IN THE SUPREME COURT OF NEW ZEALAND

SC 87/2017
[2017] NZSC 159

BETWEEN	WARREN CHARLES TE HEI Applicant
AND	THE QUEEN Respondent

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

Counsel: S K Green for Applicant
A J Ewing for Respondent

Judgment: 13 October 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] The applicant was convicted after a jury trial of wounding with intent to cause grievous bodily harm and assault with intent to injure. He appealed against these convictions to the Court of Appeal but his appeal was dismissed.[1] He now seeks leave to appeal to this Court.

[2] The Crown case against the applicant at his trial was that he had attacked the complainant, Ms Collier, with a machete. She had heard her friend, Ms Donnelly, screaming and saw the applicant chasing her. When Ms Collier intervened, the applicant had swung the machete towards Ms Collier, causing wounds to her hands as she tried to protect herself. This was the basis of the charge of wounding with intent to cause grievous bodily harm. He then hit her on the head with the wooden part of the machete, which was the basis of the charge of assault with intent to injure.

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1 *Te Hei v R* [2017] NZCA 299 (Asher, Venning and Dobson JJ) [*Te Hei* (CA)].

[3] The application for leave to appeal is advanced on the basis that a substantial miscarriage of justice has or may have occurred.[2] It is not suggested that any point of public importance arises.

[4] The principal point that the applicant seeks to raise on appeal is that the direction given by the trial Judge, Judge Adeane, on identification was deficient and that this led to a miscarriage of justice.

[5] The case for the Crown depended on the evidence of Ms Collier, Ms Donnelly and the driver of the car in which the applicant was transported to and from the scene of the assault, Mr Sammons. Ms Collier and Ms Donnelly said they recognised the applicant, having seen him before. Both initially told the police they had not seen him before but said they did this because they feared gang retaliation.

[6] Mr Sammons gave evidence that he had driven the applicant to the place where the attack occurred, had seen the applicant attack a woman, had called out to the applicant, had intervened by taking the machete from him and, after they got back into the car, had driven away again. Mr Sammons had known the applicant for about two months. Mr Sammons retracted his evidence in a handwritten affidavit some time after he made his initial police statement. In his evidence at the trial he maintained the position outlined in his original statement was the correct position.

[7] There was also evidence of a bystander who heard the driver of the car calling out to the applicant, using the name "Warren" and another witness who heard Ms Collier or Ms Donnelly saying the attacker was "Warren".

[8] The applicant's defence at trial was alibi. His partner gave evidence supporting this. However, the timing of the alibi did not rule out the possibility that the applicant was the assailant.

[9] Although the Court of Appeal said the Judge's direction on identification had aspects that were possibly too concise,[3] it was nevertheless satisfied that the Judge's summing up provided sufficient warning about the risk of unjustified reliance on

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2 Supreme Court Act 2003, s 13(2)(b); Senior Courts Act 2016, s 74(2)(b).

3 *Te Hei* (CA), above n 1, at [33].

identification evidence.[4] The Court pointed out that the most important identification evidence came from Mr Sammons. The Court noted that there was no real prospect that Mr Sammons had made a mistaken identification: the issue was whether he had truthfully described the person he had driven to the scene of the assault and had then driven away as the applicant or had lied about this. This meant the focus in relation to the assessment of his evidence was on his credibility, rather than the accuracy of his identification.[5]

[10] The Court of Appeal carefully considered the identification evidence and the direction given by the Judge. We see no appearance of error in that assessment and in those circumstances do not consider there is any risk of a miscarriage of justice necessitating a second appeal.

[11] A number of subsidiary points are also raised in the application for leave, but we see none of these as giving rise to any risk of a miscarriage.

[12] In those circumstances we dismiss the application for leave to appeal.

Solicitors:
Crown Law Office, Wellington for Respondent

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4 At [36].
5 At [35].