IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 86/2019
[2019] NZSC 120

BETWEEN	PHILLIP RICHARD JOE Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: A J Bailey for Applicant
Z A Fuhr for Respondent

Judgment: 4 November 2019

JUDGMENT OF THE COURT

A The application for leave to appeal is dismissed.

B Leave is reserved to renew the application in the circumstances set out below at [5].

REASONS

Introduction

[1] The applicant, Phillip Joe, was convicted after trial of kidnapping, two counts of male assaults female and threatening to do grievous bodily harm.[1] The charges related to two incidents occurring on separate occasions, in February and May 2017. Both incidents involved the same complainant. In addition, the applicant had pleaded guilty on the morning of trial to one charge of driving whilst disqualified. He was sentenced on these charges to a term of imprisonment of four years and six months

[1] Mr Joe was acquitted on a number of other charges and discharged on another.

and disqualified from driving for 18 months.[2] The applicant appealed unsuccessfully to the Court of Appeal against sentence.[3] He now seeks leave to appeal to this Court against that decision on the basis the Court of Appeal dismissed the appeal on an erroneous factual basis.

The proposed appeal

[2] The first of the factual matters the applicant wishes to raise is that the appeal should not have been dealt with on the basis that one of the two convictions for male assaults female involved what the complainant described as a "round house" kick to the head (charge 11). That is because the applicant was acquitted on that charge and the relevant charge (charge 9) involved a punch to the head. The second factual matter the applicant seeks to advance is that the Court of Appeal should have corrected the concurrent sentences imposed on the two male assaults female charges. That is because the sentences recorded on the applicant's criminal history are in excess of the two year maximum statutory penalty for the offence.[4] The sentences recorded for these convictions are terms of imprisonment of three years and nine months. Finally, the applicant wishes to argue the Court treated a remark the complainant said that he made in the course of one of the incidents as a threat to kill.[5]

[3] The respondent accepts, first, that the applicant was acquitted on charge 11 and that the relevant conviction for male assaults female (charge 9) involved a punch to the head.[6] The respondent also accepts the criminal history records sentences on the two male assaults female charges which exceed the maximum. Finally, the respondent submits that no prejudice arose from the reference to the applicant's remark. In these circumstances, the respondent submits the correct approach is for the applicant to seek a recall of the Court of Appeal judgment or, in relation to the second factual matter, a correction of the record of sentence under s 180 of the Criminal Procedure Act 2011. The respondent advises it will not oppose either course.

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2 *R v Joe* [2018] NZDC 22723 (Judge O'Driscoll).

3 *Joe v R* [2019] NZCA 394 (French, Mallon and Moore JJ) [CA judgment].

4 Crimes Act 1961, s 194.

5 The Court said the detention of the complainant ended when Mr Joe told her to get back in the vehicle. In that context, the Court noted Mr Joe's comment as, "ride or die we're in this together": CA judgment, above n 3, at [15].

6 The Crown charge list in the Case on Appeal in the Court of Appeal incorrectly recorded a conviction on charge 11. (The sentencing Judge proceeded on the correct basis.)

Assessment

[4] The proposed appeal does not raise any question of general or public importance.[7] The issue on appeal would be whether, if assessed on the correct factual basis, the sentence was manifestly excessive. Rather than this Court assessing that aspect for the first time, we agree with the respondent that the better course is for the applicant to apply for a recall of the Court of Appeal's judgment. That would enable that Court to address the matter on the correct factual basis.

[5] The application for leave to appeal is accordingly dismissed but without prejudice to the ability to file another application for leave to appeal to this Court if the recall application is dismissed by the Court of Appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

7 Senior Courts Act 2016, s 74(2)(a).