IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA636/2021
[2022] NZCA 504

BETWEEN	KANE STUART DARLING Appellant
AND	THE KING Respondent

Hearing: 16 August 2022

Court: Collins, Duffy and Edwards JJ

Counsel: A J D Bamford and E J Riddell for Appellant
I S Auld and T C Didsbury for Respondent

Judgment: 21 October 2022 at 9.30 am

JUDGMENT OF THE COURT

A The application for an extension of time is granted.

B The appeal is allowed.

C The conviction for aggravated robbery is quashed. No retrial is ordered.

D The record of the first warning given to the appellant by the District Court is cancelled.

REASONS OF THE COURT

(Given by Edwards J)

[1] Mr Darling and Mr Anderson originally faced a joint charge of aggravated robbery pursuant to s 235(a) (robbery causing grievous bodily harm) and s 66(1) of the Crimes Act 1961. Mr Darling also faced charges of kidnapping, possession of an

offensive weapon and conspiracy to supply methamphetamine. These charges arose out of an altercation in a car at a beach in Nelson on 16 November 2018.

[2] On 3 December 2019 Mr Darling received a sentence indication on an amended charge of aggravated robbery pursuant to s 235(b) of the Crimes Act (robbery together with any other person), and possession of an offensive weapon. He accepted that sentence indication and pleaded guilty to those two charges. Mr Darling was sentenced to four months' community detention and nine months' supervision. The kidnapping and conspiracy to supply methamphetamine charges were withdrawn.

[3] Mr Anderson pleaded not guilty to the charge of aggravated robbery pursuant to s 235(a) of the Crimes Act (robbery causing grievous bodily harm). Following a jury trial, he was acquitted of this charge and others he faced at the time.

[4] Mr Darling seeks to appeal his conviction for aggravated robbery. The appeal is advanced on the grounds that there is no reasonable basis for the conviction given Mr Anderson's acquittal at trial. Mr Darling also relies on the circumstances in which the guilty plea was entered.

The offending to which Mr Darling pleaded guilty

[5] The following is taken from the summary of facts to which Mr Darling pleaded guilty.

[6] There were two complainants of the offending. On 15 November 2018 they travelled to Nelson from Auckland and arranged to meet up with Mr Anderson.

[7] Mr Darling met with Mr Anderson and the two complainants later in the day and drove them around in his car. In the early hours of 16 November 2018 the group visited a local hotel where the female complainant won several hundred dollars from a pokie machine. After going their separate ways, the group gathered again at Tahunanui Back Beach later that morning.

[8] The complainants got into Mr Darling's car. Mr Darling was driving and Mr Anderson was seated in the rear seat behind him. The male complainant was seated in the front passenger seat and the female complainant was seated behind him.

[9] While they were driving, Mr Anderson leaned forward and attacked the male complainant grabbing him around the head and striking him repeatedly in the head and face. Mr Darling struck the male complainant also. While this was happening, both Mr Darling and Mr Anderson were yelling at the complainants to hand over their phones and bags.

[10] Mr Darling slowed the car and at this point the male complainant dived out in an attempt to avoid being further assaulted. The male complainant saw that his partner had remained in the car and, concerned for her safety, chased after the car on foot.

[11] The female complainant tried to open the door and get out, but Mr Anderson grabbed her and prevented her from doing so. The car drove further down the road but slowed which allowed the male complainant to catch up with it. He climbed back into the moving vehicle through the still open front passenger door in an attempt to get to his partner. At this point, Mr Anderson produced a knife, leaned forward from the back seat and proceeded to stab the male complainant repeatedly in the right side of his head, face, neck and body. Mr Darling joined in the assault by striking the man to his head.

[12] The car came to a stop. The female complainant, fearing further attacks, gave both men her phone and bag as they had demanded, and managed to get out of the car. The male complainant also managed to escape and ran after his partner.

[13] Members of the public who saw the incident called police who located both complainants hiding in a nearby building and rendered medical assistance to them.

[14] Mr Darling and Mr Anderson were located soon after by police patrols. The car had been put through a carwash to remove blood from the exterior and interior. A broken knife blade with blood on it was recovered from the rear passenger footwell of the car. Property belonging to the complainants was also located in the car.

[15] When found by police, Mr Anderson was carrying a backpack which contained a black-handled knife with part of the blade broken off. When Mr Darling was searched by police, a set of knuckledusters was removed from his pockets.

[16] The male complainant was hospitalised and received multiple deep laceration wounds to his head, neck, face and right side which required suturing.

Events leading up to the plea of guilty

[17] Mr Darling was originally charged with aggravated robbery causing grievous bodily harm (ss 235(a) and 66(1) Crimes Act), kidnapping, conspiring to supply methamphetamine and possession of an offensive weapon (knuckledusters). He was charged jointly with Mr Anderson for the first three of these charges.

[18] Mr Darling was initially remanded in custody, and was then granted EM bail on 18 March 2019. Mr Darling breached his EM bail on several occasions meaning he was remanded in custody for periods of time while other suitable addresses were found.

[19] The District Court file records a sentence indication being given on 18 April 2019. Correspondence from the prosecution indicates that the basis of the sentence indication was that Mr Darling would be charged as an accessory after the fact to the aggravated robbery by Mr Anderson; conspiring with Mr Anderson to supply methamphetamine; and possession of knuckledusters. Because Mr Anderson did not accept his indication, resolution of the charges did not occur.

[20] Mr Zintl was assigned as Mr Darling's lawyer in July 2019. Mr Zintl took instructions from Mr Darling on a proposal made by the Crown to resolve the charges. The proposal was that Mr Darling would plead guilty to aggravated robbery on a "together" basis (s 235(b) Crimes Act), and to the charges of possession of an offensive weapon, and conspiracy to supply methamphetamine. The kidnapping charge would be withdrawn.

[21] Mr Darling was on bail at this time. He was clear that he did not want to seek a sentence indication on the offer and preferred to go to trial. The account of events

given by Mr Darling to Mr Zintl was exculpatory. He acknowledged being the driver of the car but denied any assaults, and denied having any knowledge of the knife, or what Mr Anderson's intentions were at the relevant time. On Mr Darling's account, the male complainant was the aggressor and there was no robbery or detainment.

[22] Prior to call-over in the Nelson District Court on 31 October 2019, Mr Zintl again raised with Mr Darling the option of seeking a sentence indication on the Crown proposal made in July 2019. Mr Darling was adamant that the matter should proceed to a jury trial. However, he subsequently reconsidered his position when it became apparent that there were no trial dates available for the rest of the year. Given the time Mr Darling had spent remanded in custody and on bail, there was a real risk that the delay to trial could mean he would end up serving more time on remand than his ultimate sentence. On this basis, Mr Zintl advised seeking a sentence indication, and Mr Darling agreed.

[23] The sentence indication was set down for 3 December 2019. By this time, Mr Darling's bail had been revoked due to concerns about the presence of a six-month-old baby at the address. Mr Darling was remanded in custody. A fresh application for EM bail to Mr Darling's mother's address was listed for hearing on the same day as the sentence indication. An EM bail report prepared for that application noted opposition to EM bail due to Mr Darling's 15-year-old sister living at the address.

[24] The sentence indication was given on 3 December 2019. The basis of the sentence indication was that Mr Darling would plead guilty to aggravated robbery (s 235(b)) and possession of an offensive weapon (knuckledusters). The other charges would be withdrawn.

[25] The Judge made it clear in the sentence indication that Mr Darling would be sentenced on the basis that the aggravated robbery was at Mr Anderson's instigation, and that Mr Darling was not aware of the knife that Mr Anderson used. The Judge considered that Mr Darling had joined in what was happening and his culpability was significantly less than that of Mr Anderson.

[26] Applying a discount of 25 per cent for the guilty plea, and a small discount for time spent on EM bail, the indicated sentence was approximately 22 months' imprisonment, allowing a sentence of home detention to be considered. Regarding the EM bail application, the Judge said that if Mr Darling accepted the sentence indication, he would grant him EM bail pending sentence. Sentencing was set down for 18 February 2020.

[27] After speaking with Mr Zintl about his various options, Mr Darling agreed to accept the sentence indication. In an affidavit filed for the appeal, Mr Darling explained that he made that decision because he was desperate to be released from custody. When giving evidence for this appeal he explained that he understood that if he did not accept the sentence indication, it would be unlikely that he would be bailed prior to sentencing. That would mean that he would remain in prison over the Christmas break, and for another few months.

[28] Mr Darling was finding prison particularly difficult. He says he was subjected to sexual and physical abuse by those who had discovered he was gay. Mr Darling also suffers from depression and anxiety for which he was receiving medication. Mr Darling says that his experiences in prison left him suicidal.

