

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 112/2018
[2019] NZSC 30

BETWEEN JOHN GARRY DAVIDOFF
 Applicant

AND THE QUEEN
 Respondent

Court: William Young, O'Regan and Ellen France JJ

Counsel: Applicant in person
 Z A Fuhr for Respondent

Judgment: 20 March 2019

JUDGMENT OF THE COURT

A The application for an extension of time to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

Introduction

[1] Mr Davidoff was convicted after trial of assault with intent to injure, threatening to kill and possessing a knife in a public place without reasonable excuse. He was sentenced to an effective term of imprisonment of six months.¹ His appeal to the Court of Appeal against conviction was dismissed.² His sentence was reduced on the appeal to a term of imprisonment of five months. Mr Davidoff now seeks leave to appeal to this Court against conviction and sentence.

¹ *R v Davidoff* [2018] NZDC 15763 (Judge Glubb) [Sentencing remarks].

² *Davidoff v R* [2018] NZCA 439 (Kós P, Woolford and Dunningham JJ) [CA judgment].

Background

[2] The incident giving rise to the charges took place at backpackers' accommodation in Auckland at which both Mr Davidoff and the complainant were residents. A fight between the two men broke out. Mr Davidoff's defence was that the complainant initiated the attack and he was acting in self-defence.

[3] Mr Davidoff also faced three other charges in relation to this incident, injuring with intent to injure, assault with intent to injure and assault with a weapon. He was found not guilty of these charges.

[4] The trial Judge, Judge Glubb, in sentencing Mr Davidoff considered the jury by its verdicts was "either unsure" which of the two men initiated the attack or having decided which of the two did so determined that Mr Davidoff's actions at that point were in self-defence.³

[5] The charges of which Mr Davidoff was found guilty related to events that occurred subsequently. At that point Mr Davidoff was, as the Court of Appeal noted, "effectively being pulled away by others and it was at that time that Mr Davidoff deliberately kicked the complainant to the back of the head".⁴ After the two men had been separated, the Crown case was that Mr Davidoff threatened to kill the complainant. When Mr Davidoff was spoken to by the police he had a folding knife.

The proposed appeal

[6] The proposed grounds of appeal canvas a number of matters including the submission there has been a miscarriage of justice arising from the evidence produced at trial; that confidential medical notes relating to the complainant should have been ruled admissible at trial; the sentence was manifestly excessive; and that counsel's conduct of the trial was not competent. In terms of the conviction appeal Mr Davidoff essentially maintains the position he did not start the fight and was acting in self-defence.

³ Sentencing remarks, above n 1, at [3].

⁴ CA judgment, above n 2, at [5].

[7] The first three matters were considered by the Court of Appeal. In terms of the evidence at trial, in the Court of Appeal the focus of the argument was on the submission that the verdicts were inconsistent. The Court of Appeal rejected that argument on the basis the jury:⁵

... could reasonably have determined that the appellant was acting in self-defence in relation to the charges upon which he was acquitted, but was no longer acting in self-defence in relation to the charges upon which he was convicted. The offending involved a physical fight between the two men, which took several turns. The verdicts are not inconsistent.

[8] On the second issue, the Court considered Judge Glubb was correct that the complainant's medical notes were confidential.⁶ But, in any event, there was no disadvantage to Mr Davidoff through their non-production. Trial counsel had questioned the complainant about his previous convictions and drug use. The Court noted:⁷

The complainant acknowledged he had convictions for injuring with intent to injure and resisting police. He also acknowledged using methamphetamine previously and said that it was possible he had taken it earlier that day. This could be seen as supportive of Mr Davidoff's submission to the jury that the complainant initiated the fight.

[9] The Court of Appeal allowed the sentence appeal and reduced the term of imprisonment to five months. Mr Davidoff has now served his sentence.

[10] The complaints about trial counsel and other matters Mr Davidoff raises such as his experiences while serving his sentence are new.

Assessment

[11] Taking each of the matters raised in turn, the first point is that the principles applicable to inconsistent verdict appeals were addressed in *B (SC 12/2013) v R*.⁸ No question of general or public importance arises. Similarly, the other two issues considered by the Court of Appeal were specific to the particular factual circumstances.

⁵ At [8].

⁶ *R v Davidoff* [2018] NZDC 4091, relying on the Evidence Act 2006, s 69.

⁷ At [10].

⁸ *B (SC 12/2013) v R* [2013] NZSC 151, [2014] 1 NZLR 261.

[12] Nor does anything raised by Mr Davidoff in relation to either conviction or sentence give rise to the appearance of a miscarriage of justice in terms of the Court of Appeal's assessment of these matters. Nor do the new matters raised indicate the risk of a miscarriage.⁹

[13] The application for leave is out of time but there is no objection to an extension of time. We grant the application for an extension of time but the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

⁹ *LM v R* [2014] NZSC 9, (2014) 26 CRNZ 643 at [2].