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IN THE COURT OF APPEAL OF NEW ZEALAND

CA 305/95
CA 308/95

THE QUEEN

96/357 green

V

BONITA NINA MARSTERS
RICHARD MARSTERS

Coram: Eichelbaum CJ
Henry J
Tompkins J

Hearing: 28 March 1996

Counsel: D C Clark for Appellants
K Raftery for Crown

Judgment: 28 March 1996

JUDGMENT OF THE COURT DELIVERED BY HENRY J

Richard Marsters and Bonita Nina Marsters were found guilty at trial in the High Court on charges of conspiring to supply the class A drug cocaine and conspiring to supply the class B drug methamphetamine. Both now appeal those convictions. The appellant Richard Marsters also appeals his effective sentence of 3½ years imprisonment.

The Crown case relied substantially on communications which had been recorded pursuant to the terms of an interception warrant issued by the High Court. A number of tapes were produced as exhibits at trial and transcripts made from the working copies of the tapes were prepared by police personnel. The officer in charge of this exercise gave evidence confirming the accuracy of the transcripts, and in particular his identification of the persons speaking. The transcripts were assembled in a booklet which he referred to in giving evidence. With the consent of defence counsel copies of the booklet were made available to the jury at an early stage. The booklet itself was not formally produced as an exhibit. The officer was cross-examined, and in accordance with usual practice that was postponed until all the tapes had been produced and played to the jury.

Following completion of the summing up and before the jury retired the Judge's attention was drawn to the fact that the transcripts had not been produced as an exhibit. Objection was then taken to them being retained by the jury during deliberation. We are advised that counsel had earlier reached agreement on this point. The jury's copies were then recovered and retained in the possession of the Court. Up until that time, that is from the early stage of the Crown evidence until completion of the summing up, the transcripts had remained with the jury with the express consent of Crown and defence.

The jury retired at 10.35am on the fourth day of the hearing. Following a request made at 11.52am part of one of the tapes (MT30) was replayed. A second request to replay the same tape was received at 12.48pm. It was then replayed a further four times. At 3.15pm the jury requested the transcripts to be made available to them and also to have another tape (MT28) replayed, which it was. Objection was taken by the defence to the jury being provided with copies of the transcript, but in an oral ruling the Judge acceded to the request. At 3.55pm tape

MT36 was replayed following a further request. The jury returned verdicts of guilty against both appellants on both charges at 4.15pm.

The primary ground of appeal against the convictions is that the Judge was wrong in allowing the transcripts to be given to the jury in the course of deliberation. A subsidiary ground is that the jury were not again warned at that time as to the use to be made of the transcripts. In respect of each count the existence of an agreement and the identity of the drug were in issue. When the transcripts were first made available to the jury the Judge gave a direction as to the use to be made of them. It is not recorded but it is accepted that it was in standard form and appropriate.

In the course of his summing up the Judge again referred to the matter in these terms:

> " You have had reference to these transcripts books. I have already explained to you the way you can approach those. I am not going to repeat that explanation in full but, in effect, do not let yourselves be persuaded into accepting that what is written in the transcript must be correct because it is written there. Only accept it if you are satisfied, from your listening to the tapes, that it is correct. There are some circumstances where we know that the transcript does not record the words that it is agreed were used. You will remember the illustration about the "ash tray" and the "nostril" in which there is a clear indication an item is different so rely upon what you have heard and not just on the transcript, although the transcripts may be a good help in dealing with the questions arising in this case."

No further directions were given when the transcriptions were again made available following the jury's request made at 3.15pm.

In the course of her submissions Ms Clark placed weight on the disputed transcription of one word in tape MT30. The word in question was transcribed as "coke" but the defence contended that the word actually used in the conversation

was "smoke". It was submitted that if the latter transcription is correct then a verdict of guilty on count one was unlikely because that was the only express reference to a class A drug. It was the defence case that the word was smoke and referred to cannabis. It was this tape that was replayed five times.

The leading authority on the use of transcripts of taped conversations is ***R v Menzies*** [1982] 1 NZLR 40. In giving the judgment of the majority Cooke J at p49 said:

> "If the tape is reasonably short and clearly audible there can normally be no justification for allowing a transcript as well as playing the tape. But there will be cases in which the aid of an expert is reasonably necessary. For example, there may be the use of a foreign language. Or deficiencies in the recording may make it necessary to play tapes more than once to enable a better understanding, yet the sheer length of the tapes may mean that inordinate time would be taken by replaying them to the jury. In such cases, while there should normally be at least one playing to the jury, the evidence of an expert should be admissible as an aid to the jury. He may be a temporary expert in the sense that by repeated listening to the tapes he has qualified himself ad hoc. And we see no compelling reason why his evidence should not take the form of production of a transcript which can be admