

IN THE SUPREME COURT OF NEW ZEALAND

SC 66/2017  
[2017] NZSC 143

BETWEEN                      AKUHATUA TIHI  
   Applicant  
  
AND                              THE QUEEN  
   Respondent

Court:                      William Young, Glazebrook and O'Regan JJ  
  
Counsel:                      P J Shamy for Applicant  
   M J Lillico for Respondent  
  
Judgment:                      21 September 2017

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

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**REASONS**

**Introduction**

[1] Mr Tihi and two other prisoners seriously assaulted another inmate, who died as a result of his injuries. They were tried in the High Court and Mr Tihi was convicted of murder. His two co-defendants were convicted of manslaughter. Mr Tihi was sentenced to life imprisonment with a minimum non-parole period of 13 years in September 2016.<sup>1</sup>

[2] Mr Tihi's appeal against conviction was dismissed by the Court of Appeal on 27 April 2017.<sup>2</sup> Mr Tihi now seeks leave to appeal against that judgment.

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<sup>1</sup> *R v Betham* [2016] NZHC 2107.

<sup>2</sup> *Reuben v R* [2017] NZCA 138 (Randerson, Clifford and Whata JJ).

## **Background**

[3] Mr Tihi admitted the assault but denied any murderous intent. Three letters he had written to family members after the assault were admitted in evidence at trial. Those letters said that Mr Tihi had put the victim in hospital and was expecting life imprisonment or preventive detention as a result.

[4] In closing the prosecutor commented that the letters showed Mr Tihi recognised his involvement in the offending was so serious it could result in a sentence appropriate for murder. It was suggested this was consistent with Mr Tihi recognising that what he had done could amount to murder. The prosecutor went on to say that Mr Tihi did not say in the letters that the victim's death had been unexpected or unwanted or that any sentence he got would be unfair. The prosecutor suggested that, if Mr Tihi did not strike the blows or have murderous intent, he might have been expected to try and make excuses in the letters.

[5] The trial Judge did not give a direction to the jury in terms of s 32(2)(b) of the Evidence Act 2006 that the jury should not draw an inference of guilt from Mr Tihi's silence on those issues in the letters.

## **Court of Appeal decision**

[6] The Court of Appeal held that the prosecutor had overstepped the fine line between a legitimate challenge to Mr Tihi's veracity and inviting the jury to draw an inference of his guilt from his silence on a lack of intention to kill the victim. The Court held, however, that there was no material risk of a miscarriage arising from this or from the failure by the Judge to give a direction in terms of s 32(2)(b). The Court said that the impugned observation by the prosecutor was "made only in passing and as part of explaining the positive inferences from the letters".<sup>3</sup>

[7] Further, any risk of miscarriage arising from any irregularity under s 32 "was likely to have been overwhelmed by the obvious inference of murderous intent from

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<sup>3</sup> At [60].

the violent and repeated attacks to the victim's head. As well, Mr Tihi's admitted lies on the fundamental issues identified by the Crown plainly did not assist his case."<sup>4</sup>

### **Our assessment**

[8] Assuming for these purposes that there was a breach of s 32, we do not consider that anything raised by Mr Tihi shows the Court of Appeal's analysis was in error or that there is any risk of a miscarriage of justice.

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

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>4</sup> At [63].