



Supreme Court of New Zealand | Te Kōti Mana Nui o Aotearoa

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MEDIA RELEASE

DAMIEN SHANE KURU v THE KING
(SC 61/2023) [2024] NZSC 184

PRESS SUMMARY

This summary is provided to assist in the understanding of the Court’s judgment. It does not comprise part of the reasons for that judgment. The full judgment with reasons is the only authoritative document. The full text of the judgment and reasons can be found at Judicial Decisions of Public Interest: www.courtsofnz.govt.nz.

Suppression

High Court order in [2021] NZHC 1426 prohibiting publication, in any report or account relating to the proceedings, of the names, addresses or occupations of witnesses B, H, O and AC or any other particulars likely to lead to the witnesses’ identification pursuant to s 113 of the Evidence Act 2006 remains in force.

What this judgment is about

This appeal concerns directions on joint enterprise liability under s 66(2) of the Crimes Act 1961, the admissibility of police expert evidence under the Evidence Act 2006, and whether the jury’s verdict was unreasonable in this case. The judgment clarifies the law relating to expert evidence with specific reference to police expert evidence, and the necessary limits, qualifications, and risks to be weighed in considering its admissibility. This includes guidance for future cases as to how such evidence should be presented to render it admissible under s 25 of the Evidence Act.

Background

Mr Ratana, a senior member of the Mongrel Mob, was shot and killed following a confrontation with members of the Black Power Whanganui chapter. After a jury trial, Mr Kuru was convicted as a party to the manslaughter of Mr Ratana under s 66(2) of the Crimes Act.

Mr Ratana was staying with his girlfriend in an area considered to be Black Power territory. The Crown alleged that Mr Kuru, the president of the Black Power chapter, had ordered, sanctioned, or authorised a plan for members of the chapter to damage Mr Ratana's property and to intimidate him, accompanied by firearms. The Crown did not allege that it was part of the plan to injure Mr Ratana or any other person.

At trial, the Crown relied in part on the evidence of Detective Inspector Scott, who it called to give expert evidence on gang behaviour. Detective Inspector Scott's evidence included the statements that the president "has the final authority over all chapter business and its members" and that, in his experience, "a (serious) organised gang crime against another gang would likely occur with the sanction of the president". Detective Inspector Scott also gave general evidence on gangs, and the Mongrel Mob and Black Power in particular. His professional experience was mostly in the Gisborne area.

A majority of the Court of Appeal (Collins and Muir JJ) dismissed Mr Kuru's appeal against conviction. Cull J dissented and would have allowed the appeal.

This Court granted leave on the question of whether the Court of Appeal was correct to dismiss the appeal.

Issues

Mr Kuru appealed his conviction on three grounds, dealt with in the judgment in this order:

- (a) that the jury was misdirected regarding joint enterprise party liability under s 66(2) of the Crimes Act;
- (b) that the evidence of Detective Inspector Scott was inadmissible (and that its admission had caused a miscarriage of justice); and
- (c) that the verdict was unreasonable.

Supreme Court decision

The Supreme Court has unanimously allowed the appeal on the inadmissibility and unreasonable verdict grounds and entered a judgment of acquittal.

Reasons

The Court's reasons are as follows:

Directions on party liability

The Court was unanimous that there was no misdirection on party liability: the Judge's directions in this case were in accordance with directions held to be required by the Supreme Court in *Burke v R* [2024] NZSC 37 (at [30], [102]–[104] and [314]).

Detective Inspector Scott's evidence

The Court was unanimous that Detective Inspector Scott's general evidence as to gang hierarchies would have been admissible as substantially helpful under s 25 of the Evidence Act if it had been appropriately limited and qualified (at [64], [197] and [317]).

The Court was also unanimous that Detective Inspector Scott's evidence that "a (serious) organised gang crime against another gang would likely occur with the sanction of the president" was inadmissible and its admission amounted to an error of law (at [58], [65], [196] and [315]). This led to a miscarriage of justice and the appeal should be allowed on this ground (at [66], [199]–[202] and [315]).

Majority reasons

The majority held that Detective Inspector Scott's evidence on the likelihood that a president would know of a serious organised gang crime was unfairly prejudicial and should therefore have been excluded under s 8 of the Evidence Act. For the same reasons, the evidence was also not sufficiently reliable or probative to meet the substantial helpfulness test for the admissibility of expert evidence under s 25 of the Evidence Act (at [58]).

