IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 19/2019
[2019] NZSC 56

BETWEEN	ROBERT JOHN SOLOMON GRACE Applicant
AND	THE QUEEN Respondent

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

Counsel: Applicant in person
R K Thomson for Respondent

Judgment: 12 June 2019

JUDGMENT OF THE COURT

A An extension of time to apply for leave to appeal is granted.

B The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted after a jury trial on:

(a) One count of wounding with intent to injure. This was an alternative to the original charge of wounding with intent to cause grievous bodily harm; and

(b) One count of injuring with intent to injure. This was an alternative to the original charge of injuring with intent to cause grievous bodily harm.

[2] The applicant appealed against conviction and sentence to the Court of Appeal. That Court dismissed the appeal.[1] The applicant seeks leave to appeal to this Court. The application is made out of time but the respondent raises no issue with this and we grant the necessary extension of time.

[3] The applicant's appeal in the Court of Appeal related to the way the alternative (included) charges were added to the charge sheet during the trial and the taking of verdicts on the alternative included charges when the jury had not reached verdicts on the original charges. The applicant seeks leave to pursue again in this Court the arguments rejected by the Court of Appeal in relation to the first of these issues. He also seeks leave to pursue a number of additional grounds that were not pursued in the Court of Appeal.

[4] We deal first with the point relating to the alternative counts. The circumstances are set out in detail in the Court of Appeal's judgment and we will not repeat that account.[2] In the Court of Appeal, the submissions of the applicant (then represented by counsel) were to the effect that it was not open to the trial Judge to add new charges to the charge sheet after the commencement of the trial. The applicant has placed before us a copy of those submissions and adopts them in support of his application for leave.

[5] The Court of Appeal found that the "additional" charges were, in fact, included charges and the amendment of the charge list to refer to them was permitted under s 143 of the Criminal Procedure Act 2011.[3] We see no appearance of a miscarriage in the way the Court of Appeal determined this point.

[6] The Court of Appeal went on to consider two further points.

[7] The first was the fact that the applicant had been asked to plead to the included charges after the charge sheet had been amended. This was unnecessary and therefore an irregularity, but the Court of Appeal considered no miscarriage resulted; at most it

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1 *Grace v R* [2018] NZCA 254 (French, Ellis and Woolford JJ). The appeal against sentence was not pursued in the Court of Appeal: at [3].
2 At [9]–[23].
3 At [24]–[26].

was an irregularity that could be cured under s 379 of the Criminal Procedure Act.[4] The applicant did not challenge this and we see no basis on which he could have.

[8] The second was the fact that the trial Judge took verdicts on the included charges when the jury had not reached "not guilty" verdicts on the original charges. The Court of Appeal applied its earlier decision, *Lualua v R* and concluded no miscarriage arose, though that may not have been the case if the Crown had sought to pursue a retrial on the original counts.[5] The applicant did not explicitly seek leave on this point either, but we have considered whether it warrants leave. We are satisfied that it is a point that arises only in the unusual circumstances of the present case and that there is no appearance of miscarriage in the way the Court of Appeal dealt with it. So we do not grant leave on this point.

[9] The applicant seeks leave to raise a number of factual matters on appeal to this Court. None of them was raised in the Court of Appeal. This Court will grant leave on grounds not raised in the Court of Appeal only in exceptional circumstances.[6]

[10] We have considered each of the factual points raised by the applicant and how they were addressed at the trial. All of the points the applicant seeks to raise are matters that were before the jury. None of them gives rise to any matter of public importance. We are satisfied that no miscarriage will arise if we decline leave to pursue them for the first time in this Court.

[11] The applicant also wishes to argue that a witness at the trial should have been declared hostile. She was, however, a Crown witness and therefore subject to cross-examination. There is therefore nothing in this point. The fact that the witness was subject to a warrant for her arrest to ensure her attendance at the trial to give evidence also gives rise to no risk of a miscarriage of justice.

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4 At [31].
5 At [32]–[39], citing *Lualua v R* [2007] NZCA 114.
6 *Charlton v R* [2017] NZSC 5 at [7] and the cases cited in that paragraph.

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

Solicitors:
Crown Law Office, Wellington for Respondent