IN THE SUPREME COURT OF NEW ZEALAND

SC 86/2016
[2016] NZSC 147

BETWEEN	SHIVNEEL SHAHIL KUMAR Applicant
AND	THE QUEEN Respondent

SC 87/2016

BETWEEN	BRYNE PERMAL Applicant
AND	THE QUEEN Respondent

Court:	William Young, Arnold and O'Regan JJ
Counsel:	R M Mansfield and S R Lack for Applicant SC 86/2016 I A Jayanandan and P L Borich for Applicant SC 87/2016 Z R Johnston for Respondent
Judgment:	7 November 2016

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] The applicants, Mr Kumar and Mr Permal, were found guilty of murdering Shalvin Prasad following a trial before Venning J and a jury. Both were convicted and sentenced to life imprisonment with a minimum period of 17 years' imprisonment.[1] The Court of Appeal having rejected their appeals,[2] they seek leave to appeal to this Court.

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1 *R v Kumar and Permal* [2015] NZHC 954 (Venning J).
2 *Kumar v R* [2016] NZCA 329 (Harrison, Simon France and Woolford JJ) [*Kumar* (CA)].

[2] Both applicants argue that the Court of Appeal was incorrect:

(a) to hold that the Judge had not erred by leaving the Crown's one transaction theory to the jury;

(b) to find that there was a sufficient evidential foundation for the jury's finding that, on the Crown's one transaction theory, the applicants had assaulted the deceased with murderous intent before setting him alight; and

(c) to hold that the trial Judge's directions on the one transaction theory were correct and sufficient.

[3] In addition, Mr Permal argues that the Court of Appeal was wrong to find that the trial Judge's directions on withdrawal were sufficient, and Mr Kumar argues that the trial Judge was wrong to find that the requirements of s 104 of the Sentencing Act 2002 were met.

[4] The factual background is well summarised in the Court of Appeal's judgment[3] and we will not repeat it. It is sufficient to say that Mr Prasad was rendered deeply unconscious and, while unconscious but still alive, was set on fire and died as a consequence. The Crown alleged that the applicants intended to kill Mr Prasad but advanced two alternative factual bases – one was that they intended to kill him by setting him on fire; the other was that they had murderous intent when they assaulted him and setting him on fire was the last step in their enterprise (the "one transaction" theory). On the one transaction theory, the Crown alleged that the applicants wanted to gain access to Mr Prasad's money and were prepared to use force and, if necessary, to kill Mr Prasad to do so; while carrying put their plan they assaulted Mr Prasad so severely that they mistakenly thought they had killed him, and then did kill him by setting him on fire.

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3 At [6]–[20].

[5] We consider that the only ground of those set out in [2] above that arguably raises a question of general or public importance is that in [2](a). In *Thabo Meli v R*,[4] the Privy Council upheld convictions for murder in circumstances where the four accused had, in accordance with a preconceived plan, attacked the victim by hitting him on the back of the head with an iron bar intending to kill him and, believing him to be dead, had rolled him over a cliff so as to make his death look like an accident. In fact, the victim was not killed by the blow to the back of his head but by exposure as he lay unconscious at the bottom of the cliff. The accused had argued that while they might have had an intention to kill when the blow was struck, they did not when the victim was rolled over the cliff. That is, they did not have the requisite mens rea in relation to the act that in fact caused death. The Privy Council rejected this contention, saying that it was impossible to divide up what was one series of acts in the way suggested. The sequence of events comprised one transaction.

[6] In *R v Ramsay*, the Court of Appeal interpreted *Thabo Meli* as requiring a preconceived plan covering all elements of the sequence of events, which was being followed when death occurred, albeit that death occurred at a different stage than anticipated.[5] In the present case, the Court of Appeal disagreed with this view, saying that it did not read *Thabo Meli* "as obliging the Crown to prove an antecedent plan which when formed extended to and incorporated commission of the fatal act".[6] We agree. The view that the one transaction analysis requires such a preconceived plan has been subjected to strong academic criticism[7] and has not been accepted by courts in other jurisdictions. For example, in *Royall v R*,[8] Mason CJ, having referred to *Thabo Meli* and *R v Church*,[9] said:[10]

> The reasoning in these cases is inconsistent with the applicant's submission that in murder it is essential that there should be an intent to bring about death or injury in the manner in which death actually occurs. It is enough that the accused had the requisite intent at the outset of his or her execution

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4 *Thabo Meli v R* [1954] 1 WLR 228 (PC).
5 *R v Ramsay* [1967] NZLR 1005 (CA).
6 *Kumar* (CA), above n 2, at [32].
7 See, for example, Stanley Yeo "Causation, Fault and the Concurrence Principle" (2002) 10 Otago L Rev 213 at 221–223.
8 *Royall v R* [1991] HCA 27, (1991) 172 CLR 378.
9 *R v Church* [1966] 1 QB 59 (CA).
10 At 392–393 (reference omitted). See also Brennan J at 399–401; at 410–411 per Deane and Dawson JJ; and at 452 per McHugh J.

> of a series of acts designed to cause, and causative of, death. Those cases illustrate the proposition that, where the death is caused solely by the acts of the accused, the accused's mistake as to the precise manner and time of the occurrence of death is not a factor on which the accused can rely … .

[7] As to whether there is a risk of a substantial miscarriage of justice in relation to the three grounds identified in [2] above, we are satisfied that there is no such risk, for the reasons given by the Court of Appeal. As the Court of Appeal noted, the surrounding circumstances led to an "inescapable" conclusion that Mr Prasad's deeply unconscious state was brought about by one or other or both of the applicants.[11] Having reviewed the evidence, the Court considered that on the Crown's one transaction theory the jury's finding that the applicants had assaulted Mr Prasad with murderous intent before setting him alight was "inevitable".[12] Moreover, the Court of Appeal rejected the criticisms of the trial Judge's summing up on the one transaction theory, correctly in our view.

[8] Turning to the withdrawal ground raised by Mr Permal, we do not see it as raising a question of general or public importance given that the Court recently addressed the issue of withdrawal in *Ahsin v R*.[13] The two complaints raised are that the trial Judge did not tell the jury that they needed to view the required "reasonable steps" from Mr Permal's subjective point of view and that the directions were insufficiently tailored to the circumstances of the case. The Court of Appeal was right to reject these contentions. Accordingly, we see no risk of a substantial miscarriage of justice.

[9] Finally, there is Mr Kumar's proposed appeal against sentence. He argues that the trial Judge erred in finding that the statutory threshold in s 104 of the Sentencing Act was met. The Court of Appeal rejected this contention, finding that the imposition of a minimum period of imprisonment of 17 years was justified on the facts. As this Court has said previously, it will consider sentence appeals only where an important issue of general principle arises or where there is plainly an appearance

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11 *Kumar* (CA), above n 2, at [44].
12 At [53].
13 *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.

of a substantial miscarriage of justice.[14] In the present case, there is no important issue of general principle, nor is there plainly a substantial miscarriage of justice.

[10] In these circumstances, the applications for leave to appeal are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[14] *Burdett v R* [2009] NZSC 114; *Forrest v R* [2010] NZSC 43; and *Hakaoro v R* [2014] NZSC 169.