IN THE SUPREME COURT OF NEW ZEALAND

SC 94/2010
[2010] NZSC 151

SHAUN MIHAKA SULLIVAN

v

THE QUEEN

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: C W J Stevenson for Applicant
M E Ball for Respondent

Judgment: 9 December 2010

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Shaun Sullivan applies for leave to appeal against the judgment of the Court of Appeal,[1] which dismissed his appeal against conviction in the High Court at Wellington of murder. The applicant was one of a group of three men charged with the murder of Paul Irons, following a beating in which the three men were said to have been participants. In interviews and at trial each of the accused sought to minimise his involvement and to a greater or lesser extent, to blame one of the co-accused. The applicant and one other co-accused were convicted of murder. The

1 *Kupa-Caudwell v The Queen* [2010] NZCA 357.

third co-accused was convicted of manslaughter. The evidence against the applicant included his admissions to family members and to another witness. Other evidence put the applicant at the incident and indicated that he had behaved aggressively towards Mr Irons. In addition the applicant's stepfather gave evidence that, the morning after the assault which led to Mr Irons' death, the applicant had given him some clothes and shoes to dispose of.

[2] The applicant maintains that the trial Judge made two errors of law in his summing-up to the jury. Although both were the subject of correction by the Judge, the applicant submits that the re-direction was not capable of curing the initial errors. The Court of Appeal had rejected these contentions and also rejected the suggestion that there had been a substantial miscarriage of justice. The applicant's further application to the Court of Appeal for recall of its first judgment, on the grounds that it had failed to address or give sufficient weight to his argument on the appeal was rejected by the Court of Appeal[2] on the basis that, if there was merit in the argument, the applicant's remedy was to seek leave to appeal to this Court. In the application for leave to appeal further to this Court, the applicant maintains that the points sought to be advanced raise questions of general and public importance and that the errors in the High Court summing-up have led to a miscarriage of justice.

[3] There are two matters of complaint with the summing-up, by Wild J. First, it is said that in the direction given in his summing-up as to the use the jury was entitled to make of inferences, the Judge was wrong to illustrate the proper use of inferences by reference to an inference suggested by the Crown. Secondly, it is suggested that the Judge left the jury with the impression in his summing-up that it could not take into account out of court statements by the co-accused which were exculpatory of the applicant. Both directions were the subject of corrected direction by the Judge, at the request of defence counsel, but it is submitted on the present application that the re-directions, although acknowledged to be accurate, were incapable of correcting the initial error and that a miscarriage of justice has occurred.

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2 *Kupa-Caudwell v The Queen* [2010] NZCA 407.

[4] The Crown had asked the jury to infer from the request to the stepfather to dispose of the applicant's clothing (should the jury find such request to have been made) that the applicant was trying to destroy evidence implicating him in the fatal assault. The trial Judge's direction in his summing-up indicated that to be an inference available, should the jury find it to be the only logical and reasonable explanation. It was submitted that the use of this illustration was tantamount to a direction that the applicant was guilty of murder, because the trial Judge had in effect directed the jury that the inference of blood on the clothing and shoes was the only logical reasonable inference available from disposal. The Judge did not acknowledge the defence contention that his disposal was equally consistent with panic rather than guilt. When this view was put to the Judge by counsel, he re-directed the jury to remind it that the defence contention was that the applicant had simply panicked. This explanation was coupled with a reminder that where there are two logical or sensible conclusions from facts found to be proved, an inference may not be drawn.

[5] The Court of Appeal thought that it would have been preferable, if the Judge had wanted to use the example of the disposal of the clothing as an illustration, to put it in the manner he had done on the re-direction. But the Court had no hesitation in concluding that the initial illustration did not give rise to a miscarriage of justice because any misapprehension had been corrected:[3]

> The correction was clear and to the point and there is no complaint about the wording of the redirection.

[6] We agree with that assessment. The initial direction was an illustration of the general reasoning process open to the jury. Given that the inference was one the Crown had invited the jury to make in the particular case, it would have been preferable for the Judge to complete the illustration by pointing out at that stage of the summing-up the alternative explanation proffered by the defence, but the redirection given was adequate to correct any misimpression possible from the first general instruction. There may occasionally be a case where a misdirection is so damaging that it would be dangerous to rely on its subsequent correction but this

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[3] At [82].

general direction as to the reasoning the jury could adopt was not of that order. No point of general or public importance arises and we are satisfied that there is no question of any miscarriage of justice.

[7] The second complaint made was in relation to the direction as to the use the jury could make of the statements of co-accused. During the course of the evidence, before a Crown witness gave evidence of a statement by a co-accused and before the video-taped interviews with each of the accused were played, the Judge directed the jury that the statements were not admissible except against the accused who made them. That direction was repeated in summing-up and illustrated by reference to evidence given. In response to requests from counsel, the Judge recalled the jury to add the direction that statements of co-accused against their own interests were statements that another accused could rely on. That direction, which was to the advantage of the applicant, was given and the jury's understanding of it was confirmed by the Judge in answer to a question asked by one of the jurors on the precise point. The Court of Appeal was correct to find that there was no error in the directions given as to the limited use that could be made of out of court statements of co-accused.

[8] No question of general or public importance which requires consideration by this Court arises. No question of miscarriage of justice has been shown.

Solicitors:
Christopher Stevenson, Wellington for Applicant
Crown Law, Wellington