IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 47/2020
[2020] NZSC 128

BETWEEN	ALBERT KARL LENIN STRETCH Applicant
AND	THE QUEEN Respondent

Court:	Glazebrook, O'Regan and Williams JJ
Counsel:	D A Ewen for Applicant R K Thomson for Respondent
Judgment:	18 November 2020

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted along with two associates of causing grievous bodily harm with intent to do so (s 188(1) of the Crimes Act 1961). The applicant was convicted on the basis that he was a party to the offending under s 66(2) of the Crimes Act. On appeal to the Court of Appeal, his conviction under s 188(1) was quashed and a conviction of causing grievous bodily harm with reckless disregard for the safety of others under s 188(2) was substituted.[1] He seeks leave to appeal against his conviction on the substituted charge.

[2] The Crown case was that the applicant paid his two co-defendants to assault the victim. The co-defendants carried out the assault, but it was of such seriousness

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[1] *Stretch v R* [2020] NZCA 195 (Cooper, Collins and Simon France JJ) [CA judgment].

that the active perpetrators were charged with (and convicted of) causing grievous bodily harm with intent to cause grievous bodily harm. That meant that the actual assault went further than the common purpose of assaulting the victim. It was therefore necessary for the Crown to prove that the assault causing serious injury was, in the words of s 66(2), "known [by the applicant] to be a probable consequence of the prosecution of the common purpose".

[3] The application for leave to appeal to this Court focuses on the directions the trial Judge gave in both his summing up and in the question trail he provided to the jury about the "probable consequence" requirement. The Judge's directions were as follows:

> Secondly, and this is applying to the Crown case against Mr Stretch, when a person forms a common intention with another person or persons to commit an offence and to assist each other in doing that, then such a person is a party to any offence committed by the others in carrying out that common intention if the commission of that offence was known to that person to be a probable consequence of them carrying out the common purpose.
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> So at law, knowing something to be a probable consequence means that the person knew there was a substantial or real risk of that offence occurring in the carrying out of that common purpose, and the Crown case is that Albert Stretch, who was not present when Daniel Wiari was hurt, was a party to the offending by the other two men in that way.
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> …
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> Are you sure that [the applicant] knew at the time of forming that intention that there was a substantial or real risk Mr Wiari would suffer really serious harm in that assault?[2] If the answer is no, you are not sure, you find him not guilty. If the answer is yes, you are sure, you find him guilty.

[4] Prior to giving these directions, the Judge had read out s 66(2), following which he said he would attempt to reduce it to "intelligible English".

[5] Counsel for the applicant, Mr Ewen, argues that the formulation "substantial or real risk" is not a proper reflection of the statutory wording "probable consequence". He made this argument in the Court of Appeal. That Court said that

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2 As the Court of Appeal noted, there was an error in this formulation: what was required was that the applicant knew the *intentional* infliction of really serious harm by his co-defendants was a probable consequence. Hence the Court of Appeal's decision to substitute a conviction under s 188(2): CA judgment, above n 1, at [8] and [16].

he was in effect renewing submissions made to this Court in *Ahsin v R*.[3] The Court of Appeal noted that this Court in *Ahsin* did not consider there was any reason to revisit the "substantial or real risk" formulation, and adopted the same approach.[4]

[6] Mr Ewen said the direction by the trial Judge should have been:

> Knowing something to be a probable consequence means that the person knew there was a substantial or real risk of that offence occurring in the carrying out of that common purpose. *It is not enough that the offence is a possible consequence. It must be a likely outcome, on the facts known to the defendant at the time*.

[7] A similar argument was rejected by this Court in *Ahsin*.[5] The majority (McGrath, Glazebrook and Tipping JJ) responded to a criticism of a similar direction to the one given in the present case as follows:

> [100] Counsel's criticism [of the direction] is directed at established law on the requirements of s 66(2). In *R v Gush*, the Court of Appeal, construing the words "probable consequence" in the provision purposively and in their context, held that they meant an event that could well happen rather than one which is more probable than not. In *R v Piri*, Cooke P reiterated that "the words do not require proof that the accused thought that the result which in fact eventuated was more likely than not. He added that while no single formula is "preferable or adequate", the degree of foresight required to be proved may be referred to as "a real risk, a substantial risk, [or] something that might well happen".
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> [101] These decisions have been consistently followed since in New Zealand. The Judge's direction in this case is entirely in accordance with them and the present case does not require reconsideration of this aspect of the law.
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> (footnotes omitted)

[8] The rejection of the same argument in a recent decision of this Court is not an auspicious context for the argument the applicant wishes to pursue. In recognition of that, Mr Ewen argues that there is a difference between this case and *Ahsin*, which means that there was no need to revisit the test in *Ahsin*, but there is reason to revisit it here. He says the Judge's reference to reducing the statutory words to intelligible English took any residual force out of the statutory expression "probable

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[3] *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493.
[4] CA judgment, above n 1, at [18].
[5] *Ahsin*, above n 3, at [99].

consequence". We do not accept that: the Judge actually used those very words ("probable consequence") in the summing up quoted above.

[9] In effect, the applicant is making the same argument that this Court rejected in *Ahsin*, to the effect that the formulation that is used in the jury direction fails to distinguish between "possibility" and "likelihood". We do not consider there is a proper basis for distinguishing *Ahsin* from the present case. Nor are we persuaded that an argument that *Ahsin* should be overruled on this point has sufficient prospects of success to justify the grant of leave. The Court would not normally overrule a previous decision, especially one that reflects a longstanding test (as is the case here), unless there was evidence that the current law is causing difficulty in its administration or injustice in its outcome. Neither appears to be demonstrated in this case.

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

Solicitors:
Crown Law Office, Wellington for Respondent