IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CRI 2008-027-000660

THE QUEEN

v

JONOTHAN WINIATA POUTAI
ARTHUR DUNCAN BRIGGS
LONNIE BOYD WIHONGI
KARL HOHEA HETA

Hearing: 25 June 2009

Appearances: M B Smith & B M O'Connor for the Crown
R S Garbett for Poutai
G R Anson for Briggs
D J Blaikie for Wihongi
K C Bailey for Heta

Judgment: 31 July 2009

REASONS JUDGMENT OF PRIESTLEY J
(On s 347(3) discharges)

This judgment was delivered by me on 31 July 2009 at 4.45 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

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Introduction

[1] At the end of the Crown case counsel for Mr Wihongi and Mr Heta, who were two of the four accused then remaining in the trial, sought discharges under s 347(3).

[2] At the conclusion of argument on 25 June 2009 I delivered a short results judgment discharging both accused. I indicated that I would, out of respect for counsel's submissions, deliver this reasons judgment, which I now do.

Legal Framework

[3] In *R v Flyger* [2001] 2 NZLR 721 (CA) the threshold was explained thus:

> [13] The power to discharge an accused, accorded by s 347(3) of the Crimes Act, is not expressed to be subject to any statutory limitation. Yet it is not an unqualified power susceptible of arbitrary exercise. It must be taken to be a power exercisable in the interests of justice. The nature and circumstances of a case will inform the interests of justice. In a trial before a Judge and jury a Judge must respect the jury's responsibility to decide the facts. Accordingly a Judge should not normally make an order for discharge pursuant to s 347(3) where there is before the Court evidence which, if accepted, would as a matter of law be sufficient to prove the case. The Judge's function in these circumstances is not to attempt to predict the outcome but to examine the evidence in terms of adequacy of proof, if accepted.
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> …
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> [15] … It is not a question of what a jury would be likely or unlikely to do but what a jury may properly do. The evidence in support of a charge may be barely adequate and so tenuous as to lead a Judge to the view that the jury could not properly convict and accordingly the interests of justice require an order for discharge. The evidence in a case may be adequate, if accepted, but witnesses may appear so manifestly discredited or unreliable that it would be unjust for a trial to continue. It may be that in such circumstances a jury would be unlikely to convict, but the rationale for an order for discharge is not the likelihood of acquittal but the unsafeness of a conviction having regard to the evidence.

[4] In a subsequent judgment the Court of Appeal, in *Parris v Attorney-General* [2004] 1 NZLR 519, reinforced this approach:

> [13] We suggest that it is helpful in such circumstances, and indeed in s 347 situations generally, to correlate the exercise upon which the Judge is engaged with the function of this Court when considering an appeal on evidentiary grounds. Section 385(1)(a) of the Crimes Act 1961 provides that if the verdict of a jury is unreasonable or is not supported by the evidence the appeal is to be allowed. Hence when faced with a s 347 application, whether on the depositions, at the close of the Crown case, or after defence evidence has been heard, the Judge can usefully be guided by the same concepts. There should be a s 347 discharge when, on the state of the evidence at the stage in question, it is clear either that a properly directed jury could not reasonably convict, or that any such conviction would not be supported by the evidence. In most cases these two propositions are likely to amount to much the same thing.
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> [14] It is vital, however, to appreciate the proper compass of the word "reasonably" in this context. The test must be administered pretrial or during trial on the basis that in all but the most unusual or extreme circumstances questions of credibility and weight must be determined by the jury. The issue is not what the Judge may or may not consider to be a reasonable outcome. Rather, and crucially, it is whether as a matter of law a properly directed jury could reasonably convict. Unless the case is clear-cut in favour of the accused, it should be left for the jury to decide. If there is a conviction this Court on appeal has the reserve power to intervene on evidentiary grounds. The constitutional divide between trial Judge (law) and jury (fact) mandates that trial Judges intervene in the factual area only when, as a matter of law, the evidence is clearly such that the jury could not reasonably convict or any such conviction would not be supported by the evidence. In making these remarks we have largely accepted Mr Powell's submissions which properly emphasised the matters we have mentioned.

[5] The power to discharge, in these circumstances, is an important constitutional safeguard. It is not a situation where the presiding judge usurps the jury's role. The sparingly exercised discretion must only be exercised in situations where a correctly directed jury could not properly convict. Thus a person on trial is protected from the exposure of risk to an adverse verdict where any conviction would quite simply be unsafe. (See *R v Lua*, HC AK CRI 2006-092-4336, 24 April 2007 (Baragwanath J) at [3]-[4]).

