

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 69/2021
[2021] NZSC 132

BETWEEN JAMIE RONA KI KISSLING
Applicant
AND THE QUEEN
Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: Applicant in person
B F Fenton for Respondent

Judgment: 7 October 2021

JUDGMENT OF THE COURT

- A The application for an extension of time to apply for leave to appeal is granted.**
- B The application for leave to appeal is dismissed.**
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REASONS

Introduction

[1] Mr Kissling pleaded guilty to a charge of causing grievous bodily harm with intent to cause grievous bodily harm. His subsequent application to vacate his plea on the basis of trial counsel error was unsuccessful¹ and he was convicted and sentenced.² He appealed unsuccessfully to the Court of Appeal against conviction on the basis of trial counsel error and maintaining that his application to vacate his guilty plea should

¹ *R v Kissling* [2019] NZDC 23647 (Judge Crayton).

² *R v Kissling* [2020] NZDC 3665 (Judge Crayton).

have been allowed.³ Mr Kissling now applies for leave to appeal out of time from the decision of the Court of Appeal.

Background

[2] The Crown case was that the offending arose in the context of tension between two groups of neighbours – Mr Kissling’s whānau and the Nuku-Rauhihi whānau. Matters escalated in July 2016 to threats of violence and some altercations. In the incident giving rise to the charge, Mr Kissling is said to have pointed a slug gun at Mr Grant Nuku-Rauhihi and fired it from about three metres away. Mr Nuku-Rauhihi was hit in the eye, blinding him in that eye.

[3] Mr Kissling faced a number of charges. He was initially represented by Mr Paul Murray. Ms Gretel Fairbrother took over as counsel for a period but Mr Murray was re-appointed following the adjournment of an initial trial fixture. The trial went ahead on 12 November 2018.

[4] What happened next is set out in the Court of Appeal judgment.⁴ For present purposes, it is sufficient to note that the evidence of the first Crown witness, the complainant’s sister, was heard on the afternoon of 12 November. She was called as an eyewitness to the shooting. Although she identified Mr Kissling as the man firing the slug gun, it appears the evidence was not particularly compelling. Mr Kissling decided to see how the evidence of the complainant, who was called next, went. Mr Nuku-Rauhihi’s evidence was seen as having gone well for the Crown – Mr Kissling was clearly identified as the shooter. Mr Kissling decided to plead guilty. His signed instructions to that effect given on that day referred to the evidence noting both witnesses identified him as the shooter and that he was not willing to take the risk that he or his witnesses would not be believed.

³ *Kissling v R* [2020] NZCA 685 (French, Whata and Mander JJ). The reasons for the Court’s judgment were given in *Kissling v R* [2021] NZCA 6 (French, Whata and Mander JJ) [CA reasons judgment].

⁴ CA reasons judgment, above n 3, at [7]–[8]. A proposal to resolve matters in exchange for a guilty plea on the charge involving the slug gun was not pursued after Mr Kissling rejected the sentence indication given for that charge.

[5] Subsequently, on 7 December 2018, Mr Kissling applied to vacate his plea, raising trial counsel misconduct in a number of respects. Having heard evidence, Judge Crayton rejected claims Mr Murray did not take instructions, had not explored all lines of defence and/or failed to organise witnesses.

[6] In the Court of Appeal there were three claimed errors, namely, that Mr Murray:

- (a) did not give an alibi notice;
- (b) failed to give correct advice about the availability of bail pending sentence; and
- (c) gave unduly pessimistic advice about the prospect of an acquittal.

[7] The alibi issue came to nothing as Ms Fairbrother had, in fact, filed an alibi notice. In addition, the Court of Appeal accepted Mr Murray's evidence that the potential absence of a notice had no effect on his approach at all.

[8] In terms of bail, the Court said that Mr Murray was in error in that he had not realised Mr Kissling came within s 11 of the Bail Act 2000, which would preclude a grant of bail.⁵ The Court of Appeal accepted that the prospect of bail and the failure to be advised about s 11 were inducements to the guilty plea. But this aspect did not give rise to a miscarriage of justice where the error did not engage any of the recognised exceptional grounds for vacating a guilty plea. The following factors were relevant:

- (a) The error did not affect Mr Kissling's appreciation of the nature of the charge and did not induce a mistaken belief he had no tenable defence.

⁵ Section 11 of the Bail Act 2000 applies where a person convicted of a specified offence is found guilty or pleads guilty to another specified offence.

- (b) Mr Kissling could have had no expectation of bail as he knew the District Court Judge was not prepared to grant bail in exchange for a guilty plea.
- (c) Mr Kissling did in any event get bail on compassionate grounds almost immediately.

[9] On the final ground, advice as to prospects of success, the Court of Appeal considered Mr Kissling had been advised of the risks of proceeding, although accepting Mr Murray “may have left a pessimistic impression of the prospect of an acquittal”.⁶ However, the Court set out various matters which explained why Mr Murray had serious concerns, including the “mobile nature of Mr Kissling’s account” of where he was and as to what happened.⁷ The Court concluded “there was good reason to take a realistically low view of the prospect of an acquittal based on the available evidence”.⁸

The proposed appeal

[10] Mr Kissling wishes to raise a number of matters on appeal in support of the submission that a miscarriage of justice has resulted.⁹ Some of these matters would have this Court re-consider matters raised in the Court of Appeal, such as the alibi notice issue. There is also reference to various other matters, including the failure by counsel then acting to make an application for discharge in the context of the first trial date; the failure of counsel on the appeal to follow instructions; and an affidavit which Mr Kissling says counsel was meant to raise on the appeal. Finally, Mr Kissling challenges the Court of Appeal’s findings supporting Mr Murray’s version of events. Mr Kissling maintains counsel did not act in his best interests.

[11] The position in respect of the circumstances surrounding Mr Kissling’s entry of the guilty plea and the advice Mr Kissling received has been the subject of evidence and consideration in both the District Court and in the Court of Appeal. Nothing raised

⁶ At [38].

⁷ At [38(a)].

⁸ At [43].

⁹ Senior Courts Act 2016, s 74(2)(b). Mr Kissling also alleges various breaches of his rights under ss 24 and 25 of the New Zealand Bill of Rights Act 1990.

by Mr Kissling gives rise to the appearance of a miscarriage of justice in the assessment of those Courts of these matters. The criteria for leave to appeal are not met.

[12] Mr Kissling filed his notice of application for leave to appeal well out of time. He has provided an explanation for the delay and there is no objection from the respondent to our extending time.

Result

[13] The application for an extension of time to apply for leave to appeal is granted. The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent