

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA554/2024
[2025] NZCA 79**

BETWEEN	JOHN SIONE MOALA Appellant
AND	THE KING Respondent

Hearing: 27 February 2025

Court: Hinton, Edwards and Cull JJ

Counsel: S J Taylor-Cyphers and M T Dempsey for Appellant
B D Tantrum and J T Lowyim for Respondent

Judgment: 28 March 2025 at 3 pm

JUDGMENT OF THE COURT

- A The application for an extension of time is granted.**
 - B The application for leave to amend the ground of appeal is granted.**
 - C The appeal is allowed.**
 - D The conviction for assault with a weapon is set aside. A retrial is ordered.**
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REASONS OF THE COURT

(Given by Edwards J)

[1] Following a jury trial in the District Court, Mr Moala was found guilty and convicted of one charge of assault with a weapon and one charge of intentional damage. On 16 February 2024 he was sentenced by Judge Cathcart to nine and half months' imprisonment in respect of the assault with a weapon charge to be served

cumulatively, and convicted and discharged in respect of the intentional damage charge.¹ He was acquitted of one charge of injuring with reckless disregard.

[2] Mr Moala appeals his conviction for assault with a weapon. He does so on the basis that the Judge's summing up, and the question trail provided to the jury, included material errors regarding the intention required to prove an assault, which resulted in a miscarriage of justice.

Leave to amend ground of appeal

[3] The ground of appeal advanced before us differs to that identified in the notice of appeal. Mr Moala applies for leave to amend the ground of appeal. There is no prejudice to the Crown in allowing the amendment and there was no objection to the change. Accordingly, we grant leave to amend the ground of appeal.

Extension of time to file an appeal

[4] The appeal is filed 114 days out of time.² In an affidavit filed by Mr Moala, he explains that the delay was due to getting independent legal advice on the merits of an appeal. Initially he was advised that the appeal had no merit. For the reasons explained further below, we disagree with that appraisal. There was further delay in finding a lawyer who was prepared to advance an appeal on his behalf, and in securing legal aid for the appeal.

[5] We are satisfied that Mr Moala took reasonable steps to progress his appeal in all the circumstances. The Crown does not object to an extension of time and is not prejudiced by the extension. The interests of justice favour an extension of time to file the appeal and we grant the extension accordingly.

¹ *R v Moala* [2024] NZDC 3377 at [25]–[26].

² Criminal Procedure Act 2011, s 231(2).

Offending

[6] The convictions arose out of an incident inside Auckland Prison. Mr Moala was a sentenced prisoner at the time. Early on 25 July 2022, he was told he was to be transferred to a maximum-security unit that morning.

[7] Mr Moala objected to the transfer and went to a mezzanine floor outside the Ara Poutama Aotearoa | Department of Corrections (Corrections) staff office. What happened next was captured on CCTV footage taken from inside the prison, which was played to the jury at trial.

[8] Mr Moala ripped a prisoner telephone from a wall and held it in one hand. He picked up a milk crate and held it in his other hand. After shifting a chair, Mr Moala used the milk crate to hit the door of the staff office.

[9] The complainant, a Corrections officer, exited the staff office. He had his pepper spray drawn. There was a dispute at trial about whether Mr Moala was sprayed with pepper spray as the complainant exited the office. Mr Moala says he was sprayed in the eyes, and he could not see.

[10] Mr Moala can be seen on the CCTV footage with his face turned away from the complainant and moving away from the door. Then, with his head pointing towards the floor, Mr Moala can be seen moving towards the complainant, swinging the phone in that direction. The phone did not connect. There was a tussle between Mr Moala and the complainant, with the complainant falling over a balustrade and landing on his back.

[11] Mr Moala gave evidence at trial. In relation to the charge of assault with a weapon, Mr Moala admitted swinging the phone, but said he was disabled by the pepper spray, and was not looking where he swung it. He said he did not intend to hit the complainant with the phone at the time.

[12] As already noted, Mr Moala was convicted of the first charge of intentional damage. That followed his admission during his evidence that he had ripped the phone from the wall. He was acquitted of the most serious charge, being injuring with

reckless disregard, which related to the incident where the complainant had fallen over the balustrade.

Was there an error creating a real risk that the outcome of the trial was affected?

[13] We must allow the appeal if we are satisfied that the jury's verdict was unreasonable, or a miscarriage of justice occurred.³ A "miscarriage of justice" is defined to include any error that has created a real risk that the outcome of the trial was affected.⁴ A "real risk" that the outcome was affected exists when "there is a reasonable possibility that a not guilty (or more favourable) verdict might have been delivered if nothing had gone wrong".⁵

[14] Counsel for Mr Moala submit that the question trail and the Judge's summing up regarding the elements of the charge were in error as they conflated the two forms of intent: the intent to swing the phone and the intent to apply force to the complainant. As the latter form of intent was the key issue at trial, this error created a real risk that the outcome of the trial was affected.

[15] The assault with a weapon charge was laid under s 202C of the Crimes Act 1961, which relevantly provides:

202C Assault with weapon

- (1) Every one is liable to imprisonment for a term not exceeding 5 years who,—
 - (a) in assaulting any person, uses any thing as a weapon; or
 - (b) while assaulting any person, has any thing with him or her in circumstances that prima facie show an intention to use it as a weapon.

...

[16] Assault is defined in the Crimes Act as meaning:⁶

assault means the act of intentionally applying or attempting to apply force to the person of another, directly or indirectly, or threatening by any act or

³ Section 232(2).

⁴ Section 232(4).

⁵ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730 at [110].

⁶ Crimes Act 1961, s 2(1).

gesture to apply such force to the person of another, if the person making the threat has, or causes the other to believe on reasonable grounds that he or she has, present ability to effect his or her purpose; and **to assault** has a corresponding meaning

[17] The Crown case relied on the first part of this definition, namely “attempting to apply force to the person of another, directly or indirectly”.

[18] The question trail provided to the jury for this charge posed three separate questions:⁷

CHARGE 2: Assault with a weapon

2.1 Are you sure that on 25 July 2022 at the Auckland Prison Mr Moala in his attempt to strike [the complainant] intentionally swung a payphone at him?

If no, find Mr Moala “not guilty”
If yes, go to question 2.2.

2.2 Are you sure that Mr Moala had the cord attached to that payphone in his hand or hands when he attempted to strike [the complainant]?

If no, find Mr Moala “not guilty”
If yes, go to question 2.3.

2.3 Are you sure that Mr Moala intentionally used that payphone as a weapon in his attempt to strike [the complainant]?

If no, find Mr Moala “not guilty”.
If yes, find Mr Moala “guilty”.

“Weapon” means anything designed or used or is useable as an instrument for inflicting bodily harm.

[19] The Judge explained the elements of the charge as follows:

[38] Charge 2, assault with a weapon. You are dealing here with the allegation that Mr Moala attempted to strike [the complainant] with the payphone. Three questions arise here. Let us look at the first. “Are you sure that on 25 July 2022 at the Auckland Prison, Mr Moala, in his attempt to strike [the complainant], intentionally swung a payphone at him?” The question is framed in a way for you to answer a no or a yes to that proposition. Of course, the fact that it did not strike [the complainant] is irrelevant to proof of the charge because an assault is not only the intentional or deliberate application of force directly or indirectly to someone else, but it also extends to an attempt to apply force to the person of another. For instance, someone in boxing another throws the punch, but the other participant is adept enough to duck it

⁷ Emphasis removed.

and it misses. It is nevertheless an assault because the intention was to strike. The fact the boxer missed is irrelevant.

[39] Also, under this charge the Crown does not have to prove that injuries were inflicted by the swinging of the payphone. Logically so because we are talking about an attempt to strike here.

