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N2LR X

IN THE COURT OF APPEAL OF NEW ZEALAND

CA 176/83
CA 178/83

902

THE QUEEN

v

WAYNE MORRIS CARSTAIRS
MICHAEL JOHN SNELLER

Coram: Richardson J
Greig J
Sir Clifford Richmond

Hearing: 25, 26 July 1984

Counsel: M A Bungay with I M Antunovic for Carstairs
J R Billington for Sneller
J H C Larsen for Crown

Judgment: 9 August 1984

JUDGMENT OF THE COURT DELIVERED BY RICHARDSON J

Following a 6 day trial in the High Court in Wellington in August 1983 Michael John Sneller and Wayne Maurice Carstairs were found guilty of the murder of Robert Giovanni Cancian at Lower Hutt 6 months earlier on 25 February 1983. There were associated counts of aggravated robbery of Robert Cancian and his de facto wife, Linda Sarina Serci, of jewellery and money to a total value of $16,240. While Sneller did not enter a plea of guilty to aggravated robbery it was accepted at the trial that he

was at the scene, had committed aggravated robbery, and should be convicted. Carstairs was also convicted of the aggravated robbery on the basis that it was carried out by the 2 men acting together. Each was sentenced to life imprisonment for murder and 7 years' imprisonment for the aggravated robbery. Each promptly applied for leave to appeal against conviction on a number of grounds: Sneller as to the murder conviction only, Carstairs as to both murder and aggravated robbery. But it seems that further inquiries were being made and it was not until 13 July 1984, 11 months later, that an application was made on behalf of Carstairs for leave to call further evidence and to amend the application for leave to appeal accordingly.

The Crown case against the 2 men was summarised by the trial Judge for the jury in this way:

> " What the Crown say is that Cancian, McFarlane and Williams had been involved together in certain transactions and, in particular, with regard to the purchase of some flats in Taita. The three of them fell out in some way and the Crown say, in particular, it seems because Cancian gave some information to the Tax Department to the detriment of Williams. And so it is said that McFarlane, on Williams' instructions, hired the two accused to deal with Cancian. The result, they say, was that the accused visited Cancian's home and stole some jewellery of his and Mrs Serci's, and Sneller then struck Cancian several times, as a result of which he later died. They say that the sequence was this - Carstairs came up to Wellingtom from Christchurch on the morning of Friday 25 February. Later that morning he and Sneller together went to see McFarlane. Sneller returned to [AB's] home, where he was staying, for lunch but Carstairs took his girlfriend to lunch. When he returned

> to [AB's] place after lunch the Crown say both accused then went off to see McFarlane again. He then took them to the vicinity of Cancian's home and that this was a reconnaissance for them. That evening, it is said, the two accused and [AB] set out from her place. The accused had with them a shotgun and a baseball bat. They went first to her brother's place where she obtained a pair of overalls for them. They then went to the sports shop where she bought two balaclavas for them. They then dropped her off at the hotel and they went out to Cancian's place. They went in their disguises, in the balaclavas and also with stockings over their heads. Sneller, it is said, carrying the baseball bat and Carstairs the shotgun. They then demanded and received the jewellery and then Sneller hit Cancian with the bat. It is said that he struck Cancian a minimum of four blows and that those to the head were of such force as to shatter the skull in the way described by Dr Alexander. All were struck with considerable force, the Crown say, but that to the right side of the head was so severe that death from it was inevitable. They then left. And those are the major events upon the basis of which the Crown say that each of them is guilty of murder and aggravated robbery. "

After referring to the subject of aggravated robbery the Judge continued:

> " Dealing then with the particular charge of murder, and looking at the case against Sneller in particular. The Crown say undoubtedly he struck blows, they were of such severity as to bring him within one of those three definitions of murder. The defence offered on his behalf is that the necessary intent has not been shown to be present, that is, it has not been shown that he intended to kill there and then, nor that he intended to cause injury which he knew was likely to cause death, nor again that he intended to cause grievous bodily injury or, indeed, that the assault was anything to do with the robbery, and so on behalf of Sneller it is said that the proper verdict ought to be one of manslaughter.

> With regard to Carstairs, the Crown case is that he was a party to what Sneller did, either because he assisted or encouraged him at the time, or at least because the assault on Cancian was a likely consequence of the robbery which they were setting out to commit and of the intention which they both had with regard to Cancian from the outset.
>
> The defence for Carstairs is, first of all, that his identity as the man who was with Sneller has not been proved. As an alternative, a defence is offered that even if his identity is proved, then it is not proved that he knew Sneller was likely to carry out such an assault as this or that it was likely anyone would be hurt, and therefore it is said for him that he could not be regarded as a party to what Sneller may have done in the way of assaulting Cancian as he did. "

Against that brief background we turn to consider the various grounds raised in support of the application.

Fresh evidence

The evidence sought to be admitted in this Court is that of Jessica Mary Terressa Carpenter, a Crown witness at the trial, who in an affidavit has resiled from certain of the evidence given by her at the trial, and Maree Lucille Keeys, who in her affidavit has commented on a visit that Sneller and Carstairs made to Mrs Carpenter's house in Hamilton in late January 1983, and has also commented critically on Mrs Carpenter herself. Four Police Officers who had contact with Mrs Carpenter over the case have made affidavits in reply. Mrs Carpenter has not been located by counsel for the applicants but there is no challenge to the correctness of that affidavit evidence of the Police Officers.

The first step in such a case is to consider whether the proposed evidence is relevant, cogent and credible. So far as Mrs Carpenter is concerned we are satisfied that her recantation is not credible and that her affidavit evidence is worthless.

Both Mrs Carpenter and Mrs Keeys were interviewed by the Police before the depositions hearing and with the written consent of the applicants their written statements along with those of 97 other witnesses were admitted as evidence under s 173A of the Summary Proceedings Act 1957. Their evidence was that Carstairs, Sneller and a third man visited Mrs Carpenter's house in Hamilton over Wellington Anniversary Weekend (22 - 23 January) 1983. Subsequent to the depositions Mrs Carpenter telephoned the Police in distress saying she had had a visit from "a couple of heavies". A further statement was taken in which she said that Carstairs and Sneller had cut down a double barrelled shotgun in her garage and that the 2 men talked about robbing Cancian. Arrangements were made to ensure her safety and Police assisted her to leave Hamilton. A supplementary brief of her evidence was supplied by the Crown to defence counsel before trial. At the trial itself she gave evidence of the sawing down of the gun and that the 2 men had spoken of gaining money from a "Bob" in Wellington and of getting rich quick. But she did not come fully up to brief and did not speak of a plan to rob Mr Cancian. After she had given her evidence she told one Police Officer that she had felt sorry for Carstairs and was annoyed with the Police and would be going to

the papers. She told another Police Officer at that time that she would be able to get back on side with her former criminal associates if she said that the Police had forced her to tell lies in Court. After approaching a newspaper she made an affidavit on 25 August 1983 - but not lodged in this Court until the fresh evidence application was made on 13 July 1984 - in which she denied seeing Sneller and Carstairs cutting down a shotgun or hearing any reference by them to the deceased; and she said she had given that evidence as a result of continual pressure from Police Officers.

As we have earlier noted there is no challenge to the evidence of the Police Officers in relation to those various matters affecting her testimony. We are satisfied that her recantation evidence is not credible, her motives for making the affidavit are transparent, and the proposed fresh evidence should be treated as worthless.

Mrs Keeys' affidavit can be dealt with very briefly. The defence had her earlier statement and, following the making of formal admissions by Sneller and Carstairs that they had visited Hamilton that weekend, they agreed that she need not be called at the trial. The defence also had Mrs Carpenter's supplementary brief and so had the opportunity to check on that additional material. In these circumstances Mrs Keeys' proposed evidence could not be regarded as fresh, even if relevant and credible.

The application for leave to adduce further evidence on the hearing of the conviction applications is accordingly dismissed.

Directions as to murder

Sneller's original application for leave to appeal alleged a misdirection in the summing up in relation to para (b), the recklessness limb of s 167. That complaint was not pursued at the hearing of the application but, as foreshadowed in his memorandum of points of appeal of 23 July 1984, Sneller's counsel submitted that the evidence did not justify a direction to the jury that the provisions of s 168(1)(a) were available to support a conviction for murder. For his part Carstairs did not specifically challenge the summing up in that regard either in his original application or in his submissions. But in the course of his reply his counsel was given leave to add that ground of appeal. We mention this background at this stage because it has a bearing on the factual assessment which has to be made in considering this submission.

The relevant definitions of murder in s 167(a) and (b) and s 168(1)(a) are as follows:

> " Culpable homicide is murder in each of the following cases:
>
> (a) If the offender means to cause the death of the person killed:

(b) If the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensures or not "

" Culpable homicide is also murder in each of the following cases, whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:

(a) If he means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned in subsection (2) of this section, or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission thereof, or for the purpose of resisting lawful apprehension in respect of any offence whatsoever, and death ensues from such injury "

Robbery is one of the offences specified in subs (2).

There are various passages in the summing up in which the trial Judge dealt with the 3 bases on which the jury were being asked to consider whether the attack on Robert Cancian with the bat was within the statutory definition of murder. The first is as follows:

" Culpable homicide will be murder in each of a number of defined situations, and here the Crown have presented their case upon the basis of three of them. First of all culpable homicide is murder if the offender means to cause death. That is, if there is a deliberate act of killing. That really just speaks for itself and I need not elaborate on it. Alternatively, culpable homicide is murder if the offender means to cause to the person killed any bodily injury which he knows is likely to cause death and he is reckless whether death ensues or not. Here the Crown say that the blows stuck were of such a nature that

> it must have been obvious to the person who struck them that they were likely to cause death, that is, they were such that they could well cause death, and that the person who struck them simply didn't care whether death resulted or not. If that is the case then that is murder. The third possibility which is advanced by the Crown is based on the proposition that culpable homicide is murder if the offender means to cause grievous bodily injury, that is, really serious injury, for the purpose of facilitating the commission of certain offences, of which robbery is one, or for the purpose of facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission of such an offence, or for the purpose of resisting lawful apprehension in respect of any offence at all and if death ensues from such injury. Just applying that to the present case, the Crown say that Sneller struck three blows on the head and that in doing so he must have meant to cause grievous bodily injury, that is, because of the very force of the blows, and they say that he did so to facilitate the robbery or to enable them to get away safely or to avoid being caught. If that is established then it is immaterial whether he meant or did not mean to cause death. It is immaterial also whether he knew or did not know that death was likely to result. It would be sufficient to make this murder if he meant to cause really serious injury for one of those reasons. If any of those three situations which I have explained applies, then according to those definitions the result must be a verdict of murder. If none of them applies then by a process of elimination it must be manslaughter. "

Then in the passage cited earlier in which he referred to the Crown case and the defence cases respectively the Judge spoke of the defence offered on behalf of Sneller that it had not been shown that "the assault was anything to do with the robbery". He subsequently returned to the case against the 2 men and their defence to it. As to Sneller he described the matter in this way:

" The whole case concerning the charge of murder against him comes down to the blows which it is acknowledged he struck. The Crown say these three blows to the head, and particularly that to the right side, were of such force that the only inference you can draw is that he either meant to kill there and then or at least he meant to cause serious injury which he must have known was likely to cause death, and anyway that he struck them in the course of the commission of the crime of robbery and so they say that is murder.

The defence ... offer two possibilities which they say to you are open upon the evidence and either of which would result in the offence being reduced from murder to manslaughter. First it is said that it has not been proved that Sneller meant to use such force as is indicated by the damage caused...

" Then it is said ... that Sneller ... had suddenly apparently become convulsed with rage and ... perhaps at that moment he lost all sense of control so that it could not be said that he really meant to cause the kind of injuries which resulted. "

Next, as to Carstairs, the Judge went on to say:

" The case concerning Carstairs, of course, is different. Apart from the matter of identity, that is, whether he was there at all, there is no real suggestion that he struck any of the blows. It was suggested by the Crown that he may have struck at least one, but you may think that the evidence on that is really altogether too tenuous and I suggest that you consider the case on the basis that all the blows were struck by Sneller. "

He then discussed that first issue and continued:

" If, however, it should be considered that he was there then the defence say that there is no evidence that he knew such strong blows were to be struck or that he had any control over what Sneller saw fit to do as to that, and so it is put to you that Carstairs ought not to be regarded as a party to the striking of blows of that kind. "

After some further discussion the Judge summarised the murder issue in this way:

" I summarise the things I have said to you quite briefly in this say. First you should consider whether, at the time Sneller struck the blows that he did, he then and there intended to kill. You may well feel, although it is entirely for you, that it is not easy to arrive at that conclusion. It would also, of course, not be easy to arrive at the conclusion that Carstairs, if he was there, was a party to the intentional killing then and there of Cancian. But that is the first point you should consider.

Then the second is you should consider the next basis on which I put to you the definition of murder. Is it proved that Sneller meant to cause Cancian actual bodily harm of a kind which he knew or must have known was likely to cause death, that is, it could well cause death, and that he was indifferent to whether death resulted or not. If you should be satisfied that that is what happened then you would need to consider whether Carstairs, if he was there, was a party to the striking of blows which come into that category.

And then the third aspect, if you reach it, is whether it has been proved that Sneller meant to cause Cancian grievous bodily injury, that is, really serious injury, for the purpose of committing robbery or facilitating flight or avoiding detection. If he did that then the fact that death followed means that it was murder, even though he may not have known that Cancian was likely to die. If that is what you are satisfied happened then you would need to consider whether Carstairs, if he was there, was a party to the causing of that serious injury for one of those purposes.

You may well feel that it is this third situation which is the one which will require perhaps your closest attention and which may appear best to fit the facts. Of course if you are not satisfied Carstairs was there at all then naturally you acquit him on any basis. "

It is now submitted that the trial Judge erred in leaving the s 168 possibility before the jury. It is contended that the evidence would not support a conviction on that ground, let alone that it was that third situation which might best fit the facts. And counsel relied heavily on statements attributed by witnesses to the man who assaulted Robert Cancian with the bat. What is said is that the words spoken by the assailant at that time are not consistent with his having had in mind any of the purposes referred to in s 168(1)(a).

The first witness to speak of this was Mrs Linda Serci. After referring at length to repeated demands by the masked men for jewellery and later for money which was passed over to them in stages she said:

> " Then again the one with the gun wanted more money, where's the rest of it. We both said there is no more. At that stage from across the side of the bed I heard blows and Robert screamed. I immediately said please don't hurt him, he's not well. I can recall hearing two blows at that stage. I did not see those two blows, just heard them. After that the one with the gun who was standing in front of me, seemed to walk over me as I looked up I saw what I thought to be a dark truncheon like object. And I thought I heard another blow. At the same time words to the effect, you will never rip anyone off again, abuse or hurt anyone. The one with the gun said that. "

We pause to interpolate 2 comments. The first is that it may have been this passage which led the Crown Prosecutor to suggest that both men had assaulted Robert Cancian, a possibility which as we have seen the Judge suggested to the jury was too

tenuous so far as Carstairs was concerned. The second is that the pathologist's evidence was that there had been at least 3 blows to the head and one to the back and that because of the damage done one must regard all 3 blows to the head as having contributed to the deceased's death.

Reverting to Mrs Serci's evidence it should also be noted that in cross-examination she accepted it might have been "that the man with the gun simply addressed his comments to Robert Cancian and did not in fact hit him at all".

Mrs Beverley Ann Serci, who arrived at the Cancian house in the course of the robbery, referring to the blows said:

> " Something was said, voice sounded very agitated, high pitched voice, uncontrolled, 'You will never hurt anyone again will you, you won't hurt anyone, use anyone, abuse anyone'. Bob must have been hit 3 times at least, 3 or 4 times. I did not see the blows. I could not tell which man was responsible for them. The words which were spoken were agitated, wild, frenzied, it was, I was very frightened at that point, I thought he was a maniac. "

The next witness, Gary Alan Low, heard what he thought was a smacking sound as he entered the house and, he said:

> " I heard a male European voice say, something or words to the effect of, 'You will never hurt anybody again will you'. "

Finally there was the evidence of a witness at whose house Sneller and Carstairs stayed that night. In opening his cross-examination counsel for Sneller made it clear that her

evidence was largely accepted by Sneller, except as to points on which he then questioned her and which are not material for present purposes. But Carstairs for his part disputed her evidence. This witness was herself implicated as an accomplice and had been given indemnity from prosecution. An order for suppression of her name and details leading to her identity was made at the trial and continued on the argument of the appeal. In these circumstances it is convenient to refer to her in this judgment as "AB".

AB recounted how when Sneller and Carstairs returned to her house that evening and she and Sneller had gone to bed he discussed the burglary with her. In the course of that explanation he said that as they were leaving the house he took the baseball bat from Carstairs, he hit the man who was in the house with the baseball bat and, the witness added, "he didn't say why". The next day they all discovered from news reports that Robert Cancian was in intensive care and, again according to her evidence, Carstairs said to Sneller:

> " I think you might have hit him too hard. Or hit him in the wrong place. By hitting him in the temples. "

In his submissions before this Court Mr Billington for Sneller emphasised the words said by the earlier 3 witnesses to have been uttered by Sneller and submitted that s 168(1)(a) could have no application: as a contemporaneous statement of Sneller's intention Sneller was delivering retribution and

against that statement it was not open to the jury on the evidence to conclude that Sneller meant to cause grievous bodily injury for the purpose of facilitating the commission of the robbery or facilitating the flight or avoiding detection. Accordingly the Judge erred in directing the jury on that basis.

We are satisfied it would be wrong for this Court on this appeal to attach such overwhelming significance to those words. It seems that the jury must have accepted that although there were understandable differences in the respective recollections of Linda Serci, Beverley Serci and Gary Low as to the actual words used, there was a statement addressed to Robert Cancian to the effect that "you will never hurt anyone" - those being the words common to the 3 accounts. However, there was an understandable vagueness about what else was said and, perhaps just as important, as to who uttered the words - in cross-examination Linda Serci said it might have been the man with the gun and that he did not hit Robert Cancian; Beverley Serci said she could not tell which man was responsible for the blows; and neither she nor Gary Low identified which of the 2 men had spoken. Then there is the context in which the words were spoken. Linda Serci's evidence was clear as to that - that the first 2 blows came immediately after, in response to a demand for more money, Robert Cancian and Linda Serci had both said that there was no more. It was part of a continuing episode in which the 2 men were repeatedly demanding jewellery and money. In those circumstances it would be unreal to treat the assault as

separated from the actual commission of the robbery. And there is no automatic dividing line between the commission of the robbery and anticipating flight from the scene and avoiding detection.

Next, in recounting the incident to AB Sneller did not say why he had hit Robert Cancian. There was no suggestion to her that retribution was the motive and certainly it was open for the jury to conclude against Sneller from that account that the blows were struck in furtherance of the robbery and the departure of the men from the scene. And the discussion between the 2 men the next day, to which she testified, is entirely consistent with that analysis.

Finally, we must not lose sight of the fact that the very experienced counsel who conducted the trial all accepted at the time - as did the trial Judge - that the effect of the evidence given over 5 days, considered in its totality, was that the Crown case was properly based on s 168(1)(a) as well as on the general provisions of s 167(a) and (b). In that regard it is not without significance that the summing up does not attach any weight (when explaining the Crown case under s 167(a) or otherwise) to the statement attributed by witnesses to one of the assailants. Indeed it was not referred to at all by the Judge. It would be wrong to select one item such as that out of a mass of evidence bearing on the purposes with which the blows were struck and treat it as of an importance which was not attached to

it at the trial. In truth it was not until 11 months after the trial on the eve of the hearing in this Court that this point was raised by one only of the counsel.

Against that background we are not persuaded that the trial Judge erred in allowing the murder count to go to the jury in terms of s 168(1)(a). No other question has been raised as to the Judge's directions in relation to that basis for a murder verdict and this ground of appeal is accordingly rejected.

Other complaints as to directions to the jury

There were 3 other complaints as to the content of the summing up and subsequent directions to the jury. The first was that the jury should not have been supplied with photocopies of relevant provisions of the Crimes Act without further direction as to the law, and in particular as to the burden of proof as it relates to murder and manslaughter.

After the jury had been deliberating for about an hour they directed 2 requests to the Court, one of which was for a copy of the "legal definitions of murder as opposed to manslaughter". The Judge explained to the jury that it was not customary to supply juries with the text of statutory definitions and the reasons for that, but he went on to say that in this case, having regard to the fact that the definitions were relatively simple and straightforward and not really permitting of confusion, he had had the relevant extracts photocopied for

their use; "And I hope that will supplement what I said to you as to the definitions". The extracted provisions were s 160(2)(a) and (3), s 167(a) and (b), s 168(1)(a) and s 171.

Mr Billington who developed this branch of the argument did not object to the supplying of the text of the provisions to the jury - in limited classes of cases that may be a sensible course to follow - and here the jury obviously wanted to have the 3 different bases on which they were to consider the murder charge in front of them. And he accepted that had the summing up stood on its own he could not possibly have challenged the directions given to the jury. What was submitted was that further directions were necessary if the Crimes Act material was to be given to the jury. There was a risk he said that the jury might not then have adequately appreciated that the difference between murder and manslaughter depended on the mental element to support the charge of murder and that that mental element required further direction.

There is nothing in this point. The summing up made perfectly plain what had to be established to satisfy the definition of murder. That was said against the standard direction the Judge had given as to the burden of proof and his direction that if the jury reached the point of deciding that there was a killing by an unlawful act the result must be either murder or manslaughter. And his discussion of the Crown case and the defence case to the charge followed that pattern of

inviting the jury to focus on whether or not the additional requirements of murder were satisfied. Then, when responding to the jury's request for the definitions, the Judge made it clear that the text was to supplement what he had said as to the definitions. We are satisfied that the jury would have been under no misapprehension as to where the onus of proof lay in deciding that, if culpable homicide, it was murder rather than manslaughter.

The second complaint under this head was that the trial Judge erred in not reminding the jury of Mrs Carpenter's role in events and in failing to give in respect of her evidence the customary warning regarding accomplice evidence and corroboration. We are unable to agree. At the end of the day the significance of the evidence she had given was limited. Before trial Sneller and Carstairs had formally admitted that a shotgun was in the possession of Sneller from 16 January and that they had both been in Hamilton on 22 January. She was speaking of events occurring a month before the robbery and the attack on Robert Cancian took place and her evidence that they had sawed down the gun and had spoken of gaining money from a "Bob" in Wellington and getting rich quick was far too separated in time and circumstance and her role there as spectator not facilitator was far too tangential for her to be regarded as an accessory before the fact or otherwise as an accomplice for the purposes of the well settled accomplice rules (R v Terry [1973] 2 NZLR 620). At most she was on the periphery of the planning of a possible

future crime. No rule of law or practice required the trial Judge to administer the customary warning against convicting on the uncorroborated evidence of an accomplice and, as McCarthy P emphasised in Terry at p 623, it is always a matter for the discretion of the trial Judge in the circumstances of the particular trial whether or not to warn the jury of the dangers inherent in accepting the evidence of someone who though not an accomplice was close to the periphery of the crime. In this case the trial Judge did not find it necessary to refer to Mrs Carpenter or her evidence at all. We could not possibly say he was wrong.

The third point related to AB. The submission was that it was not sufficient in the circumstances for the Judge to give an accomplice warning in respect of her evidence and to couple that with the added warning that her evidence had to be treated with added caution because she had received an indemnity from prosecution: her evidence was inconsistent with a previous statement she had made and in the circumstances the trial Judge should have warned the jury that her evidence in so far as it implicated Carstairs was not reliable.

