IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI

SC 108/2020
[2021] NZSC 25

BETWEEN	MESUI TUFUI Applicant
AND	THE QUEEN Respondent

Court:	William Young, O'Regan and Ellen France JJ
Counsel:	P L Borich QC for Applicant F R J Sinclair for Respondent
Judgment:	18 March 2021

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Introduction

[1] After a jury trial in the High Court at Auckland, the applicant, Mesui Tufui, was convicted on charges of murder and attempted murder, along with Fisilau Tapaevalu. The applicant appealed unsuccessfully to the Court of Appeal against conviction and now seeks leave to appeal to this Court.[1]

[1] *Tufui v R* [2020] NZCA 568 (Courtney, Wylie and Muir JJ) [CA judgment]. In that judgment, the Court of Appeal also dismissed Mr Tapaevalu's appeal against sentence. His application for leave to appeal to this Court against sentence is the subject of a separate judgment being delivered at the same time: *Tapaevalu v R* [2021] NZSC 26.

Background

[2] The charges arose out of the shooting, in the early hours of the morning of 1 May 2018, of Abraham Tu'uheava and his wife, Yolanda Tu'uheava. Mr Tu'uheava was fatally shot by Viliami Taani. Mrs Tu'uheava survived having been shot twice in the head and twice in the arm. Mr Taani pleaded guilty to the murder of Mr Tu'uheava and to the attempted murder of Mrs Tu'uheava. The applicant and Mr Tapaevalu pleaded not guilty and were tried together.

[3] Mrs Tu'uheava gave evidence at the trial. She did so remotely. She described the man who shot her husband and shot her in the head as "the main guy". It was accepted that the man described as the main guy was Mr Taani. Mrs Tu'uheava described the man who shot her in the arm as "the younger guy". It was the Crown case that the applicant was the younger guy and Mr Tapaevalu was the driver of the car in which the three men travelled to the location of the shooting.[2]

[4] The jury heard evidence about the various formal identification processes in which Mrs Tu'uheava had participated. In these processes, she identified Mr Taani from a photograph montage as the main guy.[3] On various occasions, she identified a number of men, including the applicant, as the younger guy. When shown a photograph montage in which Mr Tapaevalu appeared, Mrs Tu'uheava did not identify him.[4] She was not cross-examined about this montage.

[5] The applicant did, however, seek leave to cross-examine Mrs Tu'uheava on photographs taken at the time of Mr Tapaevalu's arrest. Mr Tapaevalu has a condition which affects his right eye and it is the applicant's case that the effect of this condition on the appearance of his eye is more apparent in the arrest photographs than in his photograph in the photograph montage. In declining the application, Lang J said that the proposed questioning had all of the inherent concerns applicable to a dock

---

2 The three men are cousins. Mr Taani was a patched member of the Comanchero Motorcycle Club and Mr Tapaevalu was associated with that gang. In sentencing the applicant and Mr Tapaevalu, the Judge proceeded on the basis that the Crown had not proved beyond reasonable doubt that the shooting was premeditated, rather, the two men were sentenced on the basis that this was a drug deal gone wrong: *R v Tapaevalu* [2019] NZHC 1867 (Lang J).

3 She had also identified other men as the main guy in other photographs.

4 She said that all of the men in that montage looked like they had been given a "hiding".

identification.[5] The Judge also said that given it was over a year since the incident and given issues concerning the ability to recall, the evidence would not be particularly probative.

[6] The applicant and Mr Tapaevalu ran cut-throat defences, each asserting the other was the younger guy described by Mrs Tu'uheava.

[7] The applicant said that he was not present at the scene at all. He relied on his statement to the police that he was at a house in Mangere when the offending occurred. He said Mr Tapaevalu's two sisters were there at the same time. They both gave evidence, but neither supported Mr Tufui's claim.

[8] Mr Tapaevalu gave evidence. He said that both he and the applicant were present and that the applicant had got out of the car with Mr Taani. He said he had stayed in the car dozing in the back throughout the shootings.

