IN THE COURT OF APPEAL OF NEW ZEALAND 23/8 C.A. 191/91

1532

THE QUEEN

v.

B SHAW

Coram: Cooke P
Hardie Boys J
McGechan J

Hearing: 20 August 1991

Counsel: J C Pike for Crown
C J O'Neill for Appellant

Judgment: 20 August 1991

JUDGMENT OF THE COURT DELIVERED BY COOKE P

This is an unfortunate case in which the appellant was convicted at trial at Hamilton before a District Court Judge and jury on charges of carrying an offensive weapon, threatening to kill and assault.

In the events that occurred he was forced to defend himself in person at the trial, the Judge having refused an adjournment on the day when the trial commenced. A fixture had been made for the trial to take place on 15 and 16 May 1991 at callover on 28 March 1991. A local barrister was representing the defendant, apparently on legal aid. He

agreed to those dates. At some stage, it is thought subsequently, he ascertained that they clashed with a fixture that he had in the Family Court. He asked the Crown to rearrange the dates of the criminal trial; his letter of request to that effect was dated 10 April 1991. A written reply was not received until 10 May 1991 by a letter bearing that date. The Crown solicitor expressed regret that it was not possible to reschedule the trial and trusted that the barrister would be able to make other arrangements. The Crown solicitor's letter indicates that he had already so advised the barrister, but is not apparent from the letter or anything else before the Court precisely how long previously that had been done.

According to an affidavit by the appellant, which we have admitted without objection, the barrister told him on the morning of Monday 13 May that he had seen the Judge in Chambers on the previous Friday and had received a sympathetic hearing. Further, that the Judge had agreed that there would be insufficient time to enable other counsel to be briefed but that a formal decision would be made on the morning of the trial. It must be said, however, that although the barrister has not taken the opportunity of contradicting anything in the affidavit, we do not have the advantage of having before us either his account or a report from the learned Judge about what occurred on the Friday.

In the view that we have formed it is not necessary to defer a decision on this appeal in order to investigate those matters. What is reasonably clear is that any notification as late as Friday 10 May 1991 or only a day or two before then left too short a time to engage other counsel and enable other counsel to prepare adequately for a trial commencing on 15 May. Indeed, the defendant says that he actually approached an Auckland counsel at some date after 10 May but was advised there was insufficient time properly to prepare for a trial beginning on the following Wednesday.

It may be that the Hamilton barrister concerned should have been more active in following up his request to the Crown to rearrange the trial dates or in withdrawing from the case positively in sufficient time to allow other arrangements to be made for legal representation of the defendant in the event of the refusal of an adjournment. Again we express no definite opinion on that matter; all the relevant facts may not be before us.

The case is one of those in which, without it being necessary for this Court to endeavour to apportion blame for what has happened, it has become clear that the defendant has been deprived of rights to which he is entitled. It falls within the line of cases illustrated by R v West [1960] NZLR 555 and R v Jays (CA 177/89; judgment 24 August 1989). Moreover the approach taken in those cases has now

been reinforced by s 24(c) and (d) of the New Zealand Bill of Rights Act 1990, which declare that everyone who is charged with an offence shall have the rights to consult and instruct a lawyer and to adequate time and facilities to prepare a defence. Each case of an alleged breach of those rights must of course be considered on its own facts. In this case, in the way in which the matter developed, we are forced to the conclusion that there was a transgression of those provisions.

The District Court Judge understandably wished to expedite the business of the Court and with other matters also to attend to on that day may well not adequately have appreciated the handicap that the accused would face if compelled at virtually the last moment to undertake a defence himself. The barrister already mentioned, on the refusal of the adjournment, applied for and was granted leave to withdraw - thus inevitably leaving the defendant without professional representation.

Counsel for the Crown has informed us this morning that in the circumstances he is constrained to accept that the trial was unsatisfactory and that in the interests of justice he cannot contend that the Court should do other than quash the conviction. Mr Pike has also frankly said that he could not suggest that the absence of counsel merely resulted in harmless error or anything of that sort. It is a case in which it is conceivable that representation by

counsel would have had significant benefit to the defendant in that it was a case of some complexity in which an understanding of the defences available in law and the skills of a professional cross-examiner could have been of assistance.

We would not part with the case without stressing the responsibility of counsel representing a defendant in a criminal trial to ensure that if there is likely to be difficulty for him or her in meeting the date fixed by the Court for the trial, arrangements are made in adequate time for other representation. Let is be repeated though that this does not necessarily imply in this particular case criticism of the counsel concerned as we may not be completely apprised of the facts.

In the ordinary course we would quash the conviction and direct a new trial. We have been informed, however, that the Crown does not ask for a new trial, because the appellant has been serving his sentence of six months' imprisonment and having regard to remission there will be only a fortnight of that unserved. Accordingly the course that we adopt is simply to allow the appeal and quash the conviction. In accordance with the provisions of the Crimes Act 1961, s 384(2), an acquittal is to be entered but it must be understood that this does not imply that the Court has reached any conclusion on the facts as to the guilt or

innocence of the accused. It is merely that in the unfortunate circumstances it has to be said that he did not receive a fair trial.

RB Cooke P.

Solicitors: Lawn & Co., Hamilton, for Appellant
Crown Law Office, Wellington, for Crown