IN THE COURT OF APPEAL OF NEW ZEALAND S/1 C.A. 178/93

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THE QUEEN

v.

HARDAKER

Coram: McKay J
Thorp J
Henry J

Hearing: 13 & 22 October 1993

Counsel: D C S Morris for Crown
D J Taffs for Appellant

Judgment: 22 October 1993

ORAL JUDGMENT OF THE COURT DELIVERED BY HENRY J

The appellant was found guilty at trial before the High Court at Greymouth on charges of sexual violation by unlawful sexual connection and indecent assault of a girl then aged 9 years. He was sentenced on 22 April 1993 to an effective 2½ year term of imprisonment. The present appeal is against conviction, and the sole ground is that there has been a miscarriage of justice occasioned by the existence of a reasonable suspicion or a real danger of bias on the part of the foreman of the jury. Affidavits have been filed which, in conjunction with the evidence adduced at trial, establish the following relevant facts:

1. The complainant is the daughter of the appellant.

2. The complainant's mother gave evidence at trial as a Crown witness. She and the appellant were separated at the time of trial.

3. The foreman of the jury had a social association with the complainant's mother, existing at the time of trial and for some time previous to it. In particular, from time to time he had assisted the mother around her home following her separation from the appellant.

4. The foreman also knew the appellant, both from them having previously been members of the Legion of Frontiersmen between 1978 and 1980 and also from previous employment by the Buller District Council.

5. Following his arrest on the present charges the appellant and the foreman met on two occasions, the circumstances of which are related in the appellant's affidavit filed in this Court and described in this way:

> "(4) THAT in the period after my arrest on the charges I faced I met 'J.J.' by chance on two occasions, the first was at the D.B. Westport Hotel bottle store where the following conversation took place :-
>
> Self: 'Hello J.J.'.
>
> J.J.: 'Hello what are you doing here?'.
>
> Self: 'Getting a beer'.
>
> J.J.: 'I hope you are not taking it around to K 's place'. (K being the mother of P the complainant).
>
> Self: 'No I'm not'.
>
> J.J.: 'Oh good. I don't like people like you, if I find out you did interfere with P I'll smash you over'.
>
> Self: 'Fair enough but I haven't been found guilty yet'.
>
> (5) THAT on the second occasion, I entered the Criterion Hotel in Westport with a friend to play pool. J.J. was present with other patrons and asked me what I was doing there to which I replied I was having a game of pool. I went down the end of the bar but J.J. kept glaring at me in a hostile manner and was making what I assumed were derogatory remarks about myself to other patrons. I felt extremely uncomfortable and I and my friend left the hotel quickly."

6. The appellant did not recognise the foreman when called at empanelling, having previously known him only as "J.J." and not by name. The foreman's identity as J.J. did not become known to the appellant until after verdict.

We find the appellant's explanation for the failure to recognise the foreman and for not having taken steps earlier in this respect to be credible. We are advised by counsel that prior to empanelling the names of all Crown and defence witnesses were read out by the trial Judge to the jury panel and the relationship between the complainant, the complainant's mother and the accused was then made known. Jurors were then requested that anyone knowing the persons involved should come forward for consideration of being excused from service. The Judge's actions in this respect were in accord with the practice referred to in ***R v McCallum & Woodhouse*** (1988) 3 CRNZ 376, and should have alerted the foreman to the problem.

The test to be applied is whether there is reasonable ground to suspect the verdict may have been influenced by bias against the accused or in favour of the prosecution: see ***R v Te Pou*** [1992] 1 NZLR 522.

When due weight is given to the above circumstances, and in particular the nature of the association between the foreman and the complainant's mother, his prior knowledge of the complainant and of the existence of the charge against the appellant, the views expressed in relation to those charges, and also his failure to advise the trial Judge of his knowledge, we are satisfied that a reasonable suspicion or danger of bias has been established.

The conclusion that the trial was unsatisfactory for these reasons is not resisted by the Crown and the evidence referred to earlier has not been under challenge. Accordingly, the verdict cannot stand. The appeal is allowed and the conviction is quashed.

Mr Taffs submitted that in the particular circumstances there should not be an order for a new trial but that this Court, in the exercise of its discretion, should direct entry of an acquittal. Whether or not there is to be a new trial in such a situation is essentially a matter of discretion involving a balancing exercise to determine where the overall interests of justice lie. Mr Morris helpfully referred us

to a decision of the Privy Council in ***Reid v The Queen*** [1979] 2 All ER 904, where some of the considerations relevant to the exercise of such a discretion are discussed. Here the relevant factors, as we see them, are as follows:

1. The desirability of allegations of this nature being finally determined and not left in limbo.

2. (And associated with the first) the seriousness of the offence: here sexual violation of a daughter is alleged.

3. This will be a short trial expected to be of no more than 1½ days duration.

4. There have been no supervening evidential problems arising.

5. The time lapse since the alleged offending, which is said to have occurred in May 1992.

6. The interest of the complainant and recognition that she will have the further ordeal of a second trial.

7. There is prima facie evidence available to support the present charges.

8. The appellant has spent some 7 months in custody as a result of what we have now determined was an unsatisfactory trial.

9. The delay which must result in achieving any finality of this matter.

10. The possibility that if the appellant seeks and is granted bail then he may, after being released into society, again be re-sentenced to imprisonment if a conviction results in the re-trial. The interests of the appellant himself, as well as the family, would be against such a consequence.

11. The appellant has now served 6 months of the 2 years 5 months sentence and is eligible for remission of 1/3 of the sentence.

12. Importantly, we are now advised by Mr Morris that there is time available for the hearing of a trial in the Blenheim High Court during the week commencing 22 November. Indications are that a re-trial should be able to

proceed during that week, although Mr Taffs has indicated personally he may be in some difficulty by reason of prior commitments.

Weighing all those matters up, we have reached the view that the interests of justice can properly be met by ordering a re-trial, and there will be such an order. By consent there will also be an order directing that that trial be transferred to the High Court at Blenheim.

Mr Taffs seeks bail, which is not opposed by the Crown. Bail will accordingly be allowed on appellant's own recognisance of $2,000. Conditions will be that he is not to communicate directly or indirectly with any Crown witness; he is to report to the Blenheim Police Station each Monday, Wednesday and Friday between 3 pm and 7 pm; and he is to remain within 30 kilometres of the Blenheim High Court.

Solicitors:
Crown Law Office, Wellington, for Crown
D J Taffs, Westport, for Appellant