IN THE COURT OF APPEAL OF NEW ZEALAND 23/7 C.A. 465/92

THE QUEEN

v

1081

P

Coram: Eichelbaum CJ
McKay J
Thorp J

Hearing: 24 June 1993

Counsel: K Raftery for Crown
C J O'Neill for Appellant

Judgment: 20 July 1993

JUDGMENT OF THE COURT DELIVERED BY THORP J

Nature of Appeal

This is an appeal against the appellant's conviction in the High Court at Hamilton on 3 August 1992 of four counts of rape. All four offences were said to have occurred during 1986, on particular and identifiable occasions which the complainant could not date.

Grounds of Appeal

The grounds of appeal pursued at the hearing were:

1. By reason of conflicts in the evidence the verdicts could not be supported by the evidence;
2. Incompetence of defence counsel, in particular as to the advice given to the appellant about his giving evidence;

3. That a comment made by the trial Judge in summing up on the appellant having refrained from giving evidence was unfair and wrong in law; and
4. That the trial was unfair in that the officer in charge of the case had sat beside the complainant during her evidence.

Background Facts

When the complainant was 12 years of age her mother formed an association with the appellant, and she and her mother went to live with the appellant and his young son in a farm-house at Hoe-o-tainui, near Morrinsville.

The complainant testified that her mother commenced working at night in February or March 1986. She said that shortly after her mother started working at night, the first of a series of rapes occurred at their home. Although she stated that these did not occur on any regular basis, being more frequent at some times than others, she said that rape did occur as often as two or three nights a week, and accordingly the four charges were put forward as representative charges.

The complainant said that after the second occasion she was raped she told her mother that "when you are at work touches me". She said there was then a brief lull in the alleged abuse, but that it then resumed. All the assaults were said to have been made at the house The complainant said that she spoke to her mother about them on more than one occasion during 1986, initially telling her that the appellant was "touching" her, and later "getting into her", in their bedroom, and that she wanted it to stop. She said that because it did not stop she left and went to live with her father at the end of 1986.

She first reported the matter to the Police in July 1991. The appellant was seen by the Police on 9 August 1991. The detective's record of that interview recorded that the appellant admitted having had sexual intercourse with the complainant and that he did not deny, when given the opportunity to do so, the complainant's claims that the intercourse had taken place without her consent. The admissibility of the record of that interview was challenged on the grounds of non-compliance with Bill of Rights obligations, and that objection was upheld.

The only witnesses at trial were the complainant, 12 years of age at the time of the alleged offences, 18 years of age at trial, and her mother, who had married the accused and continued to live with him.

The Crown case clearly depended on the jury accepting the complainant as an honest and reliable witness, and it was so put to the jury in the summing up.

Ground One: Verdict not supported by the evidence.

Mr O'Neill did not rely for this point on internal inconsistencies in the complainant's evidence, but on what he described as "11 major conflicts between the evidence of the mother and the daughter".

An examination of those matters discloses that several are at most minor conflicts. However, there were conflicts between the evidence of the two as to (a) the times when certain matters occurred, (b) the mother's knowledge of the appellant's sexual activity with her daughter, and (c) the mother having been assaulted by the appellant.

Those differences clearly had to be considered by the jury. The summing up indicates that, as one would expect, they were included in the matters put to the jury by defence counsel.

The decision whether or not to accept the complainant's evidence as reliable, notwithstanding conflicts between her evidence and that of her mother, depended on the jury's assessment of their relative credibility. There was no independent corroboration of the position taken by either on any of the matters of conflict.

In our view, the conflicts to which our attention was drawn do not disclose a sufficient reason for concern about the jury's decision, implicit in its verdicts, to accept the complainant's evidence.

The witnesses' recollections of dates and times would no doubt have been affected by the circumstance that the matters both were considering had occurred six years earlier. Differences of testimony in that area were, in our view, readily explicable as being the consequence of that passage of time.

As to the other differences between the two witnesses, the jury was entitled to take into account the family situation and the divided loyalties of the mother, and to construe the mother's evidence against that background. In those circumstances, a decision to accept the daughter's evidence against the mother's where the two

were in conflict was one the jury were entitled to make, particularly observing, as they undoubtedly would have done, that the mother had chosen to continue to support her husband notwithstanding the charges made against him by her daughter.

In our view, this ground has not been made out.

Ground Two: Incompetence of Defence Counsel - in particular as to the advice given to the Appellant about his giving evidence at trial.

Two affidavits were admitted bearing on this ground of appeal.

In the first the appellant declared that his fundamental defence was that the complainant's allegations were false, and that he had not raped or otherwise had sexual relations with her. He also said that an important component of his defence was to have been that during 1986 he was in fact living in Mangakino until May of that year, and then in Te Awamutu from June 1986 until May 1987, and meantime had only made infrequent visits to the home in Morrinsville. His affidavit continued:

> "7. THESE details were explained to Mr BUNGAY. I told him that I wanted to give evidence to tell the Court that it was impossible for me to have done what M alleged. He told me that if I gave evidence it would 'activate' a statement that I had given to the Police but which had been ruled inadmissible. I now know this to be incorrect.
>
> 8. ...
>
> 9. BECAUSE of what I was told by Mr BUNGAY I did not pursue the matter of my giving evidence further. I had never been in any sort of trouble with the Police before and therefore I did not understand that I had a right to insist on giving my side of the story."

The second affidavit was that of Mr Bungay. This advised that his practice is to give the accused adequate time to consider whether or not to give evidence, and to stress that the decision is important and must in the end be the accused's decision. As to his discussions with the appellant he states:

> "10. THAT routine was adopted with the Appellant. In particular the question was discussed on the Sunday afternoon before trial. Present was the accused, his wife, my wife and myself.

My wife took notes which are available for inspection. I pointed out to the Appellant that the jury issue was one of credibility, particularly relating to the complainant.

I told the accused he ran a real risk in not giving evidence and that I thought the trial Judge would comment in some way if he did not give evidence. I pointed out that if he did give evidence he would be cross-examined. The accused did not, nor has he ever, challenged the truth or accuracy of what he allegedly said to Detective Johnson. I informed the Appellant that maybe the Prosecutor could cross-examine on this statement notwithstanding its inadmissibility as part of the Crown case. I stated that the legal position was unclear, the statement being inadmissible on technical as opposed to substantive grounds. I told the Appellant that I had sought a second opinion from a colleague, Mr. L.H. Atkins QC, who shared my concern. I also informed the Appellant the Prosecutor believed he could cross-examine as to the content of the statement. In addition I asked the Appellant certain questions he could expect in cross-examination apart from the statement. He appeared to acknowledge his answers were not satisfactory.

11. THAT the accused made a decision not to give evidence on that Sunday afternoon. He reaffirmed those instructions at the conclusion of the Crown case. He is of above average intelligence compared with other accused I have encountered. He was a self-employed person and well able to make decisions for himself. His decision not to give evidence was made after careful thought and later repeated to me.

12. THAT I have read an affidavit sworn by the accused on 11 May, 1993. I reply:

...

(d) Paragraph 7 At no stage did the accused tell me he wished to give evidence, quite the reverse. If he wished to give evidence I would not have prevented it even if I could. I stressed repeatedly it was his decision. There was no evidence to support the impossibility of the accused having committed these offences. I did warn the accused I could not guarantee he would not be cross-examined on his statement to the police, a statement which the Appellant did not reject.

(e) Paragraph 9 The Appellant's decision not to give evidence was I am sure based on a number of grounds, one of which was the possibility of being cross-examined on his statement. His was not a hasty decision and was not as a result of any outside pressure."

Mr O'Neill accepted that, as held in ***R v Pointon*** [1985] 1 NZLR 109, this Court will not lightly interfere with a verdict on the ground of some mistake on the part of counsel in the management of the defence, and will only do so if there is shown to have been some mistake so radical as to justify ordering a new trial on the grounds that there was a likelihood of a consequential miscarriage of justice.

For that reason Mr O'Neill accepted that, if the law on the topic were unclear, Mr Bungay's advice to the appellant that he was unable to guarantee that the statement would not be reintroduced in the event of his giving evidence would be unobjectionable, or at least would not be such a mistake as would justify application of the ***Pointon*** principle. We are satisfied that that must be so. The question in this case is not whether the statement would have been available to the Crown for the purposes of cross-examination, but whether there was, on the state of the authorities at the time the advice was given, any ground for concern that it might become available. That is so not only because the Court's power to interfere is in all cases predicated upon there having been a radical mistake by counsel, but because in this case the appellant's statement to the Police was such cogent evidence against him that defence counsel's plain duty was to avoid any risk that it might become available to the jury.

However Mr O'Neill submitted that the advice given to the accused by Mr Bungay that the statement might be reintroduced if the appellant gave evidence was completely contrary to well settled law on that topic.

Mr Raftery, while pointing out that Mr Bungay's affidavit indicated that the possibility that the statement might be reintroduced was only one of several factors which he put to the appellant as bearing on the appellant's consideration whether or not to give evidence, accepted that it must have been a major factor in that consideration: so that if the Court concluded that Mr Bungay was plainly wrong in the advice he gave, then he, Mr Raftery, would "find it difficult" to argue that the mistake was not sufficiently radical to warrant the application of the ***Pointon*** principle and the ordering of a new trial.

