

IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 68/2023  
[2023] NZSC 141

BETWEEN DONALD DEV KUMAR SINGH  
Applicant  
AND THE KING  
Respondent

Court: Ellen France and Kós JJ  
Counsel: J E L Carruthers for Applicant  
I S Auld and L C Hay for Respondent  
Judgment: 27 October 2023

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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**

**Introduction**

[1] Following a jury trial, Mr Singh was found guilty of wounding with intent to cause grievous bodily harm.<sup>1</sup> He appealed against conviction to the Court of Appeal on the basis that the trial Judge gave the jury an incomplete intoxication direction and the prosecution breached s 32 of the Evidence Act 2006, dealing with the right to silence. The Court of Appeal dismissed his appeal.<sup>2</sup> Mr Singh now seeks leave to appeal to this Court arguing the Court of Appeal erred in its approach to these two issues.

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<sup>1</sup> He was sentenced to 5 years and 5 months' imprisonment: *R v Singh* [2022] NZDC 16765 (Judge Wharepouru).

<sup>2</sup> *Singh v R* [2023] NZCA 220 (Katz, Whata and Davison JJ) [CA judgment].

## **Background**

[2] The relevant facts are summarised by the Court of Appeal.<sup>3</sup> We need only note the following. Mr Singh and Mr Tanginoa were drinking at Mr Tanginoa's relative's house together throughout the day on 30 October 2018. The Crown case at trial was that during the evening Mr Singh became angry after losing his phone and Mr Tanginoa decided to drive him home. During the drive, Mr Singh used a knife or box cutter to slash and stab Mr Tanginoa. Mr Tanginoa fought back but Mr Singh continued to cut and stab. Mr Tanginoa eventually got out of the car where the fighting continued. Mr Singh was injured and left the scene.

[3] When later found at the roadside, Mr Singh said he had been beaten by someone else. In hospital and after being arrested, Mr Singh maintained he had been assaulted but did not identify Mr Tanginoa as the assailant.

[4] At trial, Mr Singh's evidence was that Mr Tanginoa was the one who was angry rather than Mr Singh. Upon leaving the party, he said Mr Tanginoa attacked him. Mr Singh managed to escape out of the car. He denied stabbing Mr Tanginoa.

## **Intoxication direction**

[5] The issue as to the direction on intoxication arose in this way. There were references in the evidence, and in the addresses of counsel, to the fact that both men were drinking on the day. The Judge referred to this evidence in summing up saying this:<sup>4</sup>

You heard evidence that before the crucial events in the car, that Mr Tanginoa and Mr Singh had been drinking for much of the day. Alcohol sometimes has a disinhibiting effect so people may do things, when intoxicated, that they would not do when they are sober. But the law holds people responsible for their intentional acts, even if they are drunk at the time. A drunken intent is still an intent for the purposes of the law, so it follows that intoxication is not in and of itself a defence.

[6] On the proposed appeal the applicant wishes to argue that the Court of Appeal erred in its approach to this intoxication direction. The applicant says in this context

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<sup>3</sup> At [4]–[6].

<sup>4</sup> See CA judgment, above n 2, at [44].

that there is inconsistency in the Court of Appeal authorities on when evidence will call for an intoxication direction. Further, the applicant contends that the Court of Appeal in this case deferred incorrectly to the defence case in the situation where intoxication formed part of the Crown case. Finally, the applicant argues that the fallback position adopted by the Court of Appeal, that is, that a full direction would have made no difference, is problematic.

[7] This part of the proposed appeal would reprise arguments made in the Court of Appeal. The Court of Appeal rejected the argument that in discussing intoxication, the trial Judge needed to go on to say that intoxication was still relevant to whether in fact Mr Singh formed the specific intent necessary. The Court of Appeal took the view that a full direction was not necessary where, amongst other matters, there was no evidential foundation for the submission that intoxication vitiated intention. The Court went on to say that, even if wrong on that, the failure did not give rise to a miscarriage of justice. The Court of Appeal said this:<sup>5</sup>

In addition to the absence of any direct evidence that Mr Singh was so intoxicated he could not have intended to stab Mr Tangino, the Crown case on intent was very strong. Given the nature of the injuries suffered, a finding of requisite intent was inevitable. So, we are not satisfied that there was any real possibility of a different verdict had the full intoxication direction been given.

