IN THE SUPREME COURT OF NEW ZEALAND

SC 33/2017
[2017] NZSC 104

BETWEEN	AHU STANLEY TAYLOR Applicant
AND	THE QUEEN Respondent

Court: Elias CJ, William Young and O'Regan JJ

Counsel: M J Taylor-Cyphers for Applicant
M J Lillico and H G Max for Respondent

Judgment: 4 July 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Following trial in the High Court before Nicholas Davidson J and a jury, the applicant was found guilty of attempted murder.[1] He was later sentenced to 10 years and eight months imprisonment.[2] His subsequent appeal against conviction and sentence was dismissed by the Court of Appeal.[3]

[2] The offending occurred in the context of a violent and prolonged assault by the applicant and another man on the victim. In the course of this assault, the applicant stomped on the victim's head at least 20 times. The co-offender pleaded guilty to a charge of intentionally inflicting grievous bodily harm and was sentenced

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1 See *R v Taylor* [2016] NZHC 1620.

2 At [106]; see also at [93]-[94] where Mr Taylor offered to pay recompense of $3,000 at sentencing with a potential $7,000 more over time. Nicholas Davidson J ordered that the $3,000 paid into Court "be applied to the benefit of the family".

3 *Taylor v R* [2017] NZCA 53 (French, Mallon and Duffy JJ) [*Taylor* (CA)].

to seven years and one month imprisonment.[4] The applicant's pre-trial offer to plead guilty to wounding with intent to cause grievous bodily harm, with the concomitant dropping of the attempted murder charge**,** was declined by the prosecution.[5]

[3] The applicant is plainly dissatisfied by the differential in the sentences imposed on him and his co-offender, a differential which is largely a consequence of the prosecutor's acceptance of the co-offender's plea to the grievous bodily harm charge and non-acceptance of the applicant's offer to plead to a materially similar charge. Arguments based on this dissatisfaction were addressed in some detail by the Court of Appeal.[6]

[4] We are of the view that:

(a) It was open to the Crown to proceed against the applicant on the charge of attempted murder and to accept the burden of proving an intent to kill. There was ample evidence to support a conviction on that basis.

(b) It was likewise open to the Crown to take the view that the evidence supported the inference of intent to kill in Mr Taylor's case but that such an intent might be more difficult to establish in the case of the co-offender.

(c) In any event, even if it were the case that the co-offender should also have been charged with attempted murder, on a joint enterprise basis, this would be of no assistance to the applicant given that the attempted murder charge in the applicant's case was appropriate.

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4 *Rowles v R* [2016] NZCA 208.

5 As we understand it, at the commencement of his trial, the applicant pleaded guilty to the alternative charge of wounding with intent to cause grievous bodily harm but the Crown did not accept the plea with the result that he still faced the attempted murder charge, upon which he was found guilty.

6 *Taylor* (CA), above n 3, at [19]–[23].

(d) The applicant's conviction on the charge of attempted murder explains the apparent disparity in sentencing between himself and his co-offender.

[5] Counsel for the applicant raises what we see as two other proposed grounds of appeal. The first is that in summing up to the jury in relation to whether the jury could infer from the applicant's actions that he intended to kill the victim, the Judge did not direct in terms adopted by English courts in *Regina v Nedrick*[7] and *Regina v Woollin*.[8] The complaint is that the Judge should have told the jury that they could infer an intention to kill *only if* the applicant had recognised that the death of the victim was a "virtual[ly] certain" consequence of his actions.

[6] The possibility that the Judge might have directed in these terms was mentioned by counsel for the applicant in the Court of Appeal but not pressed as a ground of appeal.

[7] *Nedrick* and *Woollin* both involved the crime of murder and were decided against a background of mens rea requirements which differ considerably from those stipulated in s 167 of the Crimes Act 1961.[9] For this reason, they have not been influential in the way in which New Zealand judges sum up to juries in murder trials. Where attempted murder is alleged, our statute requires that an intent to kill be established. There is no need for judges to give elaborate direction in respect of this[10] and the approach adopted by the Judge is consistent with normal practice.

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7 *Regina v Nedrick* [1986] 1 WLR 1025 (CA). This case concerned the burning down of a house which resulted in the death of child. Nedrick claimed that, although he was responsible for the fire he did not want to kill anyone. The case thus raised issues very different from those in the present case. In New Zealand, it would have been dealt with under s 167(d) of the Crimes Act 1961.

8 *Regina v Woollin* [1999] 1 AC 82 (HL). This involved a murder charge arising out of an act of violence (throwing a three month-old child on to a hard surface). The mens rea alleged was not that the appellant had intended to kill the child but rather that he had intended to cause really serious bodily harm. The trial Judge had summed up to the jury on the basis that it could convict if satisfied that the appellant appreciated there was a substantial risk that he would cause the child really serious harm. In New Zealand the case would have been dealt with under s 167(b) of the Crimes Act.

9 As noted, *Nedrick* would have been decided under s 167(d) of the Crimes Act and *Woollin* under s 167(b).

10 See generally *R v Boyd* CA175/85, 9 June 1986, where Cooke P in response to counsel arguing the trial judge "should have said more on the subjects of proof of intent" noted that "Abstract discussions can cause confusion to juries and difficulties on appeal. … . Here the Judge was right not to complicate the case by any such discussion".

Given the existing well-settled practice of the courts on this issue, this proposed ground of appeal does not give rise to a question of general or public importance. As well, there is no appearance of a miscarriage of justice.

[8] The other proposed grounds of appeal relates to the way in which the Judge summed up on the effect on the applicant of alcohol he had consumed and drugs he had taken on the day of the offending. This was in reasonably general terms in which the jury was told to take into account the alcohol and drugs taken by the applicant as part of the material to be considered in determining whether there was an intention to kill and included the direction that a drunken intention is still an intention. In the Court of Appeal, no complaint was raised about this aspect of the summing up. We see nothing untoward in the directions. This aspect of the proposed appeal therefore also does not raise a question of public or general importance and again there is no appearance of a miscarriage of justice.

[9] Accordingly, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent