IN THE SUPREME COURT OF NEW ZEALAND

SC 69/2013
[2013] NZSC 96

BETWEEN	CHRISTOPHER JACOB JUNIOR SHADROCK Applicant
AND	THE QUEEN Respondent

SC 70/2013

BETWEEN	TERENCE MARIO TERE Applicant
AND	THE QUEEN Respondent

SC 96/2013

BETWEEN	MAKA UHLIA TUIKOLOVATU Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, Glazebrook and Arnold JJ
Counsel:	C B Wilkinson-Smith for the Applicant Shadrock L O Smith for the Applicant Tere M B Meyrick for the Applicant Tuikolovatu J M Jelas for the Respondent in all appeals
Judgment:	9 October 2013

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

Introduction

[1] Mr Shadrock was convicted of murder on 19 July 2012 after a trial in the High Court. Mr Tere and Mr Tuikolovalu were convicted of being accessories after the fact to murder.

[2] Their appeals against their convictions were dismissed by the Court of Appeal on 4 July 2013.[1] All three applicants seek leave to appeal against that decision.

Background

[3] The convictions arose out of an incident in a South Auckland car park. The victim, Ms Wang, died as a result of being struck by a stolen vehicle driven by Mr Shadrock when he was trying to leave the car park after snatching Ms Wang's handbag. The Crown's case against Mr Shadrock at trial relied on s 167(b) and (d) of the Crimes Act 1961.

[4] It was alleged that Mr Tere set fire to the stolen vehicle to assist Mr Shadrock to destroy evidence relating to the offending. With regard to Mr Tuikolovatu, it was alleged he had allowed Mr Shadrock to hide the stolen handbag at his address at a time when he knew Ms Wang had died and in order to assist Mr Shadrock to avoid detection.

Grounds of leave applications

[5] The issue on which all three applicants seek leave to appeal is whether the Court of Appeal was correct to hold that there was no risk of miscarriage of justice by the trial judge referring in his summing up to the concept of second and third

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1 *Tere v R* [2013] NZCA 282.

degree murder in the United States. The relevant portions of the summing up are set out in the Court of Appeal judgment.[2]

[6] In summary, the trial judge in his summing up used an analogy with second and third degree murder in the United States to explain that in New Zealand there is "one offence called murder, but it has more than one definition". The Judge was alerted to trial counsel's concern with this analogy after the summing up but he considered that there was a risk of making the situation worse if he recalled the jury, particularly as he had made it clear there is only one offence of murder in New Zealand.

[7] Counsel's concern about the analogy with second and third degree murder is that a juror who might otherwise have been of the view that a manslaughter verdict was appropriate could have been influenced to agree to a verdict of murder in the mistaken belief that murder under s 167(b) or (d) would attract a lower penalty than that applicable to a deliberate intention to kill under s 167(a).

[8] Mr Tuikolovatu initially also sought leave to appeal on the basis that the Court of Appeal erred in finding that there was sufficient evidence upon which a properly instructed jury could have come to the conclusion that he was aware of the death of Ms Wang prior to receiving the handbag. Mr Tuikolovatu has informed the Court that he no longer wishes to pursue this ground of appeal.

Court of Appeal decision

[9] The Court of Appeal was satisfied that no material risk of a miscarriage of justice arose as a result of the illustration the Judge chose to adopt for the following reasons:[3]

> (a) the Judge made it clear there was only one offence of murder in New Zealand;

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2 At [18]–[23].
3 At [51]–[57].

(b) the Judge immediately went on to take the jury through the jury questionnaire which correctly focused on the elements required to establish murder under s 167(b) and (d);

(c) the Judge correctly explained the legal position as to the elements that the prosecution had to prove with regards to s 167(b) and (d);

(d) there was an extensive summary of the competing positions of the Crown and defence which would have focused the jury on the facts relevant to the elements of the offences;

(e) there was no indication that the jury might have been giving consideration to the issue of likely penalty; and

(f) the length of the deliberations and the fact that the jury asked to see the surveillance footage of what had taken place on a frame by frame basis, which was played to them on two occasions, suggested that the jury focused on the evidence related to the factual issues which had been carefully and properly defined in the jury questionnaire.

[10] The Court of Appeal made it very clear that references to the position in the United States were inappropriate. The Court also said that the Judge should preferably have addressed the defence concerns when asked to do so. The Court said that:[4]

> the reference to the system of justice prevailing in the United States was wholly unnecessary and should have been avoided. We also note that the Judge had the opportunity to put the proper concerns of defence counsel at rest when those concerns were raised after the summing-up. It is a simple matter to correct inadvertent references of this kind that have the potential to be misinterpreted. It is best to do so out of an abundance of caution rather than run the risk of the verdicts being set aside on appeal.

Our assessment

[11] There is no point of general or public importance raised by the proposed appeal. Nor do we consider there is a risk of a miscarriage of justice.

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4 At [58].

[12] The inappropriate analogy with degrees of murder in the United States was incapable of deflecting the jury from the correct application of New Zealand law, given the trial judge's full explanation of the elements of murder under s 167(b) and (d), and his relation of those elements to the facts of the case in his full summary of the different contentions of the Crown and defence. In context, the reference to the position in the United States was immaterial.

[13] Nothing else has been put forward by the applicants to cause us to consider there was a risk that the jury considered its verdicts otherwise than on the evidence.

Result

[14] The applications for leave to appeal are dismissed.

Solicitors:
Berman and Burton for Applicant Tuikolovatu
Crown Law Office for Respondent