[8] We accept the respondent's submission that the cases are clear that an intoxication direction may be required even when intoxication is disavowed by the defence. The differences in the cases relied on by the applicant reflect, as the respondent submits, different evidence and factual assessments made of that evidence. No question of general or public importance accordingly arises here.<sup>6</sup> We agree also with the respondent's submission that the Court did not defer to the defence evidence. Rather, that evidence along with other evidence was analysed in an orthodox manner. We see no appearance of a miscarriage in the Court of Appeal's assessment of the

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<sup>5</sup> At [55].

<sup>6</sup> Senior Courts Act 2016, s 74(2)(a).

evidence in this case.<sup>7</sup> We add that the partial direction on intoxication was to be read alongside this further passage from the summing up:

[55] The Crown case is that you can infer an intention to cause grievous bodily harm from the surrounding circumstances. The defence case, by contrast, is that you cannot infer this requisite intent because Mr Singh did not do as Mr Tanginoa alleges. In the end it is up to you to make of the evidence what you will.

## **Section 32**

[9] As the Court of Appeal explained, the issue in relation to s 32 arose because Mr Singh was asked by the Judge, and by both counsel, about why he did not tell the police that Mr Tanginoa had assaulted him although he had multiple opportunities to do so. There was no direction from the Judge addressing the right to silence. However, in closing, the prosecutor only made brief reference to the fact that Mr Singh did not identify Mr Tanginoa when asked. The Court of Appeal also noted that this issue was not addressed by defence counsel in closing.

[10] The applicant wishes to argue that what occurred here was a serious breach of s 32. The prosecutor was trying to draw a direct connection between Mr Singh's silence and his responsibility for the complainant's injuries where this was one of the critical trial issues. Other directions the Judge gave did not mitigate the omission to direct in relation to s 32 given the fundamental nature of the right to silence protected by that section. Finally, the applicant says it was not correct for the Court of Appeal to rely on the strength of the Crown case in this context.

[11] In the Court of Appeal, as now, the Crown accepted that it was available to find a breach of s 32. The Court of Appeal concluded there was a breach but that it had not given rise to any miscarriage of justice. In reaching the view there was no miscarriage, the Court relied on a number of matters including the following:

- (a) This was not an "obvious" case of invitation to infer guilt from silence.<sup>8</sup> That was particularly so where the applicant had told the police and a doctor that he had been attacked by another person. The inconsistencies

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<sup>7</sup> Section 74(2)(b).

<sup>8</sup> CA judgment, above n 2, at [68] and see at [64].

between these statements and what he said at trial would have been obvious to the jury.

- (b) There were other fulsome directions on the proper use of inconsistent statements. Those directions were “fully contextualised” including a description of why Mr Singh said he had remained silent.<sup>9</sup>
- (c) This was a strong Crown case.
- (d) Other aspects of the summing up mitigated the impact of the omission to give a direction on the right to silence. The Court referred, in addition to the directions about inconsistent statements, to “the careful attention given to the presumption of innocence and the tripartite direction”.<sup>10</sup> The Court considered that when viewed as a whole, “these directions focused the jury on the need for the Crown to prove its case and on issues of credibility and reliability”.<sup>11</sup>

[12] We see no error in the Court of Appeal’s assessment. As the Court said, this was not an “obvious” case of a breach of s 32 and the other directions made clear the onus on the Crown. Nothing raised by the applicant gives rise to a question of general or public importance or to the appearance of a miscarriage of justice.

## **Result**

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

Solicitors:  
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent

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<sup>9</sup> At [69].

<sup>10</sup> At [72].

<sup>11</sup> At [72].