IN THE SUPREME COURT OF NEW ZEALAND

SC 82/2012
SC 83/2012
SC 90/2012
SC 93/2012
[2013] NZSC 40

URS SIGNER
EMILY FELICITY BAILEY
TAME WAIRERE ITI
TE RANGIKAIWHIRIA KEMARA

v

THE QUEEN

Court: William Young and Chambers JJ

Counsel: C W J Stevenson for Applicant Signer
V C Nisbet for Applicant Bailey
E R Fairbrother for Applicant Iti
J N Bioletti for Applicant Kemara
A R Burns and M J Inwood for Crown

Judgment: 23 April 2013

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] After a trial before a jury, Tame Iti, Te Rangikaiwhiria Kemara, Urs Signer and Emily Bailey were found guilty of charges of unlawful possession of firearms and restricted weapons (Molotov cocktails) contrary to s 45 of the Arms Act 1983. The charges arose in relation to military-style camps conducted on Tuhoe-owned

lands in the Urewera Ranges in 2006–2007 and to a search on the termination of a police operation in mid-October 2007. The jury was unable to reach a verdict on a charge relating to all four applicants of participating in an organised criminal group contrary to s 98A of the Crimes Act 1961. After the trial, on the application of the Crown, a stay of proceedings was entered on that charge.

[2] The applicants appealed to the Court of Appeal. That Court dismissed their appeals.[1]

[3] All four now seek leave to appeal. The grounds of proposed appeal are not identical, but there is considerable overlap. On occasions, counsel for a particular applicant has simply adopted submissions advanced on behalf of another applicant.[2] We have not found it necessary to differentiate between applicants as to the grounds advanced: if any ground of appeal had merit, it would have been appropriate to allow all four to advance that ground, regardless of whether the particular applicant's counsel had specifically advanced it.

[4] In essence, six grounds of appeal were advanced. There is some overlap in the grounds, but it is perhaps easiest to deal with them separately.

[5] First, Mr Fairbrother, for Mr Iti, submitted that the trial Judge, Hansen J, had failed to direct the jury that certain evidence admissible on the s 98A charge was inadmissible on the Arms Act charges. The evidence in question was, to use Mr Fairbrother's terminology, "general chatter evidence contained in text messages [and] computer chat room transcripts". Mr Fairbrother accepted that this evidence of statements passing between members of the group was admissible on the s 98A charge against all members of the group pursuant to the so-called co-conspirators rule of evidence[3] preserved by s 12A of the Evidence Act 2006. But, he submitted, s 12A did not apply to the Arms Act charges.

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1 *Iti v R* [2012] NZCA 492.

2 We shall mention by name only the counsel who principally advanced a particular submission.

3 We call it "the so-called co-conspirators rule" because its application is not limited to conspiracy charges: see *R v Messenger* [2008] NZCA 13, [2011] 3 NZLR 779 at [15]. See also *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [15].

[6] We are not sure the extent to which this argument was addressed to the trial Judge. It was certainly not a matter raised in the discussion between bench and bar following the delivery of the summing-up (the transcript of which we have read). We are also unsure as to the extent to which this matter was raised in the Court of Appeal. That Court, in one paragraph,[4] deals with the topic "Adequacy of directions about the use of some of the evidence", but the argument there addressed seems to be somewhat different from the one now advanced, and in any event was apparently not pressed orally. Be that as it may, we are satisfied there is nothing in the submission as it is based on a false premise. All the Arms Act charges were joint charges relating to group activity, with the consequence that s 12A applied to them as well as to the s 98A charge. Acts and declarations of members of the group were admissible as to the purpose of members of the group when engaged in group activity.

[7] Contrary to Mr Fairbrother's submission, this is not a case involving principles discussed in *Hart v R*.[5] The Judge's directions were in accordance with s 12A. We also note, as the Court of Appeal did,[6] that the Judge emphasised the need "to treat the evidence of the acts and statements of persons not before the Court with particular care".

[8] Secondly, Mr Stevenson, for Mr Signer, submitted the Crown seriously misrepresented its case when it came before this Court pre-trial, with the consequence that this Court reached the wrong decision on the admissibility of evidence. It is said the Crown submitted to this Court that the applicants were preparing for the use of deadly force. Then, Mr Stevenson submitted, the Crown opened its case at trial in a different way – namely that the defendants were preparing for the use of deadly force *in the event that the peaceful negotiation of Tuhoe grievances failed*. "Peaceful negotiation" was Plan A. Plan B was force. Mr Stevenson submitted that the Crown at trial contended for only a conditional intent to commit violence and that this demonstrated the alleged offending was significantly less serious than the scale of offending the Crown described in this Court. The submission is that this Court's decision on admissibility would have been

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4 At [107].
5 *Hart v R* [2010] NZSC 91, [2011] 1 NZLR 1.
6 At [107].

different had the Judges appreciated the true nature of the Crown's case as presented at trial.

[9] Mr Stevenson also advanced what is effectively the same argument by a slightly different route. He submitted that, once the Crown theory of the case switched to Plan A/Plan B, the Crown should have appreciated the s 98A charge was not sustainable as a matter of law and should have withdrawn it. Again, had that happened, there would have been either no evidence, or at the least much less evidence, available against the applicants on the remaining charges.