[29] Mr Darling appeared for sentencing on 18 February 2020. He was sentenced to four months' community detention and nine months' supervision.[1] The conditions of supervision required Mr Darling to attend and complete an appropriate drug and alcohol programme to the satisfaction of a probation officer. In sentencing Mr Darling, the Judge observed that Mr Anderson was a sophisticated and embedded member of the criminal fraternity in Nelson, and he considered Mr Darling to be very much out of his depth.[2]

[30] On 20 July 2020, Mr Darling was re-sentenced to 90 hours' community work and nine months' supervision for the aggravated robbery conviction.[3]

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1 *R v Darling* [2021] NZDC 22182 at [7]–[8].
2 At [1].
3 *Police v Darling* [2020] NZDC 27657 at [13]–[14].

Mr Anderson's trial

[31] Mr Anderson's trial started on 1 September 2020. He was charged with aggravated robbery causing grievous bodily harm (ss 235(a) and 66(1)) and wounding with intent to cause grievous bodily harm in the alternative. He was also charged with kidnapping. Mr Anderson pleaded guilty to the charge of conspiring with Mr Darling to supply methamphetamine, and to the charge of offering to supply methamphetamine.

[32] The Crown opened its case in line with the summary of facts. In describing the alleged offending to the jury, the Crown prosecutor said that Mr Darling had joined in. The Crown also said that the robbery was carried out by two or more persons acting together, namely Mr Anderson and Mr Darling.

[33] The defence case at trial was that it was the male complainant who brought the knife to the car, and that he was the one who had attacked Mr Darling that morning. The injuries sustained by the male complainant were said to have occurred during the course of a struggle over the knife in the car. The defence case was that Mr Anderson did not intentionally apply or use the knife to cause the injuries that the male complainant suffered.

[34] In closing arguments, the defence put particular emphasis on a Crown witness, Ms Edmonds, who was walking her dog at the beach at the time. She described seeing a man standing near the slow-moving car, and saw him get into it and attack the driver. That was consistent with the defence theory of the case which was that the male complainant was the aggressor. It was also consistent with the account Mr Darling gave to Mr Zintl.

[35] Before the jury retired, the Judge amended the charge of aggravated robbery against Mr Anderson. He removed the reference to Mr Darling, and the s 66(1) component. The amended charge read:

> … that Rueben James Anderson on 16 November 2018 at Nelson robbed [female complainant] of her handbag and at the time of such robbery caused grievous bodily harm to [male complainant].

[36] Mr Anderson was found not guilty of all three charges.

Extension of time

[37] The appeal against conviction was filed approximately 19 months out of time.

[38] Mr Darling has filed an affidavit explaining that he did not become aware of Mr Anderson's acquittal until Corrections applied to re-sentence him. It was at this time that his lawyer informed him he may have a viable ground of appeal in light of Mr Anderson's acquittal. There were further delays with the COVID-19 lockdown in August and September 2021. The notice of appeal was filed on 28 October 2021. We are satisfied that the delay is adequately explained.

[39] The Crown opposes the application for an extension of time on the grounds that the appeal has no merit and the interests of justice weigh against an extension of time to bring the appeal. The merits of the appeal are considered next.

Approach on appeal

[40] Mr Darling appeals his conviction under s 229(1) of the Criminal Procedure Act 2011. This Court must allow the appeal if satisfied that a miscarriage of justice occurred that created a real risk that the trial outcome was affected.[4]

[41] It is only in exceptional circumstances that an appeal against conviction will be entertained following a guilty plea.[5] The appellant must show that a miscarriage of justice will result if their conviction is not overturned.[6]

[42] There are four accepted categories where a miscarriage may arise following the entry of a guilty plea.[7] One of which is where, on the admitted facts, the defendant could not in law have been convicted of the offence charged.[8] Convictions have

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4 Criminal Procedure Act 2011, s 232.
5 *R v Le Page* [2005] 2 NZLR 845 (CA) at [16].
6 At [16].
7 *R v Le Page*, above n 5, at [17]–[19]; and *R v Merrilees* [2009] NZCA 59 at [34]–[35].
8 *R v Le Page*, above n 5, at [18].

sometimes been set aside under this category where a joint or principal offender has been acquitted of the same offence.

[43] In *Stewart v R*, the Supreme Court outlined the principles applicable to such cases:[9]

