IN THE SUPREME COURT OF NEW ZEALAND

SC 91/2015
[2015] NZSC 165

BETWEEN	TONI MAREE MILLER Applicant
AND	THE QUEEN Respondent

SC 92/2015

BETWEEN	TARIANA HINETEANAURANGI JONES Applicant
AND	THE QUEEN Respondent

Court:	Elias CJ, Glazebrook and Arnold JJ
Counsel:	N Levy for Applicants in SC 91/2015 and SC 92/2015 I R Murray for Respondent
Judgment:	4 November 2015

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] The applicants are two of five defendants who were jointly tried before MacKenzie J and a jury on charges arising out of a vigilante-style attack on a man who was thought by the perpetrators to have committed a rape. The attack resulted in the man's death. The applicant in SC 92/2015, Tariana Jones, was found guilty of murder and aggravated burglary. She was sentenced to life imprisonment with a minimum period of imprisonment of 17 years on the murder conviction and to a concurrent sentence of 10 years' imprisonment on the aggravated burglary

conviction.[1] The applicant in SC 91/2015, Toni Miller, who was not charged with murder, was found guilty of aggravated burglary and was sentenced to eight years' imprisonment.

[2] Ms Levy for the applicants identifies two grounds of appeal in respect of Ms Jones:

(a) First, the trial Judge did not meet his obligation to explain to the jury all the available defences (ie, including defences not mentioned by defence counsel in closing). This failure resulted in a miscarriage of justice.

(b) Second, there has been a miscarriage of justice because counsel for one of the co-accused referred in his closing address to the statements of three of the co-accused (including the applicants) when making the submission that they had conspired to cast blame on his client.

[3] In respect of Ms Miller, only the second ground is raised.

[4] By way of background to the first proposed ground of appeal, the applicants and others heard a rumour that the victim had raped a friend of theirs. A decision was made to visit the victim at his flat. A group of eight people (ie, the five defendants and three others who were not charged) set off in two cars. They had with them a wooden bat and two wooden axe handles. When they arrived at the victim's flat, two stayed in the cars while the remainder got out. Of those who left the cars, Ms Miller and another person stayed on the street outside the victim's flat while Ms Jones and the three other defendants went to the front door. When the victim answered the door, the four pushed their way in. The victim, who was partly disabled, was set upon with the weapons, as well as being kicked and punched. Hearing the victim's screams, Ms Miller and the other person who had remained outside on the street returned to the cars, as did the four who had entered the house. They then drove off. The victim received injuries in the attack from which he later died.

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1 *R v Jones* [2014] NZHC 1207 (MacKenzie J).

[5] The Crown case was that Ms Jones was the main instigator of a plan to go to the victim's home and attack him. The Crown said that she had provided the bat and had deliberately put on her "stomping boots" before the group left. She was present in the flat during the attack and, according to a witness, later said she was "glad she got a couple of boots in". The Crown said that she had washed her boots at a service station after the attack, and that an airborne blood splatter was found on one of them. Ms Jones' case was that she was not an instigator, did not know about any weapons and, like the three people who were not charged, was unaware that any serious violence was contemplated. She denied kicking the victim or encouraging the attackers and said she only entered the flat to get the others out. She argued that she was not a party to aggravated burglary or to murder.

[6] Ms Levy accepts that Ms Jones was one of the initiators of the visit to the victim's home, and describes the defence run at trial as "hopelessly optimistic". However, she submits that it was an available inference on the evidence that the three defendants who had entered the flat with Ms Jones (all men) may have agreed serious violence among themselves, or the violence may have been spontaneous on the part of one or more of them, without any prior agreement. Accordingly, Ms Jones may have been participating in an enterprise where there was a limited common purpose and what actually happened went well beyond that limited common purpose. Such possibilities should have been the subject of specific instructions to the jury by the trial Judge. Ms Levy accepted that the Judge's question trail and summing up were "literally correct" but submitted that they did not go far enough in that they failed to place the evidence that Ms Jones was an instigator of the visit to the victim's flat, on which the prosecutor had placed much emphasis, in its proper context. She submitted that the jury should have been directed as to the "potentially limited relevance that the instigator evidence could have at the time that the three men entered the flat to confront [the victim]".