[10] Whichever way this point is put, we do not consider it arguable. It is true that the focus of the discussion when this case was last before this Court was not on Plan A/Plan B. What is clear, however, is that the admissibility decisions of four of the Judges did not turn on their understanding of the particular facts alleged as constituting the s 98A offending.[7] It is true the fifth Judge, Blanchard J, did draw a distinction between the perceived seriousness of a s 98A charge and the lesser seriousness of the Arms Act charges,[8] but he was well aware that the Crown case under s 98A did not involve any imminent threat of violence. He referred, for instance, to the fact that, by the time of the April 2007 camp, "police no longer believed that any action by the group, other than carrying out training exercises, was imminent".[9]

[11] Further, if defence counsel considered the prosecutor's opening represented a significant departure from the way in which the Crown had presented the case in this Court, the defence should immediately have sought to have this Court's admissibility ruling reconsidered.[10] Indeed, if defence counsel had considered conditional intent to be incapable at law of amounting to a s 98A "objective", they could have sought a discharge under s 347 of the Crimes Act. Neither course was followed. Counsel did not raise the possibility of a conditional intent as being too inchoate to amount to an

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7 *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [69] per Elias CJ, [239] per Tipping J, [277] per McGrath J and [285] per Gault J.

8 At [206] per Blanchard J.

9 At [107].

10 Evidence Act 2006, s 14. Indeed, Mr Pike, for the Crown, had referred to the possibility of the position being reconsidered at trial if the seriousness of the offending turned out to be different from what it was currently thought to be: *Hamed*, above n 7, at 314.

unlawful purpose until after the Judge had summed up.[11] Hansen J considered the Crown had advanced its case against the applicants at trial on "substantially" the same basis as anticipated by the Supreme Court.[12] We agree.

[12] The third ground is allied with the second. Messrs Fairbrother and Stevenson submitted the trial Judge erred in directing on "purpose" under s 45 in that he failed to make clear that it would be lawful "to possess firearms in circumstances whereby an accused is merely contemplating the use of arms, at some unspecified time in the future, in the event peaceful negotiations … failed". But training with a view to criminal violence is not a lawful purpose and that is so irrespective of whether the intention to engage in violent crime is settled or conditional. The Judge did put forward for the jury's consideration the particular purposes suggested by various defendants as lawful justification for their possession of firearms.

[13] Fourthly, it is submitted the trial Judge wrongly dealt with the reverse onus of proof in s 45(2) of the Arms Act when directing the jury on the applicants' potential liability as secondary parties. (There is no complaint about the summing-up on this point in so far as it dealt with the applicants' potential liability as a principal or under s 66(2) of the Crimes Act.) We accept that this would potentially be a question of some importance, but it does not meet the criteria for leave under the Supreme Court Act 2003 because it is inconceivable that any applicant was found guilty solely as an assistor or encourager.

[14] The Crown case was that the applicants were members of a group engaged in military-style training with a view to furthering Tuhoe claims if violence was necessary. There was photographic evidence of what could fairly be regarded as group activity involving the use of weapons. All were photographed at one or more camps handling weapons. All were found to be in possession of weapons at their places of occupation. The pattern of verdicts is very significant.[13] Acquittals (and they were all acquitted on some charges) coincided with either an absence of direct evidence that the particular applicant was present in the camp on the occasion charged and/or an absence of photographic evidence showing group activity with

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11 *Iti v R*, above n 1, at n 39.
12 *R v Iti* [2012] NZHC 1130 at [11].
13 *Iti v R*, above n 1, at [20].

weapons. And findings of guilt on the camp charges were made against a particular applicant only where (a) there was photographic evidence of him or her handling a weapon or (b) there was evidence of his or her presence in the camp and photographic evidence of what could fairly be regarded as group activity in relation to weapons.[14] Guilty verdicts were returned against an applicant only when he or she was shown to be in sole or shared possession.

[15] Fifthly, a question is raised concerning the extensive pre-trial media reporting. The Court of Appeal dealt with this matter in detail,[15] as did the High Court.[16] It does not raise an issue of general or public importance warranting a second appeal. The principles on this issue are clear.

[16] Finally, Messrs Fairbrother and Stevenson raise a sentencing issue, in light of the jury being unable to agree on the s 98A charge. There is nothing in this point warranting a second appeal.[17]

[17] We are not satisfied that it is necessary in the interests of justice for this Court to hear and determine the proposed appeals. None of the matters raised is, when properly analysed, of general or public importance. Nor do we consider a substantial miscarriage of justice may occur if we do not hear the appeals.

Solicitors:
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14 The Court of Appeal's summary of the evidence in relation to each count is instructive in this regard: at [20]–[29].

15 At [31]–[64].

16 *R v Bailey* HC Auckland CRI-2007-085-7842, 23 April 2010.

17 Granting leave on sentencing matters is reserved for "rare cases": *Burdett v R* [2009] NZSC 114 at [4].