C.A. 70/71

IN THE COURT OF APPEAL OF NEW ZEALAND

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THE QUEEN v. BARRY JOHN FISHER

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Coram: North P.
Turner J.
Woodhouse J.

Counsel: Palmer for Appellant
Neazor for Crown

Hearing and Judgment: 8 September 1971

ORAL JUDGMENT OF THE COURT
DELIVERED BY NORTH P.

The appellant Fisher stood his trial in the Supreme Court at Wellington before the Chief Justice and a jury in July 1971 on an indictment containing the following four counts:- (i) That on or about 23 April 1971 at Wellington he did threaten to kill Linda Violet Kennerley; (ii) That on or about 23 April 1971 at Wellington being a male, did assault a female, namely Linda Violet Kennerley; (iii) That on or about 23 April 1971 at Wellington did commit burglary namely did break and enter a building, namely the shop of Whitcombe and Caldwell Limited situate at 45 Willis Street with intent to commit a crime therein; (iv) That on or about 23 April 1971 at Wellington did commit criminal nuisance, namely did an unlawful act which he knew would endanger the safety of the public. He pleaded not guilty to all counts. He was found not guilty on the first count but guilty on the remaining three counts. The appeal against conviction however, is limited to counts two and three. There is no appeal against sentence.

Mr Palmer, who had the advantage also, of appearing at the trial has addressed us at considerable length and we all think very ably indeed, in support of his submissions that this conviction should be set aside and presumably a new trial ordered. There were four grounds of appeal raised in the application for leave to appeal and we will deal shortly with each of these grounds in turn.

Grounds one and two, as Mr Palmer agreed, may be dealt with together. They were these: (i) That there has been a miscarriage of justice in that the learned trial Judge erred in fact and in law in wholly failing to put the appellant's defence in his summing-up to the jury upon the second count of the indictment, namely whether the appellant acted in lawful self-defence against an unprovoked assault upon him by Miss Kennerley; (ii) That there has been a miscarriage of justice in that the learned trial Judge in commenting to the jury in his summing-up upon the second count of the indictment that "it is a natural enough thing you might think for any girl to react as this girl did when she was called 'a bloody slut'......" failed to expressly put to the jury matters of fact which tended to prove Miss Kennerley was possessed of such an immoral character that the appellant's description of her as "a slut" was justifiable and may not in all the circumstances have rendered Miss Kennerley's assault upon him a provoked assault. In essence, the contention is that the Chief Justice erred in fact and in law in wholly failing to put to the jury the appellant's defence that he had acted in self-defence against an unprovoked assault. It is true that the Chief Justice contented himself by defining the provisions of s.49 of the Crimes Act

1961, namely those relating to self-defence against a provoked assault. It was not denied by the appellant that he had called the complainant a "bloody slut" with the result that she had slapped him on the face. The learned Chief Justice in commenting on the evidence said:-

> "While the evidence is for you to judge, you may be satisfied, because the accused himself says it, that he told Miss Kennerley that she was a "bloody slut" whereupon she slapped his face, a natural enough thing you may think for any girl to do when that is said to her, and that subsequently he grabbed her by the throat with his right hand to restrain her."

Mr Palmer however complained that there was evidence that Miss Kennerley was possessed of such an immoral character that the appellant's description of her as a "slut" was justifiable and accordingly could not necessarily have rendered Miss Kennerley's action in slapping his face a provoked assault. Accordingly the jury should have been directed as well in accordance with the provisions of s.48 relating to self-defence against an unprovoked assault. In our opinion, there is really no substance in this complaint. It is true no doubt that Mr Palmer contended by way of defence that the action of the appellant in seizing the complainant by the arms and later grabbing her by the throat were legitimate acts taken in self-defence against the action of the girl in slapping the appellant smartly over the face when he used the words we have just referred to. Counsel submitted that it was open to the jury to have found, on a proper direction, that the appellant had acted in legitimate self-defence because she was not justified in slapping him on the face because as counsel put it, after all she was a

"bloody slut". That is how it was put to us if we understood counsel correctly. We are of opinion there is nothing whatever in this contention. There is all the difference in the world between an accusation which is a legitimate one and a rude and offensive statement such as that directed to this girl. Even if her moral character was not as pure as some people would wish it to be, that provided no grounds whatever for his actions, and certainly does not entitle him to contend that he acted in self-defence after an assault which he had not provoked. S.48, 49 and 50 require to be read together and s.50 says, "Provocation within the meaning of sections 48 and 49 of this Act may be by blows, words, or gestures." Here, in our opinion, there is no doubt at all that the offensive observation made by the appellant to the girl - which he admits he made - clearly enough constituted provocation by words and accordingly there was no evidence at all which required the Judge to instruct the jury as to the meaning and effect of s.48. Accordingly, if the appellant wished to rely on self-defence, he was required to comply with the stricter provisions of s.49. This is how the Chief Justice put the matter to the jury and we see nothing wrong with what he said. But even if there had been any substance in counsel's submission, this is obviously a case where the provisions of s.382 would have applied and accordingly we would not have been entitled to treat the misdirection - if it had occurred - as a ground for granting a new trial unless we were satisfied that some substantial wrong or miscarriage of justice was thereby occasioned on the trial. We are far from thinking that that was so, so whichever way the matter was looked at, these two submissions in our opinion fail.

