JAMES v THE QUEEN (M102/2013)

Court appealed from: Court of Appeal of the Supreme Court of Victoria [2013] VSCA 55

Date of judgment: 19 March 2013

Date special leave granted: 16 August 2013

On 26 April 2007 Khadr Sleiman (KS) suffered serious injury when he was struck by a vehicle driven by the appellant (James). James was charged with one count of intentionally causing serious injury and an alternative count of recklessly causing serious injury. At his trial in the Supreme Court of Victoria, James contended that he did not intend to cause Sleiman serious injury. Alternatively, he claimed that he acted in self-defence, because he was fearful that Sleiman wanted to try and stab him with a knife. On 8 September 2011, James was convicted on the count of intentionally causing serious injury.

In his appeal to the Court of Appeal (Maxwell P and Whelan JA, Priest JA dissenting) James contended that a miscarriage of justice resulted from the trial judge's (Williams J) failure to leave to the jury possible alternative verdicts of intentionally, or recklessly, causing injury (as opposed to *serious* injury). In rejecting that contention, the majority of the Court noted that the issue in controversy in the trial as to intention did not concern the severity of the injury intended: rather, it concerned whether *any* injury was intended. The issue was whether the impact between the vehicle and KS was deliberate or not. It was never suggested that it might be open to conclude that James had struck KS deliberately with an intention of causing injury, rather than serious injury. There was little evidence which raised the lesser alternative offences as real possibilities. No party relied upon that evidence to suggest that conviction on the lesser alternatives was open. It was an 'all or nothing' case involving injuries which were serious on any view. Further, defence counsel throughout the trial had implicitly accepted that, if James had struck KS deliberately, the requisite state of mind in terms of serious injury must follow. It was obvious that defence counsel had, for forensic reasons, deliberately decided not to ask the judge to direct the jury about the lesser alternatives.

Priest JA (dissenting), held that if the evidence in a trial raises an alternative verdict as a realistic possibility, so that the jury might convict on it in preference to a more serious principal offence, the interests of justice generally dictate that an alternative verdict should be left. He thought it was plain that a verdict on a lesser alternative was realistically open on the evidence in this case. Failure to leave the alternatives was therefore an error which resulted in a substantial miscarriage of justice, since it could be said that conviction on the first count on the presentment was inevitable had it not been for the error.

The grounds of appeal are:

- The Court of Appeal erred in holding that, in trials other than for the offence of murder, a trial judge's duty to leave to a jury for its consideration lesser alternative verdicts - which are realistically, or fairly and practically open, on the evidence, does not transcend the forensic decisions of trial counsel.

- The Court of Appeal erred in holding that the trial judge was not bound to leave to the jury for its consideration the lesser alternative of causing injury intentionally (as an alternative to causing serious injury intentionally) and causing injury recklessly (as an alternative to causing serious injury recklessly).