IN THE SUPREME COURT OF NEW ZEALAND

SC 60/2017
[2017] NZSC 119

BETWEEN	VILIAMI ONE FUNGAVAKA Applicant
AND	THE QUEEN Respondent

Court: Glazebrook, O'Regan and Ellen France JJ

Counsel: M I Koya for Applicant
M J Lillico for Respondent

Judgment: 14 August 2017

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Mr Fungavaka was convicted after trial of the murder of Ms Georgina Manuel. Ms Manuel died after she was struck twice by Mr Fungavaka's car. Mr Fungavaka appealed unsuccessfully against conviction to the Court of Appeal[1] and now seeks leave to appeal to this Court.

Background

[2] The Crown case at trial was that Mr Fungavaka and Ms Manuel drove off together from a gathering to look for Ms Manuel's father. When they saw Ms Manuel's father walking along the road, Ms Manuel got out of the car. An argument broke out when Ms Manuel refused to get back into the car. The car's engine was running and the lights were on. Ms Manuel walked in front of the car, she yelled at Mr Fungavaka and gave him the fingers. The car engine revved and the

1 *Fungavaka v R* [2017] NZCA 195 (Winkelmann, Woodhouse and Collins JJ).

car moved forward into Ms Manuel and hit her. The car continued to move forward, spun around or did a u-turn and headed back down the road toward where Ms Manuel was lying. The car drove over her and then drove away.

[3] Mr Fungavaka gave evidence. The defence case was summarised by the trial Judge, Faire J, in his summing up to the jury as follows:

> The defence case is that the deceased stepped in front of the defendant's moving car as it was pulling away from the kerb. The defendant [submits] that any injuries she received were unintentional. In respect of the second impact, the defence case is that the defendant did not see the deceased on the roadway prior to his vehicle colliding with her. Again the defence submit that any injuries she received were unintentional. The defence submit that it was an accident or, at the very worst, it was manslaughter.

The proposed appeal

[4] The application for leave is advanced on three proposed grounds:

(a) the charge was insufficiently particularised, resulting in a miscarriage of justice;

(b) late disclosure of a further statement from the pathologist has resulted in a miscarriage; and

(c) a point of general importance is raised by the fact the Judge left manslaughter to the jury in a situation where the charge of reckless driving causing death was available.

[5] In terms of the first proposed ground, the applicant submits that each separate impact should have been the subject of a separate charge and that the charging document failed to sufficiently particularise the allegation.[2] The Crown charge notice and the charge list contained one count of murder with no particulars as to the two impacts. The Court of Appeal concluded the applicant was nonetheless "fully informed of the particulars of the charge he faced".[3] We see no appearance of a miscarriage arising from that assessment. It is apparent from the record that the

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2 Criminal Procedure Act 2011, s 17.

3 *Fungavaka*, above n 1, at [11].

applicant was made aware of the substance of the charge against him.[4] Nothing is advanced to suggest trial counsel experienced any difficulty as a result of the way in which the count was framed.[5]

[6] The second proposed ground arises because the pathologist, Dr Glengarry, provided a further, more detailed, statement during the course of the trial. In the initial formal written statement provided by Dr Glengarry prior to the trial, the cause of death was recorded as "multiple blunt force injuries due to a motor vehicle collision". Once the trial had commenced, an amended statement for Dr Glengarry was served on the defence, linking particular injuries to each impact. Following this, Dr Glengarry gave evidence at a voir dire in the course of which she said she could identify which of the injuries was caused by which impact.

[7] In particular, Dr Glengarry identified two injuries that could have been independently fatal – a brain injury and the injuries resulting from laceration of the liver. She saw the brain injury as consistent with what occurred when the car hit Ms Manuel on the first occasion and the liver injuries as consistent with the second impact. Dr Glengarry gave this evidence at trial.

[8] The Court of Appeal said that, in the context of this trial, late disclosure of Dr Glengarry's further evidence would not have had any impact on the defence. The overall effect of the initial formal written statement was that Ms Manuel had died from blunt force trauma inflicted by both impacts. That initial opinion was a basis for the Crown case that either impact was a sufficient actus reus for the murder charge.[6] The Court also noted in this respect no adjournment was sought and there was no indication of any wish to instruct a defence expert.[7] Nor, on the appeal, could the appellant say how an expert may have assisted.[8]

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4 The Court of Appeal referred to, for example, the police summary of facts which "described two impacts and stated that Ms Manuel subsequently died of multiple blunt force trauma injuries": at [11].

5 Criminal Procedure Act, s 17(4) (a charge must contain sufficient particulars to fully and fairly inform the defendant of the substance of the alleged offence). See *Gamble v R* [2012] NZCA 91 at [31]; and Simon France (ed) *Adams on Criminal Law – Criminal Procedure* (online looseleaf ed, Thomson Reuters) at [CPA17.04].

6 *Fungavaka*, above n 1, at [8].

7 At [9].

8 At [9].

[9] Nothing raised by the applicant before this Court indicates there is a risk of a miscarriage of justice arising out of the Court of Appeal's approach to this aspect. The applicant in his submissions does no more than outline various matters he would have sought expert evidence on had he known earlier about the pathologist's further evidence. And there is nothing before us to explain why that evidence would not have been sought earlier if it was important to the defence which impact had caused the death or how the first crash occurred. As to the latter, the challenge appears to be to the evidence of the eye witness which the pathologist relied on in giving her evidence, but the pathologist was entitled to rely on that. In any event, as the Court of Appeal also noted, the fact that the defence was that the death was accidental meant the cause of death was not at issue at trial.[9]

[10] We add that in the context of considering the particulars of the charge, the Court of Appeal also addressed whether there was any risk of a lack of jury unanimity as to whether the applicant caused Ms Manuel's death at a time when he had the necessary murderous intent.[10] The Court did not consider that was a risk given the only issue was whether the Crown had proved beyond reasonable doubt that one or other of the impacts was not accidental.[11] As the Court of Appeal also noted, even if there was such a risk, the question trail distributed by the Judge to the jury addressed it by requiring the jury to consider the elements of the offence separately for the first and the second impacts.[12]

[11] As to the final proposed ground relating to the fact the Judge left manslaughter to the jury, given that the applicant was convicted of murder, it is irrelevant in terms of any risk of a miscarriage whether the alternative charge could have been a lesser offence. In any event, almost inevitably with manslaughter there will be a lesser alternative, namely, the unlawful act. This proposed ground does not raise a question of general or public importance.

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9 At [9].

10 At [15], citing *R v Mead* [2002] 1 NZLR 594 (CA) at [20] (endorsed in *Mason v R* [2010] NZSC 129, [2011] 1 NZLR 296 at [11]).

11 At [16]. As the Court said, there was no issue that the applicant was responsible for each impact, nor that each impact was a substantial and operative cause of death: at [15]. We add that, given the two incidents were so close in time, they may constitute a single transaction, rather than different transactions, as discussed by this Court in *Ahsin v R* [2014] NZSC 153, [2015] 1 NZLR 493 at [181]–[189] per McGrath, Glazebrook and Tipping JJ.

12 At [16].

[12] For these reasons, the application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent