IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 58/2023
[2023] NZSC 117

BETWEEN	ABDIHAFID ALI MOHAMED Applicant
AND	THE KING Respondent

Court: Ellen France, Williams and Kós JJ

Counsel: S J Shamy for Applicant
S C Baker for Respondent

Judgment: 4 September 2023

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] The applicant has filed an application for leave to appeal from the decision of the Court of Appeal dismissing his appeal against conviction for wounding with intent to cause grievous bodily harm.[1]

Background facts

[2] The facts are set out in the judgment of the Court of Appeal.[2] To put the application in context we need only describe, in very broad terms, the Crown and

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1 *Mohamed v R* [2023] NZCA 143 (French, Thomas and Mallon JJ) [CA judgment].
2 At [4]–[35].

defence cases at trial. The Crown case was that the victim, Mr Okorie, had been asked to collect a debt from the applicant. He was given a phone number for the debtor and photographs of him. The applicant learnt Mr Okorie was looking for him. Mr Khadar, a friend of the victim, brought the applicant to Mr Okorie's home. The Crown said that the applicant stabbed Mr Okorie to avoid paying the debt. Mr Khadar hid the weapon, a machete knife. He was later convicted of being an accessory to the stabbing. At trial the main witness was the victim. The Crown also relied on telecommunications data and on evidence about a machete and sheath subsequently located at the applicant's address. These were consistent with the size of a sheath Mr Okorie said he found at his home.

[3] The case for the defence was that the applicant was not the person who stabbed Mr Okorie. The defence called evidence from Mr Khadar who was initially to give evidence for the Crown. He said the man at Mr Okorie's address when the stabbing took place was not the applicant but he would not say who the man was. He had previously told the police that the person he was with was "Red".

The proposed appeal

[4] The applicant says that the Court of Appeal's rejection of his complaints about the conduct of his trial counsel requires this Court to clarify the obligations of trial counsel to meet with their client in a timely manner, obtain a brief of evidence, and obtain fully informed instructions on matters fundamental to the defence. The proposed appeal would have the Court consider a number of particular aspects of preparation for and conduct of the trial as we now discuss briefly.

The failure to prepare a brief of evidence

[5] First, the applicant says trial counsel, Mr Hembrow, should have developed a full brief of evidence. He is critical of what he says were inadequate pre-trial meetings and in light of this questions whether the election not to give evidence was fully informed. (Prior to trial the applicant said he wanted to give evidence but, at the close of the Crown case, he elected not to give evidence.[3])

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[3] He accepted Mr Hembrow's advice that a decision about the election would be made at the end of the Crown case.

[6] Mr Hembrow was retained about a month before trial. He had exchanged emails with the applicant before meeting with the applicant on 15 September 2021. The applicant ultimately accepted this was "a proper meeting in which Mr Hembrow went through the Crown case".[4] The two exchanged further emails subsequently including details as to questions the applicant wished Mr Hembrow to put to the victim. The applicant also advanced other cross-examination suggestions. The two met again on 19 September 2021, the day before the trial was to start.

[7] The Court of Appeal in addressing this point accepted Mr Hembrow's evidence (contrary to that of the applicant) that it was not until the 19 September meeting that the applicant told him that the person who stabbed the victim was George, his Nigerian/Cuban flatmate. He was not told other details about George, for example, that he was known as "Red" and nor that the applicant's brother could assist with this evidence. After some discussion about Mr Hembrow continuing to act, the applicant signed a document instructing Mr Hembrow to cross-examine on the basis George had made the relevant phone calls and stabbed the victim.

[8] Following on from this meeting, Mr Hembrow asked police to make inquiries about a tenancy agreement the applicant gave him showing that the applicant's brother was the tenant of the property where the applicant lived. Those inquiries indicated the document was a forgery.

[9] The trial got underway. Mr Hembrow thought the cross-examination of the victim went well and so, it appears, did the applicant. After the Crown case closed, Mr Hembrow and his junior went to see the applicant. Mr Hembrow asked the applicant if he wished to give evidence. The applicant said he thought the trial was going well and he would not give evidence. He signed an instruction to this effect.