The majority said that Detective Inspector Scott's evidence could be read as addressing the ultimate issue for the jury, the main issue to be decided at trial — did Mr Kuru know of and had he sanctioned the attack? In a case with only circumstantial evidence, there was a risk the evidence would usurp the jury's function, a risk that had to be weighed (at [53]).

Against this background, the issues with the admissibility of this evidence were:

- The evidence carried with it a high risk of unfair prejudice in that it invited impermissible reasoning: namely, presidents of gangs know about and sanction rival gang attacks; this was a rival gang attack by Black Power on the Mongrel Mob; Mr Kuru is a gang president; and therefore he must have known and sanctioned this rival gang attack. The difficulty with such reasoning is that it was based only on the evidence of Detective Inspector Scott, who did not, but should have, qualified the evidence which invited this reasoning. Judicial direction could not adequately address the risk of this impermissible reasoning (at [54]).
- The evidence was of limited probative value. Detective Inspector Scott did not record in his evidence his lack of familiarity with Whanganui Black Power (at [55]). He also failed to state important qualifications on his generally expressed opinion evidence (such as acknowledging variations in a president's role between gangs, regions, and different factual scenarios) (at [56]). The law on expert opinion evidence requires it to be balanced and therefore to include such qualifications.
- Detective Inspector Scott's evidence could be read as expressing the opinion that the shooting of Mr Ratana was a "(serious) organised gang crime against another gang", without any proper basis for that opinion (at [57]).

The majority also made several observations regarding Detective Inspector Scott's general evidence on gangs. They said that expert evidence on gangs should be confined to evidence relevant to a matter at issue in the proceeding and should not contain broad-ranging discussion of contextual elements of gang life merely by way of background when that material

is not relevant to a trial issue. Detective Inspector Scott's evidence was discursive and included argumentative material that had little relevance or probative value (at [59]–[60]). Some of this discursive material — narrative-type evidence of the history, culture, criminality, and violent activity of gangs — also carried an obvious prejudicial effect (at [60]).

The majority offered guidance for future cases as to what Detective Inspector Scott should have done to render his evidence admissible under s 25. This is summarised at [64] of the majority's reasons.

Concurrence of Glazebrook J

Glazebrook J agreed that the evidence about the probability of a president authorising a serious attack was inadmissible. This is because it was evidence on the ultimate issue and the jury already had, from common knowledge and Detective Inspector Scott's evidence about gang hierarchies, sufficient information to come to a conclusion on that ultimate issue (at [190]–[191]). The opinion evidence on the ultimate issue was therefore unnecessary and should not have been admitted under s 25 (at [196]). She agreed that the evidence should also have been excluded under s 8 (at [193]–[194] and [196]).

Glazebrook J also agreed with the majority's guidance at [64] and that much of the general evidence given by Detective Inspector Scott was inadmissible as irrelevant and illegitimately prejudicial (at [195] and [197]–[198]).

Concurrence of Kós J

Kós J agreed that the part of Detective Inspector Scott's evidence relating to the likelihood of a gang president authorising a serious attack on another gang member was inadmissible because it failed the tests for relevance, non-undue prejudice, and substantial helpfulness in ss 7, 8 and 25 of the Evidence Act (at [315]).

He did not agree with the majority's more general comments on gang evidence. The objections advanced by trial counsel had centred on the passages discussing the authority of the president and the likelihood that they would sanction a "(serious) organised gang crime against another gang". Defence counsel's on-the-ground assessment was sound and there was no need here to go beyond it (at [319]).

Unreasonable verdict

The Court was unanimous that the jury's verdict convicting Mr Kuru was unreasonable. The reasoning for this finding is set out in the reasons of Glazebrook J, with whom the rest of the Court agreed (at [67], [282]–[312] and [314]–[315]).

The Court applied the test, set out in *R v Owen* [2007] NZSC 102, of whether "having regard to all the evidence, no jury could reasonably have reached to the standard of beyond reasonable doubt" (at [205]). In this case, there was a total absence of direct evidence against Mr Kuru. The remaining strands of circumstantial and other evidence were either equivocal or otherwise insufficient to establish guilt either individually or considered as a whole. While appellate courts must be careful not to usurp the function of the jury, here there was no plausible route to convict Mr Kuru beyond a reasonable doubt (at [312]).

Result

- A The appeal is allowed.
- B The appellant's conviction is set aside.
- C Order under ss 233(3)(a) and 241(2) of the Criminal Procedure Act 2011 that a judgment of acquittal be entered.

Contact person:
Sue Leaupepe, Supreme Court Registrar (04) 914 3613

