

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 73/2021  
[2021] NZSC 176

BETWEEN                      PAUL MALCOLM JOHNSON  
   Applicant  
  
AND                                THE QUEEN  
   Respondent

Court:                            Glazebrook, O'Regan and Ellen France JJ

Counsel:                        J E L Carruthers for Applicant  
   E J Hoskin for Respondent

Judgment:                      10 December 2021

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**JUDGMENT OF THE COURT**

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**The application for leave to appeal is dismissed.**

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**REASONS**

[1] Mr Johnson was convicted on a charge of wounding with intent to cause grievous bodily harm.<sup>1</sup> He was sentenced to seven years' imprisonment.<sup>2</sup> His appeal as of right from jury trial to the Court of Appeal against conviction and sentence was unsuccessful.<sup>3</sup> He now applies for leave to appeal against that decision.

**Grounds of appeal**

[2] Mr Johnson submits there was an error during his trial which meant his counsel failed to lead relevant evidence which may have led to serious doubt about the complainant's identification of Mr Johnson from a photo montage. He says the

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<sup>1</sup> Crimes Act 1961, s 188(1).

<sup>2</sup> *R v Johnson* [2018] NZDC 24332 (Judge Gerard Winter).

<sup>3</sup> *Johnson v R* [2021] NZCA 233 (Miller, Venning and Peters JJ) [CA judgment].

photograph of him in the montage was an old one and did not show the distinctive facial tattoo he had at the time of the offending. Nor did the victim mention this tattoo in interviews with the police.

### **Court of Appeal judgment**

[3] While the Court of Appeal accepted that trial counsel for Mr Johnson had mistakenly considered that Mr Johnson did not have the face tattoo at the time of the alleged offending,<sup>4</sup> it said that it had to be shown that this error created a real risk the outcome was affected.<sup>5</sup> The Court found that the outcome would not have changed. This is because identification was not a live issue at trial. The issue was rather one of recognition.<sup>6</sup> The victim knew Mr Johnson and had met him previously. The Court noted the degree of care taken in the photo montage process, a process that was not strictly required of the police given the victim knew Mr Johnson.<sup>7</sup> In addition, given the tattoo was on the side of the face, there was no real difference in Mr Johnson's appearance front-on which is how the photographs in the montage were presented.<sup>8</sup>

[4] The failure to explicitly mention a facial tattoo was also not surprising given the victim was fending off blows at the time and may not have been facing the side of the face the tattoo was on.<sup>9</sup> Finally, there was forensic evidence in the form of Mr Johnson's palm print at the scene.<sup>10</sup> Based on all of the above, the Court found there was no real risk the verdict was affected.<sup>11</sup>

### **Our analysis**

[5] Mr Johnson raises the same arguments that were before the Court of Appeal and which rest on the particular facts of the case. As conceded by Mr Johnson, no point of general or public importance arises.<sup>12</sup> Further, nothing raised by Mr Johnson

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<sup>4</sup> CA judgment, above n 3, at [20].

<sup>5</sup> At [22], applying *Haunui v R* [2020] NZSC 153 at [67].

<sup>6</sup> CA judgment, above n 3, at [24].

<sup>7</sup> At [28]–[30].

<sup>8</sup> At [27].

<sup>9</sup> At [26]. The Court also commented at [33] that an experienced police officer had not noticed the tattoo when speaking to Mr Johnson after the incident.

<sup>10</sup> At [31].

<sup>11</sup> At [34].

<sup>12</sup> Senior Courts Act 2016, s 74(2)(a).

points to any apparent error in the Court of Appeal's analysis. This means that there is no risk of a miscarriage of justice.<sup>13</sup>

## **Result**

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

Solicitors:  
Crown Law Office, Wellington for Respondent

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<sup>13</sup> Section 74(2)(b).