The third ground relates to the third count, namely that of burglary, and reads thus: (iii) That there has been a miscarriage of justice in that the learned trial Judge failed to adequately put the appellant's defence to the jury in his summing-up upon the third count of the indictment namely the absence of any intention by the appellant to commit a crime when he broke into and entered the shop of Whitcombe and Caldwell Limited in that the learned trial Judge: (a) failed to direct the jury as a matter of fact that the appellant could through a combination of alcoholic drink, drug and anger have been in such an agitated and/or irrational frame of mind as to have had no intention whatsoever other than to wantonly smash the glass door of a shop; and, (b) misdirected the jury as a matter of fact in directing them that frustration, depression and anger are not defences which the law takes any account of at all when in fact the appellant's highly emotional and partially intoxicated state may, consistently with his sworn evidence, have inhibited him from forming any intention whatsoever to commit a crime within the shop of Whitcombe and Caldwell Limited before he broke and entered that shop. This ground of appeal is expressed in elegant language and for a time, I for one, was not quite sure just what the complaint amounted to, but Mr Palmer has made it quite clear to us that what he is complaining about is not that the Chief Justice was wrong in the direction he gave as to the obligation of the Crown to prove intention, but that he did not put the defence that while the appellant clearly enough had the intention of shattering the plate glass door and for that purpose used a heavy weapon, namely a rubbish tin, his intention was simply to indulge in a wanton destructive act

for the purpose of relieving himself from the intensity of his emotional state. Counsel submitted that the learned Chief Justice had failed to put this defence to the jury. Well as to that, we think that the Chief Justice did deal with the matter adequately enough. It is always possible in retrospect when looking at a summing-up, to say that it would have been better if some further words had been added. But it must be remembered that Mr Palmer had just sat down after addressing the jury, and we imagine effectively addressing the jury, so when the Chief Justice came to deal with the defence that the Crown had failed to prove an intention to commit burglary, he apparently thought it was sufficient to say this:-

> "If you accept the evidence of the accused himself then you have the situation that, having walked down Willis Street from the St. George corner, when he got roughly opposite Whitcombe and Caldwells, what he did was to cross the street, pick up the rubbish bin and crash it through the window of the door and fall in after it. Well, you may think that if a man does that kind of thing it is only natural to assume that he intended the consequences of what he did, that he intended to go in. It is a matter on which you can draw an inference on the whole of the evidence before you. And on that, relevant to that as you may think, is what he is said to have said before he left the flat, if you accept it, "I'll prove it to you, I'll get them both". Then he walks down Boulcott Street, along Willis Street - not into any other shop down there, not into the Evening Post building which he said he knew, not into the Carlton Hotel, not into the Grand Hotel which is a little further I think down the street, but across the road into Whitcombe and Caldwells which is a shop full of rifles. That is the kind of situation that you as a jury can apply your

commonsense and your judgment to. So much for the third charge."

Well, perhaps it would have put the matter beyond all doubt if the learned Chief Justice had referred to the fact that the real defence put forward by Mr Palmer was that the Crown had failed to prove that there was an intention to commit burglary rather than simply an act of destruction. But surely it is obvious enough that the Chief Justice was commenting that if the appellant's purpose had simply been to smash a window thus committing an act of destruction to relieve his feelings, there were all sorts of buildings in Willis Street between the St. George corner and Whitcombe and Caldwells where he could have relieved his pent-up feelings before he reached this particular shop. Accordingly, we think that the complaint that is made against this part of the summing-up too is without substance.

The final ground of appeal was this: (iv) That there has been a miscarriage of justice in that the learned trial Judge, notwithstanding that he expressly directed the jury that they were not bound by his views on the facts, went too far in revealing those views which were almost invariably against the appellant and so strongly implied as to overawe the jury. In dealing with this ground of appeal, Mr Palmer was at pains to say that he did not contend that the learned Chief Justice had intentionally been unfair but he submitted that when the summing-up is looked at as a whole the Chief Justice while telling the jury that they were not bound by his views in fact went, as counsel put it, too far in revealing his views which had the effect of overawing the jury and leading to a conviction. We have examined the

summing-up and we do not consider there were any grounds for contending that it was other than a fair summing-up. We do not take the view that the learned Chief Justice went too far in any of the passages in the summing-up to which our attention was directed. Accordingly, in our opinion, all four grounds of appeal against conviction fail and the appeal is dismissed.