

HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, BELL, GAGELER AND KEANE JJ

DANG KHOA NGUYEN

APPELLANT

AND

THE QUEEN

RESPONDENT

Nguyen v The Queen
[2013] HCA 32
27 June 2013
M30/2013

ORDER

1. *Appeal allowed.*
2. *Set aside the orders of the Court of Appeal of the Supreme Court of Victoria made in respect of the appellant on 18 December 2009 and, in their place, order that:*
 - (a) *leave to appeal to that Court against the appellant's convictions be granted;*
 - (b) *the appeal to that Court be allowed;*
 - (c) *the appellant's convictions be quashed; and*
 - (d) *a new trial be had on both counts.*

On appeal from the Supreme Court of Victoria

Representation

O P Holdenson QC with C B Boyce for the appellant (instructed by Victoria Legal Aid)

T Gyorffy SC with D I Piekusis for the respondent (instructed by Director of Public Prosecutions (Vic))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Nguyen v The Queen

Criminal law – Murder – Practice and procedure – Directions to jury – Available alternative charge – Whether position of appellant and co-accused sufficiently distinguishable to affect adequacy of directions to jury – Whether reasonably open to jury to return alternative verdict of manslaughter – Whether failure to leave alternative verdict to jury constituted wrong decision on question of law – Whether substantial miscarriage of justice occurred.

Words and phrases – "alternative verdict of manslaughter", "substantial miscarriage of justice".

1 FRENCH CJ, KIEFEL, BELL, GAGELER AND KEANE JJ. In September and October 2007, Dang Khoa Nguyen ("the appellant"), Bill Ho and Dang Quang Nguyen ("Nguyen") were tried together before Williams J and a jury in the Supreme Court of Victoria. Each was charged with the murder of Hieu Trung Luu ("Luu") and the attempted murder of Chau Minh Nguyen ("Chau").

2 The Crown case was that on 8 November 2004 Bill Ho shot both Luu and Chau, and that the appellant and Nguyen were complicit in Bill Ho's crimes.

3 The evidence at trial was that the three men had gone together to a flat in Carlton to collect a debt owed either to Bill Ho or to the appellant for drugs supplied to a man named Mau Duong ("Mau"). Mau was not at the flat, but seven other young people were. Some were asleep, and some were watching television. Nguyen entered the lounge room of the flat waving a Samurai sword with which he inflicted cuts on two or three of the occupants of the flat. Bill Ho produced a revolver that he had brought with him. He fired two shots, the first of which hit Chau; the second hit Luu. Chau survived; but Luu's wound was fatal.

4 The case against the appellant and Nguyen was put on three different bases of criminal complicity: acting in concert, common purpose or extended common purpose and aiding and abetting. The contention was that they were both party to an agreement with Bill Ho to collect a drug debt and that, if necessary, they would kill to achieve that end. It was further argued that if such an arrangement had not been made before they entered the flat, it arose after they arrived at the flat and began terrorising the occupants with Nguyen's sword and Bill Ho's revolver.

5 The jury were instructed by the trial judge that, to convict Bill Ho of murder, they had to be satisfied that he shot Luu intending either to kill him or to inflict really serious injury upon him. The jury were also instructed that, to convict Bill Ho of the attempted murder of Chau, they had to be satisfied that he shot Chau intending to kill him¹. The jury were further instructed that, if they were not satisfied of Bill Ho's guilt of the murder of Luu, they should consider whether he was guilty of manslaughter by unlawful or dangerous act.

6 As to the trial judge's directions to the jury in respect of the appellant and Nguyen, the effect of those directions was to leave manslaughter to the jury as a

1 *Alister v The Queen* (1984) 154 CLR 404 at 421-422; [1984] HCA 85; *McGhee v The Queen* (1995) 183 CLR 82 at 85-86; [1995] HCA 69.

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possible verdict only if the jury concluded that Bill Ho was guilty of manslaughter, not murder². In other words, if Bill Ho was found to be guilty of murder, Nguyen and the appellant could be found either guilty of murder or not guilty of any crime in relation to the homicide of Luu.

7 The jury returned verdicts of guilty on the counts of murder and attempted murder against all three accused.

8 The appellant and Nguyen each sought leave to appeal against his convictions. The Court of Appeal of the Supreme Court of Victoria allowed Nguyen's appeal and quashed his convictions; but dismissed the appeal by the appellant.

9 As to Nguyen, the Court of Appeal concluded³ that a jury, acting reasonably, must have had a reasonable doubt as to Nguyen's guilt of the murder of Luu. The Court of Appeal held that, whether the case against Nguyen was approached as a case in which Nguyen was said to have acted in concert with the others, or as a case of common purpose, or as a case in which Nguyen aided and abetted the murder committed by Bill Ho, the evidence did not permit the jury to be satisfied beyond reasonable doubt of his guilt of murder.

10 The prosecution appealed from that decision to this Court pursuant to a grant of special leave against the Court of Appeal's orders in favour of Nguyen, who, in turn, sought to uphold the orders of the Court of Appeal in his favour. Nguyen submitted that the Court of Appeal should have allowed his appeal on the ground of a misdirection to the jury. This ground, which had been raised before the Court of Appeal by both Nguyen and the appellant, was to the effect that the trial judge had erred in law in failing to direct the jury to consider whether, in the event that the jury were satisfied that Bill Ho was guilty of murder, Nguyen and the appellant might be guilty of manslaughter rather than murder.

2 *R v Nguyen* (2010) 242 CLR 491 at 503 [43]-[44]; [2010] HCA 38.

3 *R v Nguyen* [2010] VSCA 23 at [104]-[112].

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This Court's decision in *R v Nguyen*

11 In *R v Nguyen*⁴ this Court reviewed the evidence given at trial⁵, concluding that⁶:

"On the whole of the evidence, it was open to the jury to be satisfied, beyond reasonable doubt, that all three men had come to the flat searching for Mau Duong for payment of a debt ... and ... [that] Nguyen used the sword in a way that showed his willingness to inflict cutting injuries on those in the flat ... [and] that, before the first shooting, Bill Ho had produced a revolver and had spun the cylinder in an attempt to intimidate those who were in the room ... and ... that ... Nguyen (like other occupants of the room) must have seen the gun that Bill Ho had produced and was manipulating in a threatening manner."

12 On this basis, it was held that the Court of Appeal erred in concluding that the verdicts against Nguyen were unreasonable or could not be supported having regard to the evidence⁷.

13 This Court went on to consider the directions given by the trial judge, concluding that the trial judge "made a wrong decision on a question of law" in failing "to leave manslaughter as an available verdict against [Nguyen], even if Bill Ho was guilty of murder."⁸ If Nguyen was party to an agreement, or had in contemplation, or provided assistance directed to some lesser assault than one intended to kill, it would have been open to the jury to conclude that, although he was not guilty of the charge of attempted murder, a verdict of manslaughter should be returned in respect of the count charging him with murder. As the Court said⁹:

4 (2010) 242 CLR 491.

5 *R v Nguyen* (2010) 242 CLR 491 at 495-497 [13]-[24].

6 *R v Nguyen* (2010) 242 CLR 491 at 498 [25]-[26].

7 *R v Nguyen* (2010) 242 CLR 491 at 501 [39].

8 *R v Nguyen* (2010) 242 CLR 491 at 505 [50].

9 *R v Nguyen* (2010) 242 CLR 491 at 505 [49].

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"The trial judge's directions did not admit of that possibility."

14 It was ordered that Nguyen should have special leave to cross-appeal, his cross-appeal be allowed, his convictions on both counts be quashed and a new trial be had¹⁰.

The appellant's appeal to this Court

15 Subsequent to this Court's decision in *R v Nguyen*, the appellant applied for, and was granted, special leave to appeal to this Court on the footing that he suffered a substantial miscarriage of justice by reason of the same error of law identified in *R v Nguyen*.

The arguments of the parties

16 The appellant's contention was that, so far as the sufficiency or otherwise of the trial judge's direction to the jury on the issue of complicity was concerned, the case against him was materially indistinguishable from the case against Nguyen.

17 The prosecution resisted this contention, arguing that there was no viable alternative verdict of manslaughter open against the appellant on the evidence adduced at trial. On behalf of the appellant it was said that the prosecution's argument is conclusively answered by what was said by this Court in *R v Nguyen*¹¹:

"[Nguyen] submitted that the trial judge's instructions precluded the jury from considering what were described as 'viable and entirely apt alternative verdicts' on the charge of murder. Counsel for [Nguyen] offered three examples of findings of fact which were open, and if made, would have led to a verdict of manslaughter: one in respect of each of extended common purpose, concert and aiding and abetting. As to extended common purpose, it was said that if the jury were satisfied that [Nguyen] knew of the presence of the gun before the shootings occurred, and was party to a plan that violence would be threatened to recover a drug debt, it was possible that the purpose was to do no more than cause serious harm to another short of really serious injury. As to concert, it was

10 *R v Nguyen* (2010) 242 CLR 491 at 506 [56]-[57].

11 (2010) 242 CLR 491 at 503-504 [45]-[46].

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said that it may have been that the arrangement was for Bill Ho to do no more than assault or threaten others in a dangerous fashion. As to aiding and abetting, it was said that [Nguyen's] words and actions may have encouraged or assisted Bill Ho to assault or threaten others but not to kill or do really serious injury.

Contrary to the prosecution's submission in this Court, each of these conclusions was available to the jury. Again, the conclusions were not the only findings the jury could make, but they were open. That the prosecution had put its case on the footing that deadly force was always contemplated did not preclude the jury from finding the facts in a way that was consistent with any of the three ways put forward by [Nguyen] in argument in this Court."

18 On behalf of the appellant it was said that these observations are equally applicable to the prosecution's case against the appellant. The prosecution submitted that there are material differences between the cases of Nguyen and the appellant. In this regard, the prosecution emphasised that there was evidence against the appellant that the drug debt, payment of which was being pursued on the morning of the offences, was owed to the appellant as a result of transactions arranged by him. Further, there was evidence given by Chau that he awoke to find the three men in the flat and that he heard the appellant say to Bill Ho "Get him off" or "Fuck him off". Bill Ho then pointed the gun at Chau, asking "That guy?". Chau's evidence was that the appellant nodded his head, and then Bill Ho shot him.

19 It was also urged for the prosecution that some significance should be accorded to the circumstance that the appellant did not give any account of his involvement in the events of that day whether by way of an interview with police or by giving evidence.

Discussion

20 The prosecution's arguments are not compelling. First, evidence that the drug debt in question was owed to the appellant as a result of transactions arranged by him does not necessarily shed light on the nature of the arrangement between the appellant, Nguyen and Bill Ho in a way which is apt decisively to distinguish between the position of the appellant and Nguyen in relation to the criminal responsibility of each of them for Bill Ho's crimes.

21 Next, it is to be emphasised that the reliability of Chau's evidence was disputed at trial: Bill Ho gave evidence denying that the appellant said anything

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to him prior to his shooting Chau. None of the other five occupants of the flat gave evidence of the exchange which Chau said occurred between Bill Ho and the appellant before Bill Ho shot Chau. Accordingly, it was open to the jury to entertain a reasonable doubt as to the reliability of Chau's evidence. And importantly, Chau's evidence, even if it were accepted by the jury, would not preclude a jury concluding that Bill Ho's shooting of Luu, after he had shot Chau, was neither directed by the appellant nor part of any common purpose of collecting the drug debt owed by Mau. It was also open to the jury to entertain a reasonable doubt as to whether any plan as to debt collection to which the appellant was a party extended beyond the use of violence to really serious violence or homicide.

22 The circumstance that the appellant gave no account of his involvement in the events of 8 November 2004 does not add weight to the prosecution case against the appellant¹². And, in any event, the question of present concern is not whether the verdict against the appellant should be upheld as reasonable. Rather, the question is whether the direction of the trial judge was affected by a legal error in failing to explain to the jury that it was open to them to convict the appellant of manslaughter, even if they were satisfied that Bill Ho was guilty of murder, if they were satisfied that the appellant was a party to a plan that violence would be threatened or used to recover a drug debt which involved violence falling short of really serious violence or homicide.

23 The answer to this question is that there was a viable case of manslaughter which should have been left to the jury. As was said in *R v Nguyen*¹³, "[t]his Court's decisions in *Gilbert v The Queen*¹⁴ and in *Gillard v The Queen*¹⁵ require the conclusion that, in giving the directions the trial judge did about complicity, her Honour made a wrong decision on a question of law. It was wrong not to leave manslaughter as an available verdict" against the appellant even if Bill Ho was found guilty of murder.

24 Next, as in *R v Nguyen*, it cannot be said that a conviction of murder was inevitable if a correct direction had been given. The decisions in *Gilbert* and

12 *Azzopardi v The Queen* (2001) 205 CLR 50 at 64-65 [34]; [2001] HCA 25.

13 (2010) 242 CLR 491 at 505 [50].

14 (2000) 201 CLR 414 at 416-417 [1]-[2], 434 [70]; [2000] HCA 15.

15 (2003) 219 CLR 1 at 14 [26], 15 [32], 34-35 [106], 40 [129]; [2003] HCA 64.

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Gillard, as well as this Court's decision in *R v Nguyen*¹⁶, also require the further conclusion that it cannot be said that there was no substantial miscarriage of justice in the trial judge's not leaving manslaughter as an available verdict against the appellant.

25 It follows that the appellant's submission that there is no material difference between the position of the appellant in this case and that of *Nguyen* in *R v Nguyen* should be accepted.

26 As to the conviction for attempted murder, in *Gillard*¹⁷ it was held that where in relation to a count of attempted murder a jury has been deprived, by a wrong decision on a question of law, of the opportunity to consider the possibility of a conviction for manslaughter rather than murder on another count tried at the same time, the error could have affected the whole trial. The nature of the error in relation to the murder count was said to make it impossible to dismiss the possibility that it also affected the verdict on the count of attempted murder.

27 The approach in *Gillard* was applied in *R v Nguyen*. There is no reason why this Court should not take the same course.

Orders

28 The appeal should be allowed. The orders of the Court of Appeal of the Supreme Court of Victoria made in respect of the appellant on 18 December 2009 should be set aside, and, in their place, it should be ordered that: leave to appeal to that Court against the appellant's convictions be granted; the appeal to that Court be allowed; the appellant's convictions be quashed; and a new trial be had on both counts.

16 (2010) 242 CLR 491 at 505 [50]. The prosecution sought an extension of time to file a notice of contention challenging the correctness of this Court's decision in *Gilbert*. On 5 June 2013 a differently constituted Court, French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ, refused to grant an extension of time on the ground that it was not persuaded to grant leave to argue that *Gilbert* should be reconsidered. See [2013] HCATrans 127 at 6.

17 (2003) 219 CLR 1 at 14 [27], 33 [96].