

IN THE SUPREME COURT OF NEW ZEALAND

**SC 96/2016
[2016] NZSC 137**

BETWEEN ZACHARIUS RAKENA
 Applicant

AND THE QUEEN
 Respondent

Court: Glazebrook, Arnold and O'Regan JJ

Counsel: I M Brookie for Applicant
 P D Marshall for Respondent

Judgment: 18 October 2016

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

Background

[1] On 11 June 2015, after a jury trial, Mr Rakena was convicted of the aggravated robbery of an automobile parts and scrap metal business.

[2] The Crown case against Mr Rakena was circumstantial. It was alleged that the offender's physical characteristics resembled those of Mr Rakena. Track pants with Mr Rakena's DNA and matching the description¹ of those worn during the robbery were found in a recycling bin on Mr Rakena's property. The vehicle driven

¹ Black with two white stripes down the side and a white logo on the left thigh.

by the offender was similar² to that being driven by Mr Rakena around the time of the crime.³

[3] Mr Rakena's appeal against conviction was dismissed on 27 July 2016.⁴ He applies for leave to appeal against that decision.

Course of the trial

[4] The trial began on 8 June 2015. On 10 June at 12.43 pm the jury retired to consider its verdict. It returned at 3.28 pm to deliver a verdict. Although the foreperson indicated that the jury were unanimous, one member of the jury shook his head.

[5] Instead of taking the verdict the trial judge, Judge Paul, asked the jury to retire. The matter was discussed with counsel and it was agreed that each juror would be asked if he or she agreed with the verdict. Two said they were not in agreement and one was unsure.

[6] The Judge asked the jury to return to the jury room. Defence counsel's application to discharge the jury was unsuccessful, as was the renewed application the following day.

[7] At 4.19 pm the jury was given a standard *Papadopoulos* direction⁵ and shortly after 5.00 pm the jury was sent home. Deliberations resumed the following day and at 2.20 pm the jury advised that there was a unanimous verdict. The jury provided a note to the Judge, which included the following question:

If we deliver a verdict – will we have to individually stand up and acknowledge the verdict? One member of the jury does not feel comfortable standing and verbally confirming the verdict in the courtroom.

² The car Mr Rakena had access to was a silver Toyota (of the same make as that described by one of the victims as being driven by the offender). It belonged to his girlfriend and had a registration number that differed by the first letter (E rather than F) to that recorded by one of the victims.

³ According to the evidence of Mr Rakena's girlfriend. By contrast, Mr Rakena's father's evidence was that his son was working with him at around the relevant time. It was an agreed fact that Mr Rakena was seen driving the vehicle in Onehunga earlier on the day of the robbery.

⁴ *Rakena v R* [2016] NZCA 357 (Randerson, Fogarty and Collins JJ).

⁵ *R v Papadopoulos (No 2)* [1979] 1 NZLR 629 (CA).

[8] Despite trial counsel for the applicant requesting that the jury be polled after the verdict had been taken, the trial judge advised counsel that he did not intend to poll the jury again and would simply watch the jury members closely when enquiries were made regarding the unanimity of the verdict.

[9] At 2.35 pm on 11 June 2015 the jury returned a verdict of guilty which the foreperson confirmed was unanimous. The Judge's minute following the verdict states:

At no time did any of the jury members, while they were under my observation, indicate by words or actions that they were in disagreement with that verdict.

Application for leave

[10] Mr Rakena seeks leave to appeal on four grounds:

- (a) the jury's verdict was unreasonable;
- (b) the Judge was wrong not to discharge the jury after polling individual jurors;
- (c) the Judge was wrong to give the jury a *Papadopoulos* direction; and
- (d) the Judge erred in not polling the jury after delivering its verdict.

Unreasonable verdict

[11] On this ground the Court of Appeal concluded that there was sufficient evidence for the jury to have been satisfied beyond reasonable doubt of Mr Rakena's guilt.⁶

[12] Nothing that has been raised suggests a risk that this assessment may have been in error.

⁶ At [13]–[16].

Decision not to discharge the jury

[13] This ground was not pursued in the Court of Appeal.⁷ It is now pursued on the basis that the jury division should not have been disclosed in open court and that the process showed that the jury was dysfunctional.

[14] Like the Court of Appeal,⁸ we have reservations as to whether the jury “poll” should have occurred. Rather the jury should just have been told to continue their deliberations until they were unanimous. We do not, however, consider that the process showed the jury to have been dysfunctional in the sense of being unable to continue its deliberations fairly. Nor does Mr Rakena identify any real risk of a miscarriage of justice arising from the “poll”.

Decision to give a *Papadopoulos* direction

[15] We have reservations as to whether it was appropriate to give a *Papadoloulos* direction at this stage of deliberations.⁹ However, like the Court of Appeal,¹⁰ we do not consider that a miscarriage of justice has arisen. The jury did not give its verdict until the afternoon of the next day and there is no evidence to suggest any member of the jury was placed under any improper pressure because of the direction.

Decision not to poll the jury

[16] Mr Rakena submits that, in light of what had occurred previously and the note from the jury, the jury should have been polled after taking the verdict.

[17] We would accept the Crown submission that, after the events of the previous day, there can have been no misunderstanding on the part of any member of the jury as to the meaning of a unanimous verdict. Further, there was no indication at the time the verdict was taken of any disagreement. There is thus no risk of a miscarriage of justice on this ground.

⁷ See at [20] of the Court of Appeal decision.

⁸ At [19].

⁹ This was also the Court of Appeal’s view – see at [22].

¹⁰ At [24].

Result

[18] The matters raised all relate to the particular circumstances of this case and nothing raised shows any risk of a miscarriage of justice.

[19] The application for leave to appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent