave evidence that he saw him involved in the assault with three others, two of whom he also identified. He intervened in the assault and the offenders ran off. The officer then called for assistance.

[4] Mr Waiwai did not give evidence. His defence was that he had an alibi as he was recorded on a CCTV camera at a petrol station close to the scene of the assault about the time the assault occurred and so could not have been participating in it.

[5] The police officer had given a description of the clothing worn by the person he identified as Mr Waiwai. The CCTV footage showed that Mr Waiwai was wearing clothing consistent with the police officer's description.

[6] An important feature of the defence argument was that the clock on the CCTV footage indicated that Mr Waiwai was in the petrol station when the assault was occurring, or so soon after that Mr Waiwai could not have left the scene of the attack and gone to the petrol station in the time available. However, the Crown evidence was that when the CCTV clock was checked three days after the assault against the police communications' clock, it was found to be a little over four and a half minutes slow, so that it was possible for Mr Waiwai to have participated in the assault and then run off to the petrol station.

[7] Mr Chisnall for Mr Waiwai acknowledged that this might be a complete answer, except for the timing of the police office's call for assistance to police communications, which showed a time corresponding to the time shown on the CCTV clock. He said that there was no evidence that this call was inaccurately timed. The Court of Appeal said that even on this assumption, the timings of the

various events were sufficiently uncertain that Mr Waiwai had a window of opportunity, as the Crown alleged.[3]

[8] All these matters were canvassed before the jury, and were rehearsed again before the Court of Appeal. We do not accept that this ground raises any issue of general or public importance. More particularly, essentially for the reasons given by the Court of Appeal, we do not consider that there is any risk of a substantial miscarriage of justice.

[9] Turning to the second ground, one of the co-accused who pleaded guilty had made an eight-page statement to police in which he admitted that he had assaulted the victim but said he was acting in self-defence. He also identified three people as being with him, one of whom was Mr Waiwai. The Crown indicated to the defence that it proposed to call this person as a witness at Mr Waiwai's retrial. Defence counsel raised the question of whether the witness was hostile and also suggested that there should be a pre-trial application to deal with whether or not the statement was admissible. This was because the written statement had been signed on all but the second page, and it was the second page which recorded that the others, including Mr Waiwai, were present.

[10] The question whether the witness was hostile was not resolved pre-trial, nor was the question whether the statement was admissible. At the outset of the trial, it was agreed that the Crown would call the witness when appropriate and, depending on how he responded to questions, could then make an application that he be declared hostile.

[11] When asked how many people had assaulted the victim, the witness said it was only him and no-one else was present. The Crown then asked that the witness be declared hostile. Defence counsel did not seek to be heard on the application and the Judge declared the witness hostile. Defence counsel did ask, however, that there be a voir dire on the admissibility of Mr Waiwai's statement. The Judge held a voir dire, in which he heard evidence from the officer who had taken the statement, and ruled the statement admissible. The officer said that he had shown the witness each

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[3] At [18]–[19].

page of the statement, but said that he appreciated that the witness faced some risk as a gang member as a result of what he had told the officer, as recorded on the second page.

[12] When during his evidence the witness said that the police officer was lying when he said he saw four assailants attacking the victim, he was asked about his statement to police. He accepted that he had given the names of three others to police, but said that he was simply indicating that they were with him before the attack, not that they were involved in it.

[13] Mr Chisnall argues that the Crown knew that the witness was likely to be hostile and that the reason it called him was so that it could get his statement before the jury and queries whether what occurred was consistent with this Court's decision in *Morgan v R*.[4] He also submits that the process followed by the Judge in dealing with the question of the admissibility of Mr Waiwai's statement operated to Mr Waiwai's disadvantage because he did not give evidence in the voir dire.

[14] Given that it was not certain that the witness would be hostile, the course adopted by Judge and counsel – to wait and see what the attitude of the witness was when giving evidence – was appropriate and consistent with *Morgan*. As the Court of Appeal noted, the defence was able to cross-examine Mr Waiwai on his statement, thus meeting an important concern identified by this Court in *Morgan*.[5] In terms of the admissibility of the statement, the Court noted that there was no dispute about what Mr Waiwai said in the statement, simply about what it meant, which was clearly before the jury. While the Court accepted that it would have been preferable for the Judge to have heard from Mr Waiwai rather than simply the police officer, it also noted that there was no reference to the witness's statement by either counsel in closing and that the Judge had instructed the jury to be careful about relying on it, together with explaining why. In these circumstances, the Court considered it unlikely that the statement would have been significant in the jury's assessment.[6]

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4 *Morgan v R* [2010] NZSC 23, [2010] 2 NZLR 508.
5 *Waiwai v R*, above n 2, at [33]–[35].
6 At [60].

[15] Against this background, we do not consider that this aspect raises any issue of general or public importance, nor do we accept that there is any risk of a substantial miscarriage of justice.

[16] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent