ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF G.

NOTE: DISTRICT COURT ORDER PROHIBITING PUBLICATION OF THE NAMES OF THE COMPLAINANT AND WITNESS REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA1/2023
[2023] NZCA 283

BETWEEN	SHAIDEN TYLA KARAKA Appellant
AND	THE KING Respondent

Hearing:	14 June 2023
Court:	Wylie, Thomas and Brewer JJ
Counsel:	D J Matthews for Appellant B Hawes for Respondent
Judgment:	7 July 2023 at 10 am

JUDGMENT OF THE COURT

A The application for an extension of time to appeal against conviction is granted.

B The appeal is allowed.

C Mr Karaka's convictions for aggravated robbery and receiving entered on 15 November 2018 are set aside.

D There is to be no retrial.

E Order prohibiting publication of the name or identifying particulars of G.

REASONS OF THE COURT

(Given by Wylie J)

Introduction

[1] The appellant, Shaiden Karaka, seeks to appeal convictions for aggravated robbery[1] and receiving[2] which were entered against him on 15 November 2018 following a jury trial in the District Court at Christchurch, presided over by Judge G S MacAskill.

[2] Mr Karaka's appeal has been brought some four years out of time. He wishes to appeal his convictions because of what he says was trial counsel error. He says that a miscarriage of justice has occurred because the closing address to the jury made by his counsel, whom we will call G, was woefully inadequate.[3] The Crown responsibly accepts that the closing address delivered by G did not meet the minimum standard required.

Background

[3] The Crown case was as follows.

(a) On the evening of 3 December 2016, Mr Karaka, his stepfather, John Ward, and Joshua Brown, went into a home occupied by the complainant, A. The defendants and A knew each other through an associate. The defendants demanded money from A. They claimed A owed the money to the associate for services she had provided to A. In the process Mr Ward and Mr Brown passed a knife between themselves, pointing it at A and threatening to kill him. They took turns punching A to his body. They threatened A with violence and weapons. A lay on the ground at Mr Brown's request and Mr Brown attempted to kick him in the head.

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1 Crimes Act 1961, s 235(b) — maximum penalty 14 years' imprisonment.

2 Sections 246 and 247(a) — maximum penalty seven years' imprisonment.

3 We have chosen to refer to Mr Karaka's trial counsel as G, because he is dead, cannot respond to the implicit criticism or put his version of events before the Court. This does not cause prejudice to Mr Karaka or the Crown.

(b) While Mr Brown and Mr Ward were with A, Mr Karaka took several items from A's address and loaded them into the car the defendants were travelling in. These items were valued at approximately $1,500.

(c) Mr Brown told A that he would return in the morning with a pistol and that he wanted A to pay a further $950 to him. When he was leaving, Mr Ward told A that if he called the police he would "wind up dead".

(d) After leaving A's address, Mr Karaka drove past a couple out on the street. He stopped his car and asked for a cigarette. While the couple were distracted, an unknown person entered their property and stole a handbag containing a cell phone valued at over $1,000. When the police went to Mr Karaka's house that afternoon, he attempted to hide the cell phone under a chair he was sitting on. When he was asked about the cell phone, Mr Karaka said that he knew nothing about it.

[4] Mr Karaka was only 17 years old at the time.

[5] Mr Karaka was charged jointly with Mr Ward and Mr Brown. He was initially charged with aggravated robbery, threatening to kill[4] and receiving. The charge of threatening to kill against Mr Karaka was dismissed under s 147 of the Criminal Procedure Act 2011, but the other two charges went to trial. Mr Karaka was found guilty of aggravated robbery and receiving. Mr Ward was found guilty of aggravated robbery and threatening to kill. Prior to trial, Mr Brown was found unfit to stand trial on either charge under the relevant provision of the Criminal Procedure (Mentally Impaired Persons) Act 2003.[5]

[6] At sentencing, Judge MacAskill imposed a sentence of three years and four months' imprisonment on Mr Karaka for the aggravated robbery charge and an additional sentence of 12 months' imprisonment for an unrelated robbery charge, to be served cumulatively on the first sentence.[6] Mr Karaka was sentenced to one month's imprisonment on the receiving charge and to two months' imprisonment on

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4 Crimes Act, s 306(1)(a) — maximum penalty seven years' imprisonment.
5 Section 14. This provision has since been repealed.
6 *R v Ward* [2018] NZDC 24077.

an unrelated theft charge, both to be served concurrently. As a result, the end sentence was one of four years and four months' imprisonment. Mr Karaka has served the sentence.

Application for an extension of time for filing the notice of appeal

[7] This Court has jurisdiction to hear Mr Karaka's appeal under ss 229 and 230(1)(c) of the Criminal Procedure Act.

[8] As noted, Mr Karaka's appeal was filed some four years out of time. He seeks an extension of time for filing his appeal. We have considered the application for an extension of time together with the proposed appeal.

[9] Whether or not an extension of time should be granted depends on the merits of the appeal. The ultimate touchstone is the interests of justice.[7] There are two broad questions — first, why was the appeal filed so late, and secondly, does it have merit?

[10] Mr Karaka has filed an affidavit. His background is unfortunate. He has been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and Fetal Alcohol Spectrum Disorder (FASD). Following his arrest, he applied for bail. The application was unable to proceed because there was no suitable address available. Mr Karaka had very little support available to him at that time. As a result, he was remanded in custody, at the age of 17, and he went on to spend some two years in custody between arrest and sentencing. As a result of the time he had already spent in custody, Mr Karaka was eligible for parole when he was sentenced. His main goal was to apply for parole straight away, as all he cared about was the fact that he would then be able to get out of prison. As he put it, he had missed out on two very significant years of his life by this stage and he wanted to move on. As a result, he did not instruct his lawyer to conduct a detailed review of his case. Mr Karaka accepts that he was aware that he had the right to appeal his convictions, but says that he was so focused on the prospects of being released from prison, that he told his lawyer that he did not wish to do so.

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7 *R v Knight* [1998] 1 NZLR 583 (CA) at 587; and *R v Lee* [2006] 3 NZLR 42 (CA) at [106].

[11] Eventually, Mr Karaka was granted parole but, as matters transpired, he became the subject of interim and then final recall orders. He eventually ended up serving the remainder of his sentence in custody until his statutory release date. When he was ultimately released from prison, he had little support available to him. Fresh out of jail, he quickly started experimenting with drugs and hanging out with anti-social peers. At some point, he learnt that his trial counsel, G, had passed away, and that he had been suffering from ill health, in particular dementia, in the period leading up his death. This caused Mr Karaka to think back to his trial, and to wonder whether he had had a fair hearing. At this stage he had another lawyer acting for him. He discussed matters with her and started thinking about an appeal. It was also becoming apparent to him that his conviction for aggravated robbery was having an impact on him that he had not anticipated when he was younger. He met with another barrister, who undertook a review of the file. Mr Karaka was not able to promptly finalise with the barrister or sign the notice of appeal due to his personal circumstances, but, by December 2022, he had again been remanded to Christchurch Men's Prison on further charges and he was able to sign the notice of appeal. It was filed shortly thereafter.

[12] We are satisfied that the reasons for the delay have been satisfactorily explained. We accept that Mr Karaka, as a young man, was unfamiliar with the criminal justice system, at least initially, and that his primary focus was being released from prison, on parole.

[13] Further, and as will be clear from what we have already noted above, the appeal has obvious merit. Accordingly, we grant Mr Karaka's application. The time allowed for filing the notice of appeal is extended.

The trial

[14] As noted, the Crown case at trial was that Mr Karaka and Mr Ward, along with Mr Brown, travelled to the victim's address late at night, stole various items, threatened the victim and inflicted violence on him.

[15] The victim in his evidence suggested that Mr Brown was the ringleader, but that Mr Ward was also involved in inflicting violence and making threats. Mr Karaka

was described as being on the periphery, as being involved in the taking of the property, and of loading it into the boot of the car in which the defendants were travelling. The victim said that Mr Karaka at one point tried to encourage the other two defendants to leave.

[16] Mr Ward did not give a police interview but he did give evidence at trial. He said that the property was only taken as "collateral", until the victim could repay the money which the defendants believed he owed to the associate. He said that the victim was happy to hand over the property on this basis. Mr Ward denied that there were any threats or actual violence, at least when he was present.

[17] Conversely, Mr Karaka did not give evidence at trial. He did however give a police interview after he was arrested. In his interview he denied any involvement in the aggravated robbery, or even being present at the victim's house on the night in question.

[18] In cross-examination, G, reasonably successfully, had the victim accept that Mr Karaka did not make any threats, did not engage in any violence, and was not, at any point, in possession of the knife that was being passed around.

[19] Before us, Mr Hawes for the Crown, accepted that, on the evidence adduced at trial, there were two potential defences open to Mr Karaka:

(a) that there was an aggravated robbery, but that his involvement was minimal, limited to putting property in the car, and therefore insufficient for liability to attach to him under s 235(b) of the Crimes Act 1961, because the "being together" element of the charge could not be established;[8] or

(b) consistent with Mr Ward's position, that there was no aggravated robbery at all, no violence, no threats and that the property was taken as collateral only.

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[8] Section 235(b) provides a person will have committed the offence of aggravated robbery who, being together with any other person or persons, robs any person.

[20] G's closing was very brief. We set it out in full:

> May it please your Honour, Madam Foreman and Members of the Jury:
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> It is my task to provide closings in respect to my client, Mr Karaka.
>
> You would have heard sufficient information regarding the various parties that you are sitting in judgment on. Mr Karaka is the person who I wish to concentrate on, him being one of the youngest people here and I suggest to you that he has provided a position whereby there is an ability for you to find Mr Karaka not guilty of the charges brought against him.
>
> He is a young man that we have seen. He may have some issues but I'd ask you to concentrate on a number of matters, one being that Mr Karaka is charged as a party and that…
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> THE COURT: [G] he's not charged as a party.
>
> [G]: Sorry, my mistake. It is suggested that he is a party to a robbery. That robbery has had consequences on Mr Karaka. His position is that he has not caused an offence which he cannot explain.
>
> The transcripts will be available to you to look at and consider and I'd ask you to carefully look at what Mr Karaka is alleged to have done, that there are circumstances whereby Mr Karaka's involvement seems to be on the periphery, that he has been taken along and not been the principle party, but being there or thereabouts and I would ask you, that given the status of the evidence against Mr Karaka, that you can enter a plea of not guilty to this young man.
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> In respect to various items that have been found on his property, I suggest that there are reasons for those property to be there and if there is a possibility that Mr Karaka has not committed any offence, then it is your duty to acquit him. It is not for Mr Karaka to prove anything. It is the Crown that must prove against Mr Karaka to your satisfaction before you could enter a conviction. If there is any doubt, that doubt must go to Mr Karaka. I appreciate that that may be of some concern to you, but that is the standard of proof that has to be obtained before a conviction can be entered on a supplying of guilt. It has to be beyond reasonable doubt and I suggest to you that you will have a reasonable doubt and ask you to give that benefit to Mr Karaka.
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> Thank you Your Honour.

[21] It appears that counsel then went into chambers with the Judge. The Judge was concerned at the brevity of G's closing:

> … Firstly [G] I am troubled by the [brevity] of your closings. That's partly why I've had to spend so much time preparing the draft summing up because I've tried to work out what the issues are for the jury to consider and I'm a bit concerned that I may have gone beyond what you've said to the jury.

G indicated that he thought he had made it clear that he was adopting the arguments advanced by counsel for Mr Ward. The Judge then recorded that he wasn't sure that G had made that plain to the jury. There was then a further discussion. It was proposed that G should be given the opportunity to further address the jury. The Crown did not take issue with this course, as long as G did not take the opportunity to close afresh. The Crown was content, however, to allow G to tell the jury that his client's defence was consistent with the defence that had been made by counsel on behalf of Mr Ward.

[22] Counsel and the Judge then came back into Court and G addressed the jury again. He stated as follows:

> Mr Foreman, Ladies and Gentlemen:
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> It has come to my attention that I had not put to you the defence of Mr Karaka. But on behalf of Mr Karaka, I adopt the position taken by Ms Bailey in respect to the defence for Mr Karaka.

[23] The Judge then summed up the case and the jury retired. The Judge in his summing up did not expand on Mr Karaka's position nor point out the potential defences which were available to him. As already noted, Mr Karaka was found guilty by the jury on both charges.

Analysis

[24] G passed away in October 2020 and it has therefore not been possible to seek his input on his conduct at the trial. As a result, the appeal is focused solely on the closing address given by G. Mr Matthews, appearing for Mr Karaka, was careful not to criticise G, given that he cannot respond. Nor did Mr Karaka in his affidavit direct specific criticism to G. G's closing address is however available verbatim, and the adequacy or otherwise of his closing is a matter which can be objectively assessed. The fact that G is unavailable to give evidence is no impediment to the appeal proceeding.[9]

[25] We acknowledge that the content and presentation of a closing address involves judgment, skill and style, and is context dependent.[10] Nevertheless, there are certain

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9 *Sales v R* [2022] NZCA 373 at [23], citing *E (CA133/2009) (No 2) v R* [2010] NZCA 280.
10 *Sales v R,* above n 9, at [24].

components that need to be present "as a bare minimum" in most, if not all, cases.[11] These are:

(a) an introduction;

(b) an explanation of the defendant's case;

(c) a response to the Crown's case;

(d) a clear explanation of why the defendant was not guilty of the charge or charges faced; and

(e) a conclusion.

Further, trial counsel in closing should seek to highlight any weaknesses and inadequacies in the Crown case and/or to indicate the factors in the defence case which preclude the jury from being satisfied of essential ingredients to the requisite standard.[12]

[26] As we have noted above, G's cross-examination did elicit some helpful evidence from Mr Karaka's perspective. However, G's closing address did nothing to highlight matters favourable to Mr Karaka. It did not focus on the elements of the offences. There was no real differentiation between the two charges. There was little to no engagement with the evidence as it related to Mr Karaka. There was no discussion of his state of mind, or of what he knew, believed or intended. The closing was interrupted by the Judge, who had to correct G after he asserted that Mr Karaka was charged as a party to the aggravated robbery. The address contained submissions which were against Mr Karaka's interests — for example that Mr Karaka may have had some issues. The comments as to the standard and burden of proof were truncated and may have been of concern to the jury. The closing at best amounted to a broad assertion that the charges had not been proved by the Crown. In short, we agree with

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11 *Kaka v R* [2015] NZCA 532 at [35].
12 *R v Jeakings* CA231/98, 30 November 1998 at 5; cited in *Sales v R,* above n 9, at [25].

Mr Matthews that the address did little to advance Mr Karaka's case, and in some respects, actively undermined Mr Karaka's interests.

[27] The fact that G, at his second attempt, indicated that the closing remarks made by counsel for Mr Ward applied equally to his client did not cure the initial deficiencies. Mr Ward and Mr Karaka had separate interests and the jury was required to consider the case against each separately. As noted, there was evidence that Mr Karaka had initially tried to encourage the other defendants to leave. This was not highlighted by G. Mr Karaka's interests were not served by relying on the closing submissions made on behalf of a party whose interests did not fully align with Mr Karaka's interests. The defendants, Mr Ward and Mr Karaka, did not stand and fall together.

[28] Mr Hawes acknowledged namely that the closing:

(a) lacked a coherent structure;

(b) commenced by inverting the burden of proof;

(c) demonstrated a misunderstanding of s 235(b) of the Crimes Act sufficient for the trial Judge to intervene;

(d) failed to articulate a logical pathway leading to a not guilty verdict on either charge with references to the evidence and Crown and defence cases;

(e) did not address the statement given by Mr Karaka to the police in which he denied being present at all;

(f) only obliquely referred to the charge of receiving;

(g) was not cured by adopting the arguments advanced by Mr Ward's counsel, because Mr Ward's interests and Mr Karaka's interests did not necessarily align; and

(h) ultimately, did not assist the jury in its task nor carry out the function for which a closing address is intended — advocating for a defendant by explaining why the Crown has not proved its case.

Mr Hawes responsibly accepted that the closing address failed by some margin to meet even the bare minimum standards noted above.

[29] Regrettably, the Judge did not correct the deficiencies in his summing up.

[30] A trial Judge has a degree of responsibility to ensure that a defendant's case is properly put and that responsibility is heavier in cases where defence counsel's performance has been poor.[13] A trial Judge however cannot always cure an inadequate defence. The Judge cannot go so far as to assume the role of a second advocate for the defendant.[14] If the defence is manifestly inadequate, the Judge may be required to direct trial counsel to present a proper closing address, or even go so far as to discharge the jury, and order a new trial.[15]

[31] In any event, the Judge did not specifically draw the jury's attention to Mr Karaka's case in his summing up. Nor did he abort the trial and discharge the jury.

[32] We have no difficulty in concluding that a miscarriage of justice has occurred. Mr Karaka's case was not properly put to the jury. He did not have a fair trial, and a miscarriage of justice has resulted.

A retrial?

[33] In the course of his submissions, Mr Hawes indicated that despite the fact that Mr Karaka has served the sentence that was imposed on him, the Crown was seeking an order for a retrial, because there was no issue with the prosecution case. He advised that such order was sought, so that the position could be reviewed, the complainant in relation to the aggravated robbery spoken to, and the prosecutorial discretion exercised.

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13 *Ede v R* [2010] NZCA 358, [2010] 3 NZLR 557 at [46].
14 *R v Shipton* [2007] 2 NZLR 218 (CA) at [37]; and *Kaka v R*, above n 11, at [30].
15 *Sales v R,* above n 9, at [26]–[27]; and *Kaka v R*, above n 11, at [43].

[34] This issue has vexed the Court.

[35] When an appeal is allowed, s 233 of the Criminal Procedure Act applies. The Court must set aside the conviction and must also make any other order it considers justice requires, which includes directing that a new trial be held.

[36] The conventional principle is that the Court should order a retrial and leave it to the Crown to determine whether to proceed with it.[16] This convention is often considered to be appropriate where a conviction has been set aside because of a procedural or legal error at the trial, but there remains evidence on which a jury could convict.[17]

[37] Here, there was no issue with the prosecution case. There was other evidence on which the jury was able to convict — for example Mr Karaka's fingerprints were found on various items of the property which were taken. Ordering a retrial would not have the effect of giving the Crown another chance to cure evidential deficiencies in its case against Mr Karaka. The trial miscarried not through any fault of the Crown but rather because of defence counsel error and generally, a retrial is ordered if an appeal against conviction is allowed due to the conduct of the appellant's trial counsel.[18]

[38] However, the Crown's contention that a retrial should be ordered in this case is somewhat diminished because Mr Karaka has already served his sentence.[19] It is unlikely that any greater sentence would be imposed following any retrial.[20] There are other matters personal to Mr Karaka, notably his ADHD and his FASD. The offending occurred some seven years ago when Mr Karaka was only 17 years old. The convictions have caused problems for Mr Karaka when he has been subsequently sentenced on other matters.

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16 *M (CA663/2008) v R* [2010] NZCA 302 at [47].
17 Simon France (ed) *Adams on Criminal Law* (online ed, Thomson Reuters) at [CPA 233.02(2)].
18 *R v J (CA 360/2006)* [2007] NZCA 141 at [21].
19 *Witehira v R* [2016] NZCA 123 at [38].
20 *Witehira v R*, above n 19, at [38]; *R v Accused* (CA54/1996) (1996) 13 CRNZ 561 (CA) at 241; *R v Kino and Mete* [1997] 3 NZLR 24 (CA) at 29; *Redman v R* [2013] NZCA 672 at [58].

[39] While the issue is finely balanced, we have concluded that it is appropriate in this case not to order a retrial. We do not consider that it would be fair to Mr Karaka to do so. We order that there is to be no retrial.

[40] We make an order prohibiting publication of the name or identifying particulars of G. G is deceased and thus cannot respond to the implicit criticism nor put his version of events before the Court. This order does not prejudice Mr Karaka or the Crown.

Result

[41] The application for an extension of time to appeal against conviction is granted.

[42] The appeal is allowed.

[43] Mr Karaka's convictions for aggravated robbery and receiving entered on 15 November 2018 are set aside**.**

[44] There is to be no retrial.

[45] Order prohibiting publication of the name or identifying particulars of G.

Solicitors:
Crown Solicitor, Christchurch for Respondent