

IN THE SUPREME COURT OF NEW ZEALAND

**SC 1/2007
[2007] NZSC 19**

JAMES MICHAEL LEULUAIALI'L

v

THE QUEEN

Court: Blanchard, McGrath and Anderson JJ

Counsel: G W Wells for Applicant
M A Corlett for Crown Law

Judgment: 30 March 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The proposed appeal is against a conviction for murder. Three men, including the applicant, went together to a house. Two men, Mr Tumahai and the applicant, went inside, the third remaining outside. Mr Tumahai had earlier, at a party, been heard to say in the presence of the applicant that he was going to kill someone. The applicant and Mr Tumahai together attacked the first victim. The applicant held him down. Mr Tumahai produced a knife and stabbed him twice. That victim survived. Mr Tumahai pleaded guilty to wounding the first victim with intent to cause grievous bodily harm. The applicant pleaded not guilty to attempted murder but was convicted. That conviction was set aside by the Court of Appeal because of a misdirection by the trial Judge, namely that the jury was not told that

the Crown had to prove both a specific intention to kill by Mr Tumahai and knowledge by the applicant of that intention. The Court of Appeal declined to apply the proviso to s 385(1) of the Crimes Act 1961 because there was no evidence that the applicant was aware that Mr Tumahai carried a knife until he produced it and it was by no means impossible that the stab wounds were inflicted on the first victim before the applicant appreciated that the knife was being used and was able to make a decision whether or not to assist Mr Tumahai in that process.

[2] There was then an attack on the second victim. The evidence was that the applicant was seen pushing him against a wall. Mr Tumahai was alongside the applicant at that time. The second victim's body was later found in another room bearing 17 stab wounds and other lacerations. Mr Tumahai pleaded guilty to murdering the second victim and obviously it was he who inflicted the stab wounds.

[3] The ground of appeal which the Court of Appeal rejected in relation to the applicant was that the trial Judge had failed to direct the jury that they had the option of finding the applicant guilty of manslaughter only. The Court of Appeal accepted that there was a misdirection in respect of that failure but applied the proviso because it found that there was no credible narrative supporting lack of murderous intent. It said that a reasonable jury properly directed would inevitably have convicted because from the moment that Mr Tumahai produced and used the knife on the first victim the applicant knew that Mr Tumahai was in the mood to murder people in the house involved in dealing in cannabis (as the second victim was) who had attracted his disapproval. By grabbing the second victim and pushing him against the wall soon afterwards, the applicant must have known that he was making him a helpless prospective victim for Mr Tumahai. The Court of Appeal said it was quite unreal to suggest as a reasonable possibility some change of heart by the applicant between that point and the frenzied attack by Mr Tumahai.

[4] The proposed appeal involves no question of law of public or general importance. The Court of Appeal was plainly correct in its legal analysis. Nor are we persuaded that because of the deficiency in the summing up a substantial miscarriage of justice may have resulted.

Solicitors:
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