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4 CA judgment, above n 1, at [50] and see at [51].

[10] Against this background, the Court of Appeal said:

(a) the election was a fundamental decision and needed to be a fully informed decision; and

(b) the decision here was fully informed. The applicant was comfortable with the conduct of the trial.

[11] In terms of the lack of a brief of evidence, the Court said that omission reflected the fact the applicant did not give any information about George.

Failure to put defence case

[12] Second, the applicant says there was a deviation from written instructions in the course of cross-examination. This is a reference to the instruction to cross-examine on the basis George stabbed the victim. Again, the Court of Appeal accepted this was a fundamental decision. However, the applicant changed his instructions on this point. This finding is a reference to a discussion Mr Hembrow had with the applicant during the trial. The applicant agreed Mr Hembrow should not ask the victim about George.

Admission of evidence by consent

[13] Third, the applicant is critical of the decision to admit hearsay eyewitness evidence by consent. The witness, Ms Walik, visited Mr Okorie on the day he was attacked. Her statement described the attacker in general terms ("dark, black or dark with a beard") consistent with the applicant (dark-skinned and with a beard). Mr Hembrow was advised by the prosecution that she had left the country and that her whereabouts was unknown.

[14] The Court of Appeal said the following about this evidence:

(a) Mr Hembrow did (contrary to the applicant's evidence) discuss this evidence with the applicant. He explained why he thought it was in the applicant's interest to consent to the admission of the evidence and the applicant consented to the admission of this evidence.

(b) Mr Hembrow's advice that the evidence was helpful to the defence was reasonable — the witness although present at the stabbing could not identify the attacker. Her statement "provided at least some basis" to challenge the identification of the applicant as the attacker.[5]

Inadmissible evidence

[15] Fourth, the applicant says two pieces of evidence were wrongly admitted, namely, evidence the applicant had been to prison and was deported from Australia, and evidence from a photographic montage.

[16] As to the first item, the applicant says it was relevant to whether he was the debtor but not to whether he was the stabber. Mr Hembrow should have put to the jury that the applicant accepted he was the debtor. On this the Court of Appeal considered:

(a) the evidence was relevant circumstantial evidence supporting the victim's account that his attacker was the person whose photograph he had been sent;

(b) the risk of prejudice was outweighed by its probative effect; and

(c) in any event, the limited use that could be made of the evidence was addressed by the Judge in summing up.

[17] On the second item, the victim was asked to take part in a formal identification procedure. He was shown a photographic montage and identified a person in the montage as the Somalian guy who he said had stabbed him. This photograph was of the applicant. The defence case was that it was not possible to know whether the identification in the montage was based on Mr Okorie's memory of the person in the photographs on his phone or on his memory of the person who stabbed him.

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5 At [108].

[18] The Court of Appeal considered it was "arguably prudent"[6] to conduct the formal identification procedure but, in any event, the risk of prejudice was addressed by the defence in cross-examination and in closing, and the Judge also gave clear directions about the need for caution in relation to this evidence.

Our assessment

[19] We are not satisfied that the proposed appeal raises questions of general or public importance about the responsibilities of trial counsel.[7] The Court of Appeal accepted that fundamental decisions were in play. But, having considered the facts, the Court did not accept the events gave rise to a miscarriage of justice.

[20] Nor do we consider anything raised by the applicant gives rise to the appearance of a miscarriage of justice.[8] The arguments the applicant would have this Court consider would reprise the consideration of these matters by the Court of Appeal. There is no apparent error in the Court of Appeal's assessment of these matters against the background of the Crown case. The trial Judge gave clear directions to the jury on the approach it should take to the two items of evidence said to be inadmissible.

Result

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

Solicitors:
Addington Law Centre, Christchurch for Applicant
Crown Law Office, Wellington for Respondent

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6 At [120].
7 Senior Courts Act 2016, s 74(2)(a).
8 Section 74(2)(b).