

IN THE SUPREME COURT OF NEW ZEALAND

**SC 7/2014
[2014] NZSC 36**

BETWEEN PAUL ANTHONY THOMPSON
 Applicant

AND THE QUEEN
 Respondent

SC 18/2014

BETWEEN BON VINCENT NAMANA
 Applicant

AND THE QUEEN
 Respondent

Court: McGrath, William Young and Glazebrook JJ

Counsel: N Levy for Applicant in SC 7/2014
 V Nisbet for Applicant in SC 18/2014
 H W Ebersohn for Respondent in SC 7/2014 and SC 18/2014

Judgment: 4 April 2014

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

Introduction

[1] This case relates to an aggravated robbery committed by Mr Thompson, Mr Namana and a Mr Howes. After the robbery, the Crown's case was that

Mr Thompson, Mr Namana and a Mr Matiaha wounded Mr Howes with the intention of causing grievous bodily harm. The applicants were found guilty on both charges.

[2] Mr Thompson's defence was that he was not present when the offences were committed. The alibi evidence (provided by a co-accused, Mr Archibald)¹ was before the Court in Mr Thompson's police interview. Directions on the alibi defence were given by the trial judge.

[3] The main ground of appeal is that Mr Thompson's alibi defence was not put to the Crown witnesses. It is submitted by Mr Namana that, if Mr Thompson's appeal is upheld, his appeal should also be allowed as Mr Thompson's counsel would have failed to mount a proper attack on the credibility of two central Crown witnesses.

The Court of Appeal decision

[4] The Court of Appeal held that, although the alibi defence was not put directly to the key witnesses, the focus of trial counsel's cross-examination of both witnesses was that their evidence was not true, in particular because of their motives to lie and inconsistencies in their evidence.² The Court considered that there was nothing, either in trial counsel's questioning or in her closing address, to indicate that Mr Thompson was no longer relying on his alibi defence.³ In addition, while the alibi defence was not mentioned explicitly in closing, the jury was asked by trial counsel to compare the evidence of the main prosecution witnesses with the spontaneity and clarity of Mr Thompson's account to the police, including "what he was doing that night, where he was that night, who his friends were."⁴

[5] The Court of Appeal considered that there would have been risks in defence counsel concentrating on the alibi defence (given that it was provided by a co-accused).⁵ Thus, while other counsel may have concentrated on the alibi defence, it was a legitimate defence counsel tactical decision not to do so and instead to mount a

¹ Mr Archibald was charged as a party as he had provided a firearm to the robbers.

² *Namana v R* [2013] NZCA 640 (Wild, Asher and Dobson JJ) at [41].

³ At [42]–[43].

⁴ At [43]–[44].

⁵ At [44] and [47].

general attack on the credibility of the Crown witnesses.⁶ The Court of Appeal was in any event satisfied that Mr Thompson's alibi defence was squarely before the jury and that there was no risk of a miscarriage.⁷

Grounds of application

[6] Mr Thompson submits that the boundaries of trial counsel's licence to run his chosen positive defence (alibi) do not extend to adopting a course which fails to put that defence to Crown witnesses and implicitly accepts their evidence on his presence at the scene.

[7] The next submission is that the Court of Appeal erred in law in finding that a general challenge to the credibility of Crown witnesses was sufficient to satisfy trial counsel's duty to run an accused's chosen defence and that the Court also erred in fact in concluding that the way trial counsel framed her questions did not involve an implicit acceptance that Mr Thompson was at the relevant address on the night in question.

[8] For these reasons, it is submitted that Mr Thompson's defence was not adequately presented to the jury.

Discussion

[9] The issues are confined to the particular facts and nothing raised suggests the risk of a miscarriage of justice for either Mr Thompson or Mr Namana. In the case of the latter, he did not rely on the alibi evidence and so, even had Mr Thompson's application been granted, there could be no sustainable grounds of appeal for Mr Namana. In the case of the former, Mr Thompson's alibi defence was clearly before the jury and the credibility of the prosecution witnesses was challenged in a robust manner by trial counsel.

⁶ At [44].
⁷ At [52].

Result

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

Solicitors:

Val Nisbet, Wellington for Applicant in SC 18/2014

Crown Law, Wellington for Respondent