Supreme Court of New Zealand
Te Kōti Mana Nui

13 SEPTEMBER 2019

MEDIA RELEASE – FOR IMMEDIATE PUBLICATION

JESSE-JAMES WINTER v THE QUEEN

(SC 102/2018) [2019] NZSC 98

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court's judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest www.courtsofnz.govt.nz

Background

Following a jury trial, the appellant, Mr Winter, and a co-defendant were convicted of being party to two charges of wounding with intent to cause grievous bodily harm and one charge of male assaults female. Two others involved in the incident pleaded guilty just before trial.

The incident giving rise to the charges arose in this way. The two defendants who pleaded guilty, Mr Hanson and Ms McGrath, developed a plan to seriously harm a man after a dispute had arisen between the man and Ms McGrath. Mr Winter, and his co-defendant at trial, joined the plan later.

The group went to a property where they believed they would find the man they planned to assault. However, the man had already left by the time the group arrived to carry out their plan. The group instead attacked three of the other four people present at the address. Two of the victims were stabbed with a knife by Mr Hanson.

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One of the key issues at trial was whether Mr Winter knew that Mr Hanson was armed with a knife.

Mr Winter appealed unsuccessfully to the Court of Appeal against conviction.

The Supreme Court granted leave to appeal, the approved question being whether the Court of Appeal was correct to dismiss the appeal. This required the Supreme Court to consider two grounds of appeal which the Court of Appeal had dismissed:

(a) whether a text message sent by Mr Hanson to his girlfriend, who was not party to the plan to assault, that he was "arming up to do what we do" should have been admitted at Mr Winter's trial; and

(b) whether the Judge should have put an included charge to the jury. An included charge arises where there is a lesser charge encompassed by the offence charged, such that the lesser charge will necessarily be committed where someone is convicted of the offence charged. No included charge was put to the jury.

The Supreme Court's decision

The Supreme Court has unanimously dismissed the appeal.

Whether the "arming up" text message was admissible

The text message sent by Mr Hanson was a "statement made by a co-defendant". Under s 22A of the Evidence Act 2006, such a statement was only admissible against Mr Winter if there was reasonable evidence of a joint enterprise, reasonable evidence that Mr Winter was a member of the joint enterprise and the statement was made in furtherance of it. The main issue in this case was whether the text message was in furtherance of the joint enterprise.

The Supreme Court held that the text message should not have been admitted at Mr Winter's trial. The text message was not in furtherance of the joint enterprise. It did not, for example, involve the attempted recruitment of someone else to the group's plan. Mr Hanson's girlfriend was not a member of the plan to assault. Nor did it involve the acquisition of something required for the group's plan. Viewed in context, the text was part of an exchange of a domestic nature.

However, the Court did not consider there was a miscarriage of justice. That was because, in agreement with the Court of Appeal, any risk of unfair prejudice was dealt with by the trial Judge's directions. The unfair prejudice which might attach to the text was that the jury would have treated it as tending to prove that Mr Winter knew Mr Hanson was armed with a knife. But the Judge directed the jury that the text could not be used for this purpose.

Whether an included charge should have been left to the jury

On the question of whether an included charge should have been put to the jury, the Court departed from the previous New Zealand authority, *R v Mokaraka*. The Court clarified that the test to be applied is whether the interests of justice require the trial judge to put an included charge to the jury. They will so require where, on the evidence and arguments made at trial, the jury is squarely confronted by the possibility that the included charge will be proved, but not the original, more serious, charge.

The Court also found that it was not helpful to describe the obligation to put the included charge as a "discretion" because the judge in cases where the jury is so confronted should put the included charge unless a countervailing factor is present. Examples of countervailing factors are that the included charge is trifling by comparison or there is unfairness arising to either the prosecution or defence.

The Court found also the threshold for appellate intervention described in *Mokaraka*, that the appellate court must be satisfied that the jury may have convicted out of reluctance to see the defendant get away with disgraceful conduct, was no longer applicable. Rather, in the usual way, the appellate court will have to consider the outcome in terms of s 232 of the Criminal Procedure Act 2011, that is, whether or not the omission has given rise to a miscarriage of justice.

On the facts of the case, the Court found it was not in the interests of justice to leave an included charge to the jury because the jury was not squarely confronted with the possibility of an included verdict. The two suggested included charges were injuring with intent to injure and assault with intent to injure. In the case of injuring with intent to injure, the availability of that verdict turned on there being an arguable case there was a lesser level of harm caused to the complainants, yet it was not disputed that the complainants were wounded. In addition, in relation to assault with intent to injure, it was not in the interests of justice that the charge be put because it was so trifling in comparison to the original charge.

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