IN THE SUPREME COURT OF NEW ZEALAND

SC 105/2016
[2016] NZSC 144

BETWEEN	KAVEINGA HELOTU LAVEMAI Applicant
AND	THE QUEEN Respondent

Court: William Young, Glazebrook and Ellen France JJ

Counsel: A J Ellis for Applicant
J B Y Cheng for Respondent

Judgment: 2 November 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] On 11 October 2012, the applicant went to a neighbouring property with a view to stealing property from it. The victim was staying there temporarily and came to the door when the applicant arrived. The applicant attacked the victim to the point that the victim was seriously injured. He was found dead in the house the next day.

[2] At the applicant's trial for murder and theft before Gilbert J and a jury, the pathologist who gave evidence for the Crown (Dr Garavan) said that the victim had been struck a minimum of 11 times in the region of his head and neck (with at least eight blows to the head and three to the neck). His evidence as to this was extremely detailed and was not challenged at trial. Instead, the applicant's position, as indicated when he was interviewed by the police and maintained at trial, was that he had punched the victim only three times and that the other blows must have been struck by someone else. This, not very plausible, defence was undermined by

evidence that the applicant had told one friend he had "punched, and punched, and punched. He wanted to stop but he couldn't. There was a voice, just punch, don't stop, just carry on." There was also evidence of a hearsay nature to the effect that he had made remarks to a broadly similar effect to another person.[1]

[3] When the applicant appeared for sentence, the prosecutor sought the imposition of a non-parole period and invoked s 104 of the Sentencing Act 2002. Counsel who appeared for the applicant at sentencing conceded that s 104 was engaged and argued that a non-parole period "of no more than 17 years should be imposed".[2] The Judge sentenced the applicant to life imprisonment and imposed a 17 year non-parole period.

[4] The applicant's appeal to the Court of Appeal was confined to sentence.[3] It having been dismissed, he now seeks leave to appeal to this Court.

[5] In support of the application for leave, counsel for the applicant's diffuse submissions seem to identify the following grounds of appeal:

(a) The applicant was wrongly sentenced, because the Judge proceeded on the basis that he threw more than three punches. Counsel maintains that the Judge should, prior to sentence, have conducted a disputed facts hearing as to the number of blows. He also relies on a the report of a second pathologist (Dr Hamilton), obtained after trial, which appears to express the view that the victim's injuries could have been caused by three blows.

(b) Counsel who appeared for the applicant at sentencing was at fault by "agreeing with a 17-year minimum sentence".

(c) The applicant had been told by counsel (other than counsel who appeared at sentencing) that he could expect a non-parole period of

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1 *R v Lavemai* [2014] NZHC 797 (Gilbert J) [HC sentencing notes] at [2]–[4].
2 Dr Ellis was not trial counsel.
3 *Lavemai v R* [2016] NZCA 363 (Randerson, Fogarty and Collins JJ) at [2].

12–14 years. As well, he had not been put on notice before trial that the Crown would be seeking a 17 year non-parole period.

(d) In his sentencing remarks, the Judge said that he had considered the cases relied on by the prosecutor and defence counsel and also other cases and went on "I will provide a reference to these cases in a footnote to my sentencing notes when they are released". By not identifying in his oral remarks the cases in question, the Judge is said to have been in breach of s 31 of the Sentencing Act (as to the giving of reasons) and s 341 of the Criminal Procedure Act 2011 (as to the delivery of judgments).

[6] The Court of Appeal was not persuaded that the 17 year non-parole period imposed by the Judge was manifestly unjust. Instead it concluded that the sentence was "appropriate".[4] This particular conclusion is not directly challenged by counsel for the applicant, save in respect of his reliance on the report of the second pathologist, Dr Hamilton. The proposed grounds of appeal relate primarily to process.

