



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

22 APRIL 2024

MEDIA RELEASE

JUSTIN RICHARD BURKE v THE KING
(SC 75/2022) [2024] NZSC 37

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.

What this judgment is about

This appeal concerns the scope of joint enterprise liability under s 66(2) of the Crimes Act 1961 in relation to culpable homicide. In particular, at issue is what exactly a secondary party to manslaughter must foresee as a probable consequence of the prosecution of the common unlawful purpose they formed with the principal offender.

Background

The appellant, Mr Burke, was an associate of the Nomads gang. A dispute arose between the president of the gang and a less senior gang member, Mr Heapey. It was decided that Mr Heapey needed to be punished for his disrespect. The plan was for the Nomads’ disciplinarian, Mr Webber, and Mr Burke to give Mr Heapey a “mean hiding”. Mr Webber fatally attacked Mr Heapey by repeatedly stabbing him with a knife. Mr Burke alleged that he had no knowledge of the knife and that he had assumed the hiding would be proportionate to the relatively minor level of Mr Heapey’s disobedience. The trial Judge accepted, at sentencing, that the Crown had not proved Mr Burke knew Mr Webber had a knife.

Mr Webber was charged with the murder of Mr Heapey and pleaded guilty. Mr Burke was charged as a party to murder under s 66 of the Crimes Act and pleaded not guilty. Mr Burke was found guilty of manslaughter.

At trial, the directions given by the Judge to the jury meant a conviction under s 66(2) was possible if Mr Burke did not know that Mr Webber had a knife and if all Mr Burke foresaw was an assault likely to cause more than trivial harm. The trial Judge sentenced Mr Burke on the

basis that he had been found guilty as a s 66(2) party and that he did not know that Mr Webber had a knife. He was sentenced to five years and two months' imprisonment.

Mr Burke appealed against his conviction and sentence to the Court of Appeal. On 29 June 2022, the Court of Appeal dismissed both appeals.

On 21 October 2022, the Supreme Court granted leave to appeal against the conviction. The approved question was whether the Court of Appeal correctly interpreted and applied s 66(2) of the Crimes Act.

Relevant legislation

Section 66 of the Crimes Act sets out how participants in criminal offending can be held liable as a "party" to an offence. Section 66(2) states that where "2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose".

Issues

Mr Burke advanced his appeal on two grounds. The first was that the trial Judge should have directed the jury that a conviction under s 66(2) was only open if they were satisfied that Mr Burke knew a *stabbing* (or an act of its type) was a probable consequence of the prosecution of the common purpose. The second was an alternative ground of appeal, if the first ground was not accepted. Under this ground, Mr Burke submitted that the Judge should have directed the jury that a conviction under s 66(2) was only open if they were satisfied that Mr Burke knew an unlawful *killing* was a probable consequence of the prosecution of the common purpose. There was a degree of overlap between the two grounds.

Supreme Court decision

The Supreme Court has unanimously allowed the appeal against conviction. The majority, comprising O'Regan, Williams and Kós JJ, allowed the appeal under the first ground. Winkelmann CJ and Glazebrook J, agreeing with the outcome but each writing separately on the reasons, would have allowed the appeal under the second ground.

First ground

The majority found that, in the circumstances of this case, the jury should have been directed that they had to be satisfied that Mr Burke foresaw as a probable consequence of the prosecution of the common purpose that Mr Webber would assault Mr Heapey in the manner that actually occurred. To do that, they should also have been directed that they needed to be satisfied Mr Burke knew Mr Webber had a weapon.

The majority also found that the trial Judge's directions were flawed in other respects. First, because the trial Judge had described the common purpose as involving a lesser degree of harm: a "hiding" rather than a "mean hiding", meaning an assault likely to cause serious harm. Second, because the way the Judge's question trail was framed meant that the jury may have wrongly understood the requirement for the act causing Mr Heapey's death to be "in the

prosecution of” the common purpose as meaning “at the same time as” and not “in the course of implementing” the common purpose of giving Mr Heappey a mean hiding.

Second ground

The majority rejected the contention that, to be guilty as a party to manslaughter under s 66(2), an accused has to foresee an unlawful killing as a probable consequence of the prosecution of the common purpose. They considered that foresight of death is not required of a principal offender and should not be required of the secondary party either. They did not consider this approach would lead to over-criminalisation given their conclusion on the first ground.

Winkelmann CJ and Glazebrook J each concluded that the probable consequence Mr Burke needed to foresee was that an unlawful killing would occur. They considered this was consistent with the authorities and with policy, and reflected the actual wording of s 66(2), which requires foresight of the offence (culpable homicide) committed. An unlawful killing is an essential ingredient of a culpable homicide.

Probable consequence

The Court was also asked to revisit the meaning of “probable consequence” in s 66(2). The majority and Glazebrook J refused to do so and endorsed the wording adopted in the present case and in earlier authorities, which defines “probable consequence” as “a substantial or real risk” and something that “could well happen”. Winkelmann CJ disagreed, finding that those other expressions were not synonyms for “probable consequence”, instead preferring “likely” as a synonym for “probable”. All of the Judges agreed that there was merit in the guidance given to juries in Victoria, Australia, which emphasises that the word “probable” is in contrast to merely “possible”.

Result

The appeal was allowed. The Court indicated that it will, when making formal orders, set aside the conviction for manslaughter. The Court asked for submissions from the parties on whether Mr Burke’s conviction should be substituted for a conviction of injuring with intent to injure under s 189(2) of the Crimes Act.

Contact person:

Sue Leaupepe, Supreme Court Registrar (04) 914 3613