[40] I move to the second question. “Are you sure that Mr Moala had the cord attached to the payphone in his hand or hands when he attempted to strike [the complainant]?” We have all seen the CCTV footage. He clearly had the payphone in his hand or hands when he swung it. But the key question for the defence is whether the Crown has got off first base with the first question.

[41] The third question. “Are you sure that Mr Moala intentionally used the payphone as a weapon in his attempt to strike [the complainant]?” Often, we think of weapons as being guns or baseball bats, something of that nature, something which immediately conjures up a weapon in our minds. A knife is another example. But as the box below the question indicates, in terms of definition: “A weapon means anything designed or used or is useable as an instrument for inflicting bodily harm”. A broomstick can be used as an instrument for inflicting bodily harm even though its ordinary purpose, of course, is to sweep the dust away. That is an illustration of how ordinary objects can become weapons and be useable.

[20] We consider there was an error in this case. Question 2.1 of the question trail conflated the intentional movement (deliberately swinging the phone at the complainant), with the intention to apply force. These were separate and distinct elements in this case. The first relates to the deliberate (as opposed to accidental) action involved in swinging the phone. The second relates to the defendant’s intention at the time the phone is swung — that is, whether the defendant was attempting to apply force to the person of another at the time the phone was swung. The two forms of intention are not the same. It is possible to deliberately swing a phone at a person without intending to strike them, for example, to stop someone from advancing towards you.

[21] More significantly, the phrasing of question 2.1 in the question trail was also in error in that it did not direct the jury to consider whether Mr Moala was attempting to strike the complainant. Rather, it presupposed that Mr Moala was attempting to strike the complainant at the time he swung the phone. The framing of the question suggested that the attempt to strike the complainant had already been determined, or that it would be determined by considering whether Mr Moala had deliberately swung the phone in the complainant’s direction.

[22] These errors were not corrected by the Judge's direction. While the Judge identified that the key issue was whether Mr Moala had attempted to strike the complainant with the phone, he did not go on to distinguish a deliberate swinging of the phone at the complainant, from an attempt to apply force or to strike him. He also did not correct the presupposition inherent in question 2.1.

[23] Moreover, while the boxing analogy was offered as an example of an assault where there was no actual force applied, we consider it added to the confusion in this case. It may be assumed that a boxer is intending to apply force to their opponent when they throw a punch, even if it does not connect.⁸ However, such an assumption could not be made in this case. The jury was required to separately consider whether Mr Moala was intending to apply force to the complainant when he deliberately swung the phone at him.

[24] The fact that an assault includes a threat to apply such force to the person of another does not save this case. That was not the basis upon which the Crown case was put at trial, and the Crown did not rely on that definition of assault, whether as an alternative or at all. Mr Moala did not defend the charge on this alternative, and he was not questioned on the basis that he was threatening to apply force, rather than intending to apply that force, at the time he swung the phone.

[25] The errors were critical in this case because, as the Judge said, whether Mr Moala was attempting to strike the complainant when he swung the phone was the key issue in dispute. As already noted, Mr Moala had admitted to swinging the phone deliberately, but had denied that he was attempting to strike the complainant with it.

[26] We consider the errors in the question trail, compounded by the Judge's summing up, are likely to have caused confusion in the minds of the jury as to an essential element of the charge. There is a real risk that the outcome of the trial was affected. We are satisfied that a miscarriage of justice has occurred. The appeal should be allowed on this basis.

⁸ Even then, it could be the case that a punch is thrown in the direction of an opponent to distract or confuse the opponent, but with no intent to strike. That scenario raises the same issue as in this case, underscoring the point that it will depend on the circumstances of each case.

[27] Counsel for the appellant sought a retrial in the event the appeal was allowed. We are aware of no reason to the contrary and order accordingly.

Result

[28] The application for an extension of time is allowed.

[29] The application for leave to amend the ground of appeal is granted.

[30] The appeal is allowed.

[31] The conviction for assault with a weapon is set aside. A retrial is ordered.

Solicitors:
Crown Solicitor, Auckland for Respondent.