> [5] It will not always be the case that a secondary party must also be acquitted in the absence of the conviction of a principal offender. There will be circumstances in which a jury can safely convict a person of secondary liability for an offence notwithstanding that the evidence, or fresh evidence, leaves reasonable doubt as to guilt on the part of the principal offender. This may be the case where, for instance, it is certain that the offence took place but the identity of the principal offender is unknown or in doubt, yet the identity of the secondary party is clear. It may be the case where the principal offender cannot be found guilty by reason of infancy, insanity or death, or is otherwise not amenable to prosecution. And it may also be the case where the criminal liability of the parties is separately established, especially on the basis of different evidence — if, for example, evidence against the secondary offender is inadmissible against the principal offender.
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> [6] However in circumstances where, as here, the successful appeal and subsequent s 347 discharge of the principal offender indicates reasonable doubt about whether the alleged primary offending took place at all, the conviction of a secondary party for encouraging that offending must be considered unsustainable. In such circumstances the acquittal of the principal implies that the elements of the offence cannot be proved, so that the primary offence cannot be said to have been committed, especially where the acquitted person was the only possible principal. If no crime occurred, the secondary party cannot be said to have helped the principal offender to commit it.
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> (footnotes omitted)

[44] In *McIntyre v R*, the appellant pleaded guilty to a charge of accessory after the fact to murder.[10] The alleged murderer pleaded not guilty and was subsequently acquitted at trial. The appeal was allowed. This Court said:

> [2] To succeed on a charge of accessory after the fact to another crime the Crown must prove the substantive crime was committed, although it is not necessary that a person be convicted of that substantive crime. In the circumstances, the Crown conceded that the successful self-defence claim by the alleged primary offender has the consequence that there was no murder. Accordingly, Mr McIntyre cannot be an accessory to a murder that did not occur.

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9 *Stewart v R* [2011] NZSC 62, [2012] 1 NZLR 1.
10 *McIntyre v R* [2017] NZCA 579, [2018] NZAR 43.

[45] This Court came to the same conclusion in *Jones v R.*[11] Mr Jones had been convicted with two others as a party to a charge of blackmail. The conviction of the principal offender, Mr Clutterbuck, was subsequently quashed by the Court of Appeal and no retrial was ordered. Applying the principles in *Stewart*, the Court of Appeal found that Mr Clutterbuck's successful appeal called into question the certainty and safety of the jury's verdict regarding Mr Jones. Mr Jones' appeal was allowed and the conviction quashed.

[46] In *R v Darby*, the majority of the High Court of Australia held that the acquittal of one defendant on appeal for conspiracy to rob did not affect the conviction of the other co-conspirator.[12] The majority departed from old law which found both defendants must be either acquitted or convicted in those circumstances and set out the following approach:[13]

> In the light of the wealth of both academic and judicial consideration that has been devoted to this topic in recent years, we have no doubt that this Court should now redirect the common law of Australia on to its true course. It should determine that the conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person. In our opinion such a determination will focus upon the justice of the case rather than upon the technical obscurities that now confound the subject.

[47] The majority held that in cases where there was no material distinction in the evidence against both defendants, a trial direction to either convict or acquit both accused would continue to be appropriate "not because of any technical rule but because of the circumstances of the case".[14]

[48] There are cases where apparently inconsistent verdicts have been explained by the evidence. In *R v Wahrlich*,[15] Mr Wahrlich was charged together with another man, Z, of causing grievous bodily harm to four people. Mr Wahrlich was convicted at trial, but Z was acquitted in a separate trial. This Court considered there were sufficient differences in the evidence called at each trial to explain the different verdicts. The

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11 *Jones v R* [2014] NZCA 613.
12 *R v Darby* (1982) 148 CLR 668.
13 At 678.
14 At 678.
15 *R v Wahrlich* [1976] 2 NZLR 9 (CA).

Court repeated the principle that inconsistent verdicts from different juries in respect of defendants charged with the same offence does not necessarily render the guilty verdict unsafe.

[49] Similarly, in *R v Zaman*,[16] the United Kingdom Court of Appeal dismissed an appeal from Mr Zaman who had pleaded guilty to assisting the principal offender to leave the scene of an alleged conspiracy to supply heroin and providing him with shelter. The principal offender was later acquitted of the principal offence. The Court noted that the commission of the offence by the principal offender might be established in the case of an assister even though it was not established against the principal offender. For example, evidence admissible against the assister may not be admissible against the principal offender, or there may be additional evidence discovered following the principal offender's acquittal, but before the assister's trial, which put the commission of the offence by the principal offender beyond doubt.[17]

[50] The Court was satisfied there was sufficient evidence by which Mr Zaman could have obtained the necessary knowledge to establish the offence against him irrespective of what the prosecution was able to adduce at trial.

Is there a miscarriage of justice?

[51] We start by considering whether Mr Darling's plea of guilty to the charge under s 235(b) and Mr Anderson's acquittal of the charge under s 235(a) can be reconciled.