The proposed appeal

[9] The principal basis on which the applicant seeks leave to appeal is that he should have been permitted to put to Mrs Tu'uheava the arrest photographs of Mr Tapaevalu. These were of a better quality than the image in the photograph montage she had been shown. The applicant says that the inability to put this evidence to the witness, which the Court of Appeal accepted was an error, resulted in a miscarriage of justice because there was a reasonable possibility that a different verdict would have been returned.[6] He also wishes to argue that the Court of Appeal erred in not considering whether the error in not allowing cross-examination on the arrest photographs led to a miscarriage because it resulted in an unfair trial.[7] In this respect, the applicant argues a breach of his rights under s 25(a), (e) and (f) of the New Zealand Bill of Rights Act 1990. Finally, he says the proposed appeal will raise issues about the approach to directions when cut-throat defences are run, and in particular, whether the trial Judge should have given a warning under s 122 of the Evidence Act 2006 about the reliability of Mr Tapaevalu's evidence. The applicant contends that the

5 *R v Tapaevalu* HC Auckland CRI-2018-092-5114, 10 June 2019.
6 Criminal Procedure Act 2011, s 232(2)(c) and (4)(a).
7 Section 232(2)(c) and (4)(b).

proposed grounds engage the substantial miscarriage of justice limb of the criteria for leave to appeal[8] and also that they give rise to questions of general or public importance.[9]

Our assessment

[10] The submission that the inability to cross-examine Mrs Tu'uheava about the arrest photographs created a real risk the outcome of the trial was affected would revisit the argument made in the Court of Appeal. The Court considered that while any probative value of this evidence was slight, the applicant should have been allowed to put this evidence to Mrs Tu'uheava. But the Court said the inability to do so had not resulted in a miscarriage given she had already identified four different people as the younger guy and the fact directions as to the reliability of the identification evidence were given to the jury. This meant Mrs Tu'uheava's identification evidence was of "limited probative value and would have remained so, whatever her response to the arrest photographs".[10] Further, the Court said that while the Crown case against the applicant, which otherwise rested on circumstantial evidence and Mr Tapaevalu's account, was not particularly strong, the jury could have accepted Mr Tapaevalu's account which would have provided a sufficient basis to reach the verdict that it did.

[11] In assessing the effect of the omission of this evidence, the Court of Appeal applied the test set out by this Court in *Misa v R*.[11] No question of general or public importance therefore arises. As to whether the error created a real risk the outcome of the trial was affected, that is a question which turns on an assessment of the facts, particularly as to the effect of the overall confusion in the identification evidence that was before the jury. Nothing raised by the applicant suggests any error in the Court of Appeal's assessment of the factual position.

[12] Nor do we consider that the proposed ground based on unfair trial meets the criteria for leave to appeal. We accept the submission for the respondent that

---

8 Senior Courts Act 2016, s 74(2)(b).
9 Section 74(2)(a).
10 CA judgment, above n 1, at [55].
11 *Misa v R* [2019] NZSC 134.

considering the issue in terms of trial fairness would not change the required analysis in this case from that adopted by the Court of Appeal.[12] Further, as the respondent also notes, the Court did address the question of whether the applicant was deprived of the opportunity to present his defence and concluded he was not.[13]

[13] Finally, whether a reliability direction under s 122 of the Evidence Act should have been given in relation to Mr Tapaevalu's evidence was not raised in the Court of Appeal.[14] It would be unusual for this Court to permit a second appeal to be brought on a ground not raised in the Court of Appeal unless there was a real possibility that it could be demonstrated by reference to that ground that there had been a miscarriage of justice at the trial.[15] The argument raised does not suggest such a possibility in this case.

[14] The application for leave to appeal is accordingly dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

---

12 The respondent refers in this respect to the observation of this Court in *R v Condon* [2006] NZSC 62, [2007] 1 NZLR 300 at [78], that the assessment of trial fairness "is to be made in relation to the trial overall" and that "[i]t is not every departure from good practice which renders a trial unfair".

13 CA judgment, above n 1, at [48].

14 No direction was sought at trial. In summing up, the Judge discussed the applicant's case that Mr Tapaevalu had "every reason in the world to put the blame on [the applicant] because otherwise the blame sits firmly on him".

15 *Pavitt v R* [2005] NZSC 24 at [4]; and *Dunn v R* [2020] NZSC 58 at [15].