[7] The Court of Appeal addressed these arguments.[2] The Crown had alleged liability under s 66(1) or, in the alternative, s 66(2) of the Crimes Act 1961. The Court of Appeal concluded that the question trail dealt adequately with the various intents required under s 66(1) and (2), that there was sufficient evidence to find one

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2 *Jones v R* [2015] NZCA 312 (Wild, Keane and Kós JJ), at [29]–[40].

or more of the intents proved against Ms Jones to the requisite standard and that the defence of a lesser common purpose was adequately put to the jury by the trial Judge.

[8] Having reviewed the question trails[3] and the Judge's summing up, we see no reason to disagree with the Court of Appeal's analysis on this aspect of the case, and see no risk of a miscarriage of justice.

[9] To explain, in relation to liability under s 66(2), the Crown alleged that the common purpose was to assault the victim. The jury was directed to consider whether Ms Jones had formed a common intention with the others to force their way into the victim's flat; whether the victim's injuries were caused by one or more of the group in the course of carrying out that common purpose; and whether the injuries were known to be a probable consequence of carrying out the common purpose. If the jury found these points proved, Ms Jones would be guilty of culpable homicide. The Judge then directed the jury to consider whether the person(s) who inflicted the injuries on the victim did so with murderous intent and, if so, whether Ms Jones knew that there was a substantial or real risk that the person or persons would do so with murderous intent. If so, she would be guilty of murder but if not, manslaughter only. One matter which the Judge highlighted when discussing the question trails in his summing up was the issue of knowledge that weapons were being carried. He noted that if the jury concluded that a particular accused did not know of the weapons, it would be "most unlikely" that the jury could conclude that the accused knew that life-threatening injuries were a probable consequence of the assault on the victim.

[10] The Judge made it clear to the jury when outlining Ms Jones' defence that her case was that she was in the same position as the three people who were not charged in that she did not know about the weapons, or have any expectation that any weapons would be used. He noted that the defence position was that there was no evidence of murderous intent, no knowledge of an intention to use force and no evidence of a plan other than to give the victim a fright – Ms Jones did not anticipate that there would be violence and what occurred was "wildly outside her

[3] There was a separate question trail for each defendant.

expectation". We consider that the Judge's instructions sufficiently covered the point that any common purpose on Ms Jones' part was a limited one and that what occurred went well beyond it. Moreover, as Crown counsel submitted, Ms Jones seeks leave to appeal only against her murder conviction. This creates something of a difficulty for her in that to find her guilty of aggravated burglary, the jury must have found that she knew that a weapon was involved.[4]

[11] By way of background to the second proposed ground of appeal, counsel for one of the co-accused referred in his closing address to the police statements made by three of the co-accused (including both applicants) and submitted that the three "conspired and blamed [his client] as the bat carrier to protect someone, or more than one". The Court of Appeal accepted that these references should not have been made,[5] but held that no miscarriage of justice resulted because the statements had been subjected to criticism by the prosecutor and the further criticism by defence counsel would not have created any significant additional prejudice.[6]

[12] Ms Jones and Ms Miller had given different versions of events in their police interviews. The prosecutor highlighted these individual inconsistencies in his closing address. The Judge gave a lies direction. He also directed the jury that what one defendant said in a statement was not admissible against another, and explained the rationale for the rule. Like the Court of Appeal, we do not consider it seriously arguable that defence counsel's reference caused prejudice of a type that raises the risk of a miscarriage of justice. In effect, defence counsel was running a "cut throat" defence, which is reasonably common in cases of this sort.

[13] Accordingly, the applications for leave to appeal are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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4 See the Crimes Act 1961, s 232.
5 *Jones v R*, above n 2, at [43].
6 At [45]–[48].