[52] The aggravating feature of a robbery under s 235(b) is the presence of two or more people. It is the collective element of a charge under this section that distinguishes the offence from aggravated robbery under s 235(a) and s 235(c). To prove the offence under s 235(b), the persons involved in the offending (of which there must be at least two) must be acting in concert and share a common intention to rob. Each must be complicit in the joint enterprise.[18] As this Court explained in

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16 *R v Zaman* [2010] EWCA Crim 209, [2010] 1 WLR 1304.

17 At [18].

18 *R v Feterika* [2007] NZCA 526 at [24]–[34] citing *R v Gruenwald* CA99/04, 9 August 2004; *R v Galey* [1985] 1 NZLR 230 (CA); and *The Queen v Joyce* [1968] NZLR 1070 (CA). See also *R v Greening* (1990) 6 CRNZ 191 (HC) at 192. These cases concerned a legislative provision which differed in some respects to s 235(a), but these differences are irrelevant to the common intention element of the offence.

R v Feterika, that means if two or more persons are present and one robs without the others anticipating or willing that, aggravated robbery under s 235(b) will not have been proved.[19]

[53] These elements differ to those of aggravated robbery under s 235(a). To prove that charge, the Crown must prove there was a robbery and grievous bodily harm. Importantly, there is no requirement to show the presence of two or more people, and no requirement to show a common intention.

[54] Mr Anderson's acquittal draws into question whether there was a robbery at all. Applying the reasoning in *McIntyre* to this case, Mr Darling cannot be found guilty of committing an aggravated robbery together with Mr Anderson if there is no proof that a robbery was committed.[20]

[55] The not guilty verdict also suggests there is reasonable doubt about whether Mr Anderson had the necessary intention to commit a robbery. But even if the jury were satisfied of this element, it is entirely different to the common intention required to prove the offence under s 235(b). If Mr Anderson did not have an intention to act together in concert to commit the robbery, then an essential ingredient of the offence against Mr Darling cannot be proved.

[56] Furthermore, this is not a case where there is a different pool of evidence against Mr Darling and against Mr Anderson which might explain the different results on the respective charges each faced. We have not been pointed to any evidence that would have been admissible against Mr Darling which was not also admissible against Mr Anderson. The pool of evidence against both defendants was the same.

[57] Similarly, this is not a case where the robbery could have been undertaken by someone else. No parties, other than Mr Darling and Mr Anderson, were alleged to have been involved. Further, the Crown's case consistently linked Mr Darling's offending to that of Mr Anderson, with the latter being the primary offender in this case. That was reflected in the fact that both parties were originally charged under

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19 *R v Feterika*, above n 18, at [34].
20 *McIntyre v R*, above n 10.

s 235(a) and s 66(1), the sentence indications given at the time, and the way the Crown opened its case at trial. Given the presentation of the Crown case, it is inconceivable that Mr Anderson would have been found not guilty at trial, but a verdict of guilty returned against Mr Darling.

[58] The circumstances in which Mr Darling's plea were entered add weight to the risk of miscarriage in this case. Mr Darling was under immense pressure at the time he entered his plea of guilty. This was due to the difficulties he was experiencing in custody due to his sexual orientation and mental health.

[59] In addition, Mr Darling had already spent significant time on remand and on bail while waiting for a trial date to be allocated. Indeed, given the delays in obtaining a trial fixture, there was a significant risk that his time spent on remand would exceed the likely sentence he would receive. The fact that this was operative on Mr Darling's mind is evident in his firm instructions to plead not guilty and not to seek a sentence indication, which changed when it became obvious that a trial date was still some time away.

[60] We emphasise that we cannot find any evidence of counsel error in this case. Mr Zintl properly advised Mr Darling before the guilty pleas were entered. However, we accept that Mr Darling was concerned that he may have to remain on remand pending sentence which was several months away and was over the Christmas period. The EM bail report had raised some issues with the proposed EM bail address and it appears that Mr Darling may have reasonably apprehended a risk that the application would be declined. This just added to the pressure on Mr Darling to enter a guilty plea.

[61] To recap, we consider Mr Anderson's acquittal means that Mr Darling could not, in law, have been convicted of an offence under s 235(b). That is sufficient to establish a miscarriage of justice despite his guilty plea, but the circumstances in which he entered the guilty plea add weight to that conclusion. We have found the appeal has merit, therefore the application for an extension of time should be granted, and the appeal allowed. As Mr Darling has now served his sentence, we make no order for a retrial.

Result

[62] The application for an extension of time is granted.

[63] The appeal is allowed.

[64] The conviction for aggravated robbery is quashed. No re-trial is ordered.

[65] The record of the first warning given to the appellant by the District Court is cancelled.

Solicitors:
Bamford Law, Nelson for Appellant
Crown Law Office, Wellington for Respondent