IN THE SUPREME COURT OF NEW ZEALAND

SC 139/2016
[2017] NZSC 23

BETWEEN	RYAN WARREN GEARY-SMART Applicant
AND	THE QUEEN Respondent

SC 140/2016

BETWEEN	JACOB CHRISTOPHER GEARY-SMART Applicant
AND	THE QUEEN Respondent

Court:	William Young, Arnold and O'Regan JJ
Counsel:	D J More for Applicant R W Geary-Smart J M Ablett-Kerr QC for Applicant J C Geary-Smart Z R Johnston for Respondent
Judgment:	3 March 2017

JUDGMENT OF THE COURT

The applications for leave to appeal are dismissed.

REASONS

[1] Ryan and Jacob Geary-Smart were convicted of murder, along with two co-offenders. Ryan Geary-Smart was sentenced to life imprisonment with a minimum period of imprisonment of 18 years. Jacob Geary-Smart was sentenced to life imprisonment with a minimum period of imprisonment of 17 years. Both

appealed unsuccessfully against conviction and sentence to the Court of Appeal.[1] Both now apply for leave to appeal to this Court against both conviction and sentence. We will deal with the conviction aspects of the applications first.

[2] The evidence at the trial was that two of the offenders, Mr Cummings and Mr Boskell entered the house of the victim, while the present applicants remained outside. It was only after Mr Cummings and Mr Boskell did not return as expected that the present applicants entered the house, by which time the victim had already been badly beaten. The Crown case was that the present applicants then participated in the continued beating of the victim leading to his death.

[3] Both applicants wish to challenge the decision of the Court of Appeal to refuse to admit as fresh evidence in support of their appeals to the Court of Appeal an affidavit from one of their co-offenders, Mr Boskell. In his affidavit, Mr Boskell described his role in the murder in terms that were inconsistent with his evidence at trial. He said when the four offenders went to the victim's house, their intention was to buy drugs but, unbeknownst to the others, he intended to beat up the victim. His evidence minimised the roles of the applicants and maximised his own role (he said he was responsible for the death of the victim and the killer blows had been delivered after the applicants had left the victim's property).

[4] Early in the cross-examination of Mr Boskell, the Court of Appeal required that Mr Boskell obtain legal advice about self-incrimination before answering further questions. After obtaining that advice, he advised he did not want to give further evidence. We consider the Court of Appeal was entitled to follow the course it did. The applicants also wish to argue the Court of Appeal wrongly rejected Mr Boskell's evidence (in his affidavit and the cross-examination that had occurred prior to the advice about self-incrimination being sought) as lacking in credibility. We do not see this point as raising any matter of public importance, and we see no risk of miscarriage if leave is not granted on this ground.

[5] Both applicants also wish to raise arguments about propensity evidence that was admitted at the trial. The background to these arguments is that the Crown case

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1 *Cummings v R* [2016] NZCA 509 (French, Miller and Asher JJ).

was initially that the four defendants were parties to the murder under both ss 66(1) and 66(2) of the Crimes Act 1961. In relation to s 66(2), the Crown case was that all four defendants were assisting in the prosecution of a common purpose.

[6] The propensity evidence related to eight previous incidents involving some or all of the defendants acting as a group using threats and some violence in the period of three weeks prior to the murder. The evidence was admitted at a pre-trial ruling, when the s 66(2) allegation was still in play.[2] However, at the end of the Crown case the Crown decided not to pursue the s 66(2) allegation, and confined itself to arguing that the defendants were liable either as principals or as parties in terms of s 66(1) (aiding and abetting). The trial Judge, Gendall J, was then asked to rule the propensity evidence inadmissible, on the basis that the propensity evidence had been admitted on the basis that it was relevant to the s 66(2) allegation, and it was no longer relevant once that allegation had been abandoned. He declined to do so.[3] Gendall J's ruling was upheld by the Court of Appeal.[4]

[7] The applicants wish to argue that the propensity evidence should not have been admitted because it was insufficiently relevant to the offending, that the Judge should have considered each propensity incident as it related to each offender, rather than making a global assessment and that Gendall J was wrong not to declare the propensity evidence inadmissible after the s 66(2) allegation was abandoned.

[8] The points the applicants seek to raise are specific to the facts of this case and do not raise any matters of public importance. They were thoroughly considered by the Court of Appeal and we see no risk of miscarriage if leave is declined on these points.

[9] Jacob Geary-Smart also seeks to raise other points relating to the propensity evidence directions given to the jury by Gendall J. While we accept that those directions could have been more clearly directed at the case at hand, we see no reason to go behind the Court of Appeal's careful evaluation and rejection of these arguments.

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2 *R v Boskell* [2014] NZHC 1420 (Gendall J).
3 *R v Boskell* HC Dunedin, CRI-2013-012-2556, 11 December 2014.
4 *Cummings v R*, above n 1, at [30].

[10] Jacob Geary-Smart wishes to raise points of appeal relating to the way the Judge directed the jury on party liability. The essence of the argument is that the Judge did not sufficiently link the legal directions to the evidence in the case. The Court of Appeal rejected these arguments, though it noted that it would have been helpful for the trial Judge to have linked the elements of party liability under s 66(1) to the evidence against Jacob Geary-Smart.[5] It was, however, satisfied the directions in the question trail and the Judge's summing up were sufficient. We do not see any matter of public importance arising and we see no appearance of error in the Court of Appeal's evaluation. Nor do we see any point justifying leave on the application of s 66(1) to the facts of this case.

[11] Jacob Geary-Smart also wishes to raise an issue about the Judge's summary of the defence case in his summing up to the jury. Jacob Geary-Smart's counsel had, in closing, dealt in some detail with the evidence that was adverse to Jacob Geary-Smart but not admissible against him. The Judge did not endorse this or repeat it in his summing up. We do not see this as a point that would be an appropriate basis for leave to appeal to this Court. The Court of Appeal found that the Judge summed up the competing cases in a way that was fair and balanced.[6] The Court also found that the Judge had directed carefully about the limited admissibility of some evidence, which was admissible against one or more defendants but not others.[7] We see no appearance of error in that analysis.

[12] Having considered the points raised in relation to sentence by both applicants, we are satisfied that there is no proper basis for the grant of leave to appeal against the Court of Appeal's decision in relation to sentence.

[13] The applications for leave to appeal by both applicants are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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5 At [42].
6 At [46].
7 At [37].