The Accused Wihongi

[6] At a pre-trial stage Mr Blaikie, for Mr Wihongi, made a previous s 347 application. This application was declined by Heath J on 20 November 2008. His Honour commented that the case against Mr Wihongi was finely balanced.

> [26] The more problematic point, from the Crown's perspective, is the stark contrast between the evidence of Mr [S] and that of Mr [W]. The

> Crown will submit at trial that Mr [S] is a witness of the truth for the purpose of identifying the four accused whom he saw involved in the incident. Mr Thomas acknowledged that it would be necessary for the Crown, in closing to a jury, to explain why Mr [W] evidence ought to be preferred to that of Mr [S] on the critical question of whether Mr Wihongi played any role in the beating.
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> [27] This case is finely balanced. It seems to me that the narrow point is whether, by relying on inferences of the type I have described to implicate Mr Wihongi in criminal activity, the Crown is calling inconsistent evidence (from Mr [W] and Mr [S]) as to truth in circumstances in which their evidence is irreconcilable. As the evidence presently stands, I have doubts whether the Crown can run its case in that way but, applying *Parris*, the case is not sufficiently "clear-cut in favour of the accused" to remove it from the jury: *Parris* at [14], set out at [8] above.
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> [28] It is for the Crown to decide how to run its case at trial. Whether the case against Mr Wihongi should go to a jury once the Crown evidence has been closed is a different issue.

[7] Significantly Heath J alerted the Crown to the need to resolve exactly how it would run its case at trial. Mr Smith candidly accepted that this problem had not dissipated.

[8] Mr Wihongi faced a count of, jointly with five other accused, wounding the victim with intent to cause grievous bodily harm (s 188(1)). The only evidence against the accused came from two witnesses who both gave evidence as protected witnesses. One, Mr W, was at the time the cell-mate (cell 6) of the victim. The other, Mr S, was the occupant of another cell.

[9] There was clear evidence that the accused Poutai directed, for his own reasons, an attack on the victim in his cell. Mr S was at all relevant times sitting at the same table as Poutai and watching. Mr W, for his part, had a more oblique view of his cell from the door of the games room but could nonetheless see into the cell.

[10] The Crown opened its case to the jury by effectively suggesting the assault on the victim was in three waves. Wave 1 involved Connelly and Hooer. (Both pleaded guilty at an early stage of the trial.) Wave 2 involved Briggs and Te Whata. (Te Whata also pleaded guilty at an early stage.) Wave 3 involved Te Whata and Hooer, during the course of which there is clear evidence that Hooer smashed the victim around the head with batteries tied into a sock as a weapon. The evidence from Mr S was the accused Mr Wihongi had played no part in any of the assaults.

Mr W, for his part, says he saw a person who matched the description of the accused (who at the time had distinctive dreadlocks and who was the only person in the prison pod with hair in this style) outside cell 6 at an early stage. There was no evidence, however, of Mr W seeing Mr Wihongi either enter or leave the victim's cell. Mr W, in evidence, accepted that was the case. Nor had he seen Mr Wihongi's face at any stage. This evidence from Mr W, being all that was available to the Crown to implicate the accused, was inconsistent with the evidence of Mr S.

[11] So to succeed in its count the Crown would have to prove first, that the victim had been wounded by Mr Wihongi acting as either a principal or a party, and that secondly the accused had the intention to cause the victim grievous bodily harm, drawing that inference from the available evidence.

[12] The guilty pleas of Connelly and Hooer, who on the evidence of Mr S were the accused involved in the first wave of the attack, creates a fundamental inconsistency in the Crown case in respect of which Heath J had placed the Crown effectively on notice. Furthermore the evidence about the first wave suggests that the physical damage to the victim was minor. He was not stomped, or kicked, or thrown on the ground. Rather he was punched. When the assailants of the first wave left his cell he sat on the bench apparently uninjured, visible through the doorway. This incited Poutai's anger and led to Poutai ordering the second wave of the attack.

[13] Other relevant evidence drawn out by Mr Blaikie at trial was that the accused was quiet and compliant.

[14] Mr Smith properly submitted that in any criminal trial different witnesses would see things different ways and that, so far as the inconsistency between the evidence of Messrs S and W was concerned this was ultimately a jury matter. The standard direction to the jury permitted them to accept or reject different parts of evidence they heard from a witness.