[7] The case for the Crown was that the murder was committed in the course of a robbery. The sentencing remarks of the Judge indicate that he accepted that this was so. This meant that s 104(1)(d) was engaged.[5] Accordingly, Gilbert J was required by s 104 to impose a 17 year non-parole period *unless* satisfied that it would be manifestly unjust to do so. There was no requirement for the prosecution to advise the applicant prior to sentencing of the stance to be taken at sentence. The applicant's complaints as to the allegedly optimistic sentencing advice are immaterial as such advice could hardly render the default s 104 non-parole period unjust, let alone manifestly so.

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4 At [28].

5 The Judge was also of the view that s 104(1)(e) applied (because of the brutality and callousness of the crime). Also applicable, on the face of it, was s 104(1)(c) (unlawful presence in a dwelling house). See HC sentencing notes, above n 1, at [17]–[20].

[8] The Judge was not invited to conduct a disputed facts hearing and he was entitled to "accept as proved any fact that was disclosed by the evidence at trial".[6] Although a disputed facts hearing might, on occasion,[7] be appropriate following trial, there was, in the circumstances of this case, no requirement for such a hearing.

[9] We are not satisfied that the concession apparently made by counsel[8] that a 17 year non-parole period would be appropriate was wrong. In any event, to succeed on a sentence appeal, the applicant would have to show that the sentence imposed was wrong. The focus must thus be on the sentence imposed rather than the submissions made by counsel.

[10] The report of the second pathologist, Dr Hamilton, seems to have been primarily sought with a view to determining "whether … some of the injuries detected by Dr Garavan may have been present before the accused struck the deceased". The report lists 18 injuries which were apparent on "the digital images from the autopsy examination". In the course of his report, Dr Hamilton commented that: "It would seem at least possible that the distribution of injuries could be the result of three punches as described by Mr Lavemai". From this, it is argued that Dr Hamilton considered it *possible* that all the injuries suffered by the victim were caused by only three blows. On the other hand, the extensive list of injuries which were noted, the absence of any direct and explicit challenge by Dr Hamilton to Dr Garavan's assessment of at least 11 blows (eight to the head and three to the neck) and the purpose for which the report was obtained suggest that something else was meant.

[11] We are inclined to the view that Dr Hamilton meant to say that what he saw on the images was not inconsistent with the theory that (a) the applicant had inflicted only three blows and (b) other blows were struck by someone else and at a different

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6 Sentencing Act 2002, s 24(1)(a).

7 See *Aram v R* [2007] NZCA 328 at [71] where, for reasons explained by the Court, it was observed that such hearings "are rarely necessary" following trial where the sentencing judge is the trial judge.

8 We have reservations whether the passage cited from counsel's written sentencing submissions which is referred to in the leave submissions and set out above at [3] was a concession as to the appropriateness of a 17 year non-parole period as opposed to a contention that the non-parole period should not exceed 17 years. The Judge's sentencing remarks, however, attribute a concession to counsel and such a concession may well have been made orally or in parts of the written submissions which we have not seen: HC sentencing notes, above n 1, at [22].

time. In any event, given Dr Garavan's detailed evidence as to the minimum number of blows (and particularly as to the location of the injuries), more than a throw-away line in a report directed to a different purpose would be required to warrant leave being granted to run a new evidence argument.

[12] More generally, we are not persuaded that there is an appearance of a miscarriage of justice in relation to the non-parole period imposed. The jury's verdict establishes conclusively that the applicant assaulted the victim with murderous intent.[9] This assault occurred in the course of a robbery. The applicant's conduct in not seeking assistance for the victim in the aftermath of the assault speaks for itself.

[13] The complaint as to the way in which the judge referred orally to the cases which he had considered and which were subsequently listed in a footnote in the written version is too trivial to warrant extended discussion, especially in light of s 30(2) of the Sentencing Act 2002 which permits particularity of the reasons to the level which is appropriate to the case at hand. It certainly does not warrant the grant of leave to appeal.

[14] There being no point of public or general importance in the proposed appeal and no appearance of a miscarriage of justice, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

[9] Being the intents provided for in ss 167(1)(b) and 168(1)(a) of the Crimes Act 1961.