NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF MS R PURSUANT TO S 202 OF THE CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE. SEE http://www.legislation.govt.nz/act/public/2011/0081/latest/DLM3360349.html

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 66/2021
[2021] NZSC 137

BETWEEN	CODY DEREK MARTIN Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and O'Regan JJ

Counsel: S R Lack for Applicant
M J Lillico for Respondent

Judgment: 15 October 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant and his co-defendant, Kasha Gosset, were tried for the murder of Bradley Lomax. He had been shot with both a sawn-off shotgun and a cut-down .22 rifle. The fatal shots – to the victim's head – were fired from the shotgun. The applicant and his co-defendant had earlier picked up the victim and driven him to an isolated area where he was killed. The two firearms were in the car and loaded when they picked up the victim.

[2] When interviewed by detectives, the applicant admitted having shot the victim in the leg with the sawn-off shotgun but claimed that the fatal shots had been fired by his co-defendant. His co-defendant's position at trial was that the fatal shots had been fired by the applicant.

[3] The Crown did not claim to be able to prove which of the two defendants had fired the fatal shots. Rather its position was that each of them was guilty as a party. Both were found guilty at trial and their conviction appeals were dismissed by the Court of Appeal.[1]

[4] The applicant's co-defendant has a prior conviction for attempted murder resulting from his shooting another man in the chest with an improvised pistol (in the form of a cut-down .22 rifle). The applicant wished to lead evidence of this at trial but the trial Judge did not permit him to do so.[2] It is this aspect of the case which is the basis of the application for leave to appeal.

[5] The arguments which the applicant wishes to advance are of some significance. They concern the approach to be taken in joint trials where a defendant wishes to lead propensity evidence against a co-defendant. This was discussed by the Court of Appeal in *Moffat v R* where the Court was not unanimous as to the approach to be taken.[3]

[6] The approach taken by the trial Judge and Court of Appeal primarily focused on relevance. In the view of both, the evidence was not relevant; this because the identity of the person who fired the fatal shots was not critical to liability.[4]

[7] Such evidence, if led at trial, would have been a two-edged sword for the applicant. It would have lent some plausibility to the applicant's narrative of his co-defendant being the man who fired the fatal shots. This, however, would have been at best of limited assistance to the applicant; this given that the jury was necessarily going to be left in doubt as to who that man was and had no choice but to approach

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1 *Gosset v R* [2021] NZCA 187 (Goddard, Lang and Hinton JJ) [CA judgment].
2 *R v Gosset* [2019] NZHC 216 (Mander J) [HC propensity judgment].
3 *Moffat v R* [2009] NZCA 437, [2010] 1 NZLR 701.
4 HC propensity judgment, above n 2, at [29]; and CA judgment, above n 1, at [116].

the case on the basis that there was at least a reasonable doubt on this issue in relation to each of the two defendants. More significantly, it would have been damaging to his position as to party liability. This is because he had conceded when interviewed by the Police that his co-defendant had told him that he intended to kill the victim shortly prior to picking the victim up, and a combination of the details of the attempted murder along with his apparent awareness of the incident itself would necessarily have cast a major shadow over his claim that he did not think that his co-defendant had been serious. His claim not to have taken the remarks about killing the victim seriously was, in any event, not particularly plausible given that the two men had loaded firearms with them when they picked up the victim.

[8] This case involves a very particular factual situation and trial dynamic. If the propensity evidence had any relevance, it was vanishingly small. And, in any event, it cannot realistically be suggested the applicant's prospects of an acquittal would have been improved if the evidence had been admitted. Counsel for the applicant makes the fair point that the conduct of a defendant's defence is for the defendant and that in this case the applicant had a right to make his own decision as to the tactics to be adopted at trial. But while this is correct, an appeal to this Court would only be allowed if a miscarriage can be established.[5] Given that the applicant cannot credibly point to any actual forensic prejudice, there is no risk that a miscarriage of justice will occur if leave is refused. In those circumstances, the application for leave to appeal must be dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

5 Criminal Procedure Act 2011, ss 232(2) and 240.