[15] The difficulty with this approach is that it could well lead to an injustice. Mr S's evidence was totally consistent with the pleas of the accused Connelly and Hooer. Although the jury might well accept Mr W's evidence that Mr Wihongi and

his dreadlocks were seen in the vicinity of the cell, it would clearly be unsafe to draw the inference from that proximity, particularly given Mr W's acceptance that he never saw the accused enter or leave the cell, that Mr Wihongi had been a party to wounding the victim and had exhibited the necessary *mens rea*.

[16] For these reasons I reach the view that a properly directed jury would not convict the accused and a guilty verdict against him, in all the circumstances, would be unsafe. For that reason he was discharged.

The Accused Heta

[17] The accused Mr Heta faced one count. It was not suggested that he had been involved in the assault on the victim. Rather the Crown case was that he was an accessory after the fact. This charge was laid under s 71(1) of the Crimes Act 1961.

[18] To sheet home the count the Crown would have to prove beyond reasonable doubt:

a) Another person or people had already committed a crime;

b) The accused, knowing that people had committed or been a party to the crime, tampered with or actively suppressed any evidence against those people. (There are two aspects here. First, knowledge of the prior crime and secondly assistance of the type proscribed.)

c) The accused acted for the purpose (not necessarily the dominant purpose) of helping those people to avoid being arrested or convicted.

[19] The evidence in respect of the accused was that he was one of the inmates responsible for keeping the pod yard clean. He had access to buckets and mops for that purpose.

[20] The sole evidence relating to Mr Heta (there being no suggestion that he was involved in the assaults) was from Mr W. At the conclusion of the assaults Mr W's

evidence was that he was told to clean up his cell (cell 6). He stated that he dawdled his way around the walkway (the cell being at the opposite side of the pod to the games room where he had been stationed). As he approached his cell (where the victim had been assaulted) he was wordlessly approached by Mr Heta who presented him with a bucket full of water and a mop. Mr W for his part took the water and the mop and made an attempt to clean up blood on the floor and walls of the cell. The victim was lying in the cell.

[21] Mr Bailey of course accepted an offence under s 188(1) had been committed. It was also accepted that the accused had given the bucket and mop to Mr W.

[22] There Mr Heta's involvement ended. There was no evidence (indeed there was some evidence to the contrary) that the accused had any connection with the principal offenders or the gang of which they were members. There is no evidence of any discussions at any stage between the accused and the other offenders. There is certainly no evidence that Mr Heta was aware of the direction (given by the accused Hooer) to Mr W to clean up the cell. All that was involved was the equivocal passing of a bucket and mop, which were in any event freely available in the compound that day. There is no evidence that the accused was aware of the blood inside the cell or that he was aware of the extent of the assault on the victim.

[23] These matters were in part looked at by Duffy J in her careful pre-trial judgment of 17 March 2009 where she declined to discharge Mr Heta under s 347. Her Honour regarded Heta's actions as being arguably the equivalent of using an innocent intermediary (in this case Mr W) to commit an offence (at [22]).

[24] But, with respect, that analogy leads nowhere. Mr W, because he had witnessed it, was well aware what had occurred inside the cell. His intention was to clean it up. There can be no doubt that everyone in the pod that day (with the lamentable exception of the prison guards) were aware that the victim was being beaten up.

[25] I accept that it would properly have been a jury matter for them to consider whether, by proffering the bucket and mop, Mr Heta was assisting Mr W in his task

of cleaning up his cell. The point of transfer was just short of the door of the victim's cell. But there the matter must end.

[26] Mr W had been told to clean up his cell. But there is no suggestion that the purpose of that direction was to destroy evidence or to help any of the perpetrators of the assault avoid arrest. Neither the accused nor the victim, being all locked in the pod, were going to go anywhere. The victim would eventually be discovered. Cleaning up the cell with water and mop would not have destroyed any evidence of value. That action was not the same as various accused washing their shoes and clothing which might have been spattered with the accused's blood.

[27] Although the accused, in proffering the mop and bucket, might well have had the intention of supplying Mr W with the means of cleaning up his own quarters, that falls a long way short of the essential ingredients the Crown would have to prove that Mr Heta intended to assist the assailants by that action, and that it was his purpose to enable the assailants to avoid arrest. Nor, as the evidence from the Crown has come out, do I agree with Duffy J (who rightly stated that the drawing of inferences was a jury matter) that the inference the Crown would be inviting the jury to draw relating to the *mens rea* and *actus reus* aspects of s 71(1) would be a safe inference.

[28] Any conviction of Mr Heta on the facts proved at trial would have been unsafe and could not responsibly have flowed from the appropriate directions.

[29] For these reasons therefore the accused was discharged.

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Priestley J