Mr O'Neill's submission that the law on this point is clear beyond doubt was based on the statement in *Adams on Criminal Law*, Ch 2.3.09, that: "An inadmissible statement made by the accused to the police may not be used in cross-examination", and the decision of the English Court of Criminal Appeal in ***R v Treacy*** [1944] 2 All ER 229, cited in support of that proposition. That decision was

applied by the same Court in ***R v Rice & Ors*** [1963] 1 QB 857, to support the slightly different proposition that an inadmissible statement might not be used "to reveal that the accused has made the statement, as distinct from merely using the information derived from it". *Adams* also notes on this head the Privy Council decision in ***Wong Kam-ming v R*** [1979] 1 All ER 939, which generally supports the position taken in ***R v Treacy*** on the use of inadmissible statements but approves the use in limited circumstances of inculpatory statements made by an accused during the course of a voir dire.

While there does not appear to be direct authority on the point in this country, two decisions in which it has arisen indirectly have indicated opposite views upon it. In ***R v Paiti*** (Auckland T.184/90, decision 17 October 1990) Smellie J, having at the end of a voir dire hearing ruled statements made by the accused in that trial inadmissible, reserved to the Crown "the right to apply for leave to cross-examine on the statements, which leave, in the absence of binding or highly persuasive authority to the contrary, I anticipate would be granted". On the other hand, in ***R v Agraval*** (CA 297/92, decision 17 December 1992) this Court, without hearing argument on the point, assumed that cross-examination on the contents of an excluded statement was not permitted.

Mr Raftery submitted that while it was settled law, and well understood by Crown prosecutors, that the ***Treacy*** principle applied to statements ruled inadmissible by reason of threat or inducement or breaches of the Judges' Rules, those matters going to voluntariness or overall fairness, it was not clear beyond doubt that non-compliance with obligations created by the Bill of Rights would have the same result.

He asked us to note that it was not only Mr Bungay, a very experienced senior counsel, who had had doubts about the position, but that these had been shared by senior counsel consulted by him. He argued that Mr Bungay was also entitled to have regard to the fact that the experienced Crown Solicitor who was prosecuting the case had indicated that he would seek to use the statement in cross-examination if the accused gave evidence. Finally, Mr Raftery pointed to the ruling in ***R v Paiti*** as evidence of some judicial support for the view that a statement ruled inadmissible as part of the Crown case for Bill of Rights reasons might become available for the purposes of cross-examination if the accused gave evidence.

The Court was aware, at the time of argument, of the decision of the Supreme Court of Canada in ***R v Kuldip*** (1990) 1 CR (4th) 285. That case considered the broader issue of the effect of Charter obligations on the use of evidence given by an accused in prior proceedings. However, its decision on that point proceeded on the basis that pre-Charter jurisprudence had not adequately distinguished the use of prior evidence in cross-examination for purposes of incrimination from its use to impeach credibility. The editorial note says that it raised "the interesting and more important question" whether a statement obtained in breach of Charter rights excluded from use as an incriminating statement ought also to be excluded from use to impeach credibility. Reference was made to the decision of the United States Supreme Court in ***Harris v New York*** 401 US 222 (1971), 91 SCT 643, which held that prior inconsistent statements which an accused had not claimed were coerced or involuntary, even though made under circumstances which rendered them inadmissible to establish the prosecution's case in chief, could properly be used to impeach his credibility.

Against that background we accept the proposition put by Mr Raftery that Mr Bungay was "not without some foundation for his concern" that if the appellant gave evidence the Crown might be able to succeed in making use of his statement. We accordingly hold that the case put forward by the appellant on this ground, namely that the law on this topic is clear beyond any doubt, has not been made out.

The point is one of considerable importance. Had it been necessary to the decision of the present case to make a firm ruling on the admissibility of the statement for the purposes of cross-examination we should have considered referring the case for determination by a full Court, following full and comprehensive argument. But in our view it is not necessary that we reach a final determination on the point, it being sufficient that we determine whether or not the point is so clear and beyond argument that Mr O'Neill's submission should be upheld.

For completeness, we note that nothing said above is intended to express this Court's support for the proposition that a statement ruled inadmissible for breach of s 23 of the NZ Bill of Rights Act 1990, or for any other reason, is admissible for the purposes of cross-examination. Indeed, it is our view that if prosecuting counsel has in mind seeking so to use a confessional statement in respect of which he has notice of a Bill of Rights objection, he should raise the further question of the admissibility of the statement in cross-examination for consideration and

determination at the same time as the question of the admissibility of the statement for evidence in chief is being considered.

The second ground of appeal is accordingly also rejected.

Ground Three: The comment by the Trial Judge on the Accused having refrained from giving evidence was "unfair and/or wrong in law".

The relevant passage, from page 10 of the summing up, reads:

> "A point made by Mr Bungay was that these allegations are easy to make and hard to refute. Now in that respect the accused is entitled to have put into the scales the evidence that you heard from his wife that when she took up with him the fact that a complaint had been made by the daughter he denied it. And that is part of all the evidence in the case. On the other hand you are entitled when you come to putting in the scales the weight that ought to be attached to that denial, that the denial was not given on oath, that you have not had the benefit of hearing the accused say it to you directly, it has come indirectly through his wife and that it has not been tested in cross-examination. The complainant, that is M , was cross-examined and her evidence was tested in that way. The denial which the accused gave to his wife, and which you have heard indirectly, has not been given in the same manner. And the denial of the daughter's version must have come only part way through the period of abuse and appears to have been a denial directed only to an allegation that he was touching her and not the more serious and full allegations that are made in this Court. Having said all that, however, I must emphasise that there is no onus upon an accused person at any stage to prove his innocence, that he does not have to go into the witness box and give evidence, that he is quite entitled to sit back and see if the prosecution has proved its case and that it would be quite wrong of you to conclude that just because the accused has chosen not to give evidence that that must mean that he is guilty."

Mr O'Neill referred firstly to the decision of this Court in ***R v McCrae*** (CA.337/92, decision 14 May 1993). The judgment at p6, when discussing the circumstances in which an accused person might expect comment, stated that where:

> "An accused person relies on an exculpatory statement ... but gives no evidence to backup the statement, then a balanced comment might well be justified."

It was submitted for the appellant that his denial to his wife of having interfered with her daughter, to which the wife testified, was not "an exculpatory statement" within the meaning of that passage. We are quite unable to accept that submission: in our opinion it clearly was. Further, the Judge's comment was more a comment on the quality of the evidence than a criticism of the accused for having refrained from giving evidence. It was a similar comment to that seen as "mild" in ***R v Andrews*** [1992] 3 NZLR 62, 64. In our view the statement made was indeed a "moderate" comment, fully justified by the circumstances.

The second point taken on this head by Mr O'Neill was that s 366 is in conflict with s 25 NZ Bill of Rights Act 1990, and in particular the reconfirmation by s 25(c) and (d) of the presumption of innocence and the right not to be compelled to be a witness.

We doubt whether indeed the two are in conflict. But in any event it is, in our view, difficult to give s 366 any effective meaning other than that which the Courts have accorded to it over a considerable period of time. In that circumstance, the combined effect of s 4 NZ Bill of Rights Act 1990 and the arguments which persuaded this Court in ***R v Phillips*** [1991] 3 NZLR 175 that the Bill of Rights did not affect the interpretation of s 6(6) Misuse of Drugs Act 1975, support maintaining the conventional interpretation of s 366. It is not the case here, any more than it was in ***Phillips***, that the section can be given some new and effective meaning which would accord both with its own language and that of s 25. When asked what alternative meaning could be applied to s 366, Mr O'Neill suggested that the Bill of Rights rendered the making of "adverse" comment unacceptable, but that other comment would remain unaffected. That, in our view, completely misconceives the purpose and intent of s 366, which has at all times been regarded as a provision relating to and controlling adverse comment on an accused refraining from giving evidence.

Ground three is accordingly also rejected.

Ground Four: The trial was rendered unfair by the Officer in Charge being permitted to act as the complainant's support person during the trial.

We would be sympathetic to the view that it is undesirable that the Police, expressly or impliedly, volunteer to the jury their support for a complainant's credibility. We are, however, entirely unimpressed by the argument that the conduct of the officer in this case breached that principle.

Clearly there is no prohibition in s 375(a) upon the selection by a complainant of any person she wishes to attend her in court, and we are totally disinclined to introduce some implied limitation. As a matter of practice it may be desirable, wherever this can be arranged, to find some other support person than the officer in charge, to avoid any appearance of implied comment on the credibility of the complainant. But that being said, the officer's acceptance of her request to act as her support person in the present case cannot sensibly be elevated to the level of creating the risk of a miscarriage of justice.

This ground is also rejected.

It follows that the appeal must be dismissed.

Crown Solicitor, Auckland, for Crown
CJ O'Neill, Barrister, PO Box 1470, Hamilton, for Appellant