In R v Morgan [1981] 2 NZLR 164 this Court rejected the proposition that whenever it could be shown that there had been prior inconsistent statements there would invariably have to be a direction to the jury that they must regard the evidence given at the trial as unreliable. What was held there was that in such a

case there would usually be a need for a warning from the Bench concerning the extent to which a jury might feel able to act on the evidence of that witness. But, as the President went on to add:

> " ... Such a warning and its strength must always depend upon such matters as the significance of the evidence itself, the level of contrast between the two conflicting statements, the circumstances in which the previous inconsistent statement came to be made, and the whole atmosphere and context of the case, including the nature of the charge laid against the accused. "

When initially questioned by the Police AB said that Sneller and Carstairs were at her house when she arrived home during the evening of the night in question and that they remained there for the rest of the night. She later resiled from that and gave a comprehensive account of events. In her evidence at the trial she said that before she saw the Police she had discussed with Sneller and Carstairs what she would tell them and had initially given them that alibi; and she was cross-examined by counsel for Carstairs at some length as to that and as to her awareness of the difficult position she herself was in.

The Judge gave an appropriately long and impeccable accomplice direction in the course of which he traversed at some length what she had said in evidence in relation to Carstairs which might indicate that he was with Sneller at the robbery and the respects in which and extent to which she appeared to implicate Carstairs.

He then expressly directed the jury that there was no evidence which in law was capable of amounting to corroboration of what she had said about Carstairs so as to place him in the Cancian house with Sneller, and went on to emphasise that certain matters of evidence bearing on the question whether she was a generally reliable witness did not amount to corroboration. The Judge then directed the jury to treat her evidence with added caution because of the fact that she had been given immunity from prosecution, warning the jury of the risk that a witness in such a position could be said to have coloured his or her evidence or, indeed, might be giving false evidence in order to achieve that protection for himself or herself. Finally, in putting the defence case the Judge emphaised the criticisms made of her evidence as being unreliable, given in her own interests under the protection of immunity, and containing various discrepancies and changes and he reminded them at some length of particular criticisms which had been made.

We are satisfied that the Judge's directions gave the criticisms of AB's evidence all the force that the circumstances required and adequately warned the jury as to the manner in which they should approach her evidence. This ground of appeal is also rejected.

Sufficiency of evidence and refusal to admit further evidence

It is convenient at this point to refer to 2 unrelated submissions. The first is that the verdicts returned by the jury

are unreasonable and cannot be supported having regard to the evidence. That submission was not developed in any detail and having regard to the conclusions we have earlier reached in relation to the applicability of s 168(1)(a) and to the weight the jury was entitled to attach to the evidence of AB, it is obvious that this ground must fail too. We may add, however, that Mr Larsen who took us carefully through the evidence satisfied us that there was considerable independent support for a great deal of her evidence implicating both men.

The second is that the Judge erred in not acceding to a request by counsel for Carstairs that a Police Officer who had in his evidence given a physical description of one Errol David Chadwick (alias Payne) should be recalled so that a photograph of Chadwick could be put to him; and it was said in the result a miscarriage of justice had occurred.

Chadwick, an associate of Sneller, was chief executive of a second-hand car sales firm from whom Sneller purchased the car he and Carstairs were driving that day. The next day Sneller and AB went to call on him but the Police were there. In the course of the investigation Chadwick was interviewed by the Police, and with the written consent of Sneller and Carstairs his written statement was admitted in evidence at the depositions hearing. When Sneller and Carstairs formally admitted possession by Sneller of the car it became unnecessary on the case as it then appeared to require Chadwick to give evidence at the trial.

However at a late stage of the trial certain Crown witnesses were cross-examined as to Chadwick's association with Sneller and as to his description. This was it seems a prelude to an intended suggestion in addressing the jury that Chadwick might have been the second intruder at the Robert Cancian house. It appears that Chadwick had gone to Australia before the trial took place and in the result almost at the end of the Crown evidence a Police witness, Detective Sergeant Reid, was asked to describe Chadwick, whom he knew. His recollection was that Chadwick had dark eyes, but in cross-examination he said he could not say it was impossible for him to have blue eyes. The point of that was that Mrs Linda Serci had said that the second intruder had cold blue eyes. That same day counsel addressed the jury and Mr Bungay's address on behalf of Carstairs was not completed when the luncheon adjournment was taken. During the adjournment a coloured photograph, said by the provider of the photograph to be of Chadwick, was handed to Mr Bungay. Counsel asked the Judge for leave to have Detective Sergeant Reid recalled so that the photograph could be put to him. In the exercise of his discretion and after inspecting the photograph the Judge declined to do so. We should add that we have also examined the photograph and record that it does not clearly show the colour of the eyes of the man who was featured there.

Against that background we are not persuaded that the Judge erred in the exercise of his discretion in that regard. It was very late in the trial and the Judge was entitled to

conclude that the photograph was not of such cogency or indeed relevance as to warrant granting leave for its introduction at that point.

The deferral of the summing up and the length of the jury's deliberations

The trial started on a Monday. The evidence of the Crown concluded at 10.42 a m on the Friday. Counsel for Sneller elected not to call evidence. Counsel for Carstairs did not make an opening address but called a short witness whose evidence was finished at 10.51 a m. We were advised from the Bar that counsel for the defence submitted that the 3 final addresses and the summing up should be heard on the same day. The Judge directed that counsel should address that day and those addresses were then completed at 2.50 p m. He did not sum up until the Monday morning. His summing up then took 1 hour 12 minutes. The Judge answered 2 requests from the jury at 12.13 p m. About 9.45 p m Mr Billington, counsel for Sneller, expressed some concern to the Judge at the length of the retirement. The Judge intimated that he would leave it for a short time. The jury eventually returned with their verdicts at 10.43 p m. The 11 hours 30 minutes that elapsed from completion of the summing up to delivery of verdicts of course included the periods when they were at lunch and dinner and the time the Judge spent in considering and then answering their questions.

Against that background 2 inter-related grounds were advanced for the applicants. The first was that it was unsatisfactory to have the summing up to the jury take place 3 days after counsel addressed the jury. The second was that the jury were allowed to deliberate for an unreasonably long period in the circumstances of this trial, particularly as they were not expressly advised of their right to disagree. In support of the first contention it was said that like an anaesthetic the force of counsel's submissions in their final addresses wears off, and that after a lapse of 3 days the impact would be largely diminished. Counsel added that extraneous influences over the weekend might have affected the approach of individual jurors. In support of the second it was submitted that there was a risk that after such a long retirement and in the absence of such a direction at some point of the right to disagree unrealistic concessions might have been made by some jurors in order to obtain unanimity.

Obviously it is preferable for the summing up to follow immediately or shortly after the addresses but it is not always feasible, particularly in lengthy trials. The trial Judge may well anticipate that the addresses and summing up will together take more than a day - or if completed within the day, that the deliberations of the jury following on after lengthy addresses and the summing up may impose an unfair burden on their powers of concentration - and that the better course is to split the addresses and the summing up over 2 days. We are not persuaded that the Judge's decision was unreasonable in the circumstances.

The course he adopted had the advantage of allowing the jury to begin their deliberations during the morning and, while the addresses were not as fresh in their minds as they would have been if delivered the same day, the summing up itself carefully and fairly restated the respective cases for the Crown and the defence. And we cannot speculate on the possibility that contrary to their oaths jurors might have allowed their thinking over the weekend to be subjected to the influence of unspecified extraneous factors.

We are also satisfied that the length of their deliberations was not unreasonable in the circumstances. The evidence and addresses of counsel had occupied almost 5 days. It was not surprising that after that time, and given the issues for their consideration, they should take quite a long time in considering their verdict. The importance of not hurrying a jury emphasisised in such cases as R v Papadopoulos [1979] 1 NZLR 621 was rightly kept in kind by the Judge. Coincidentally in that case, too, after a trial which occupied several days the summing up and the jury's retirement on the final day also totalled about 12½ hours and this Court did not regard those times as unreasonable. We should add that there was nothing in the summing up in this case to justify a belief that the jury were not free to disagree or that they would be required to keep on deliberating until they agreed, or in any event for a long time.

The applications for leave to appeal against conviction are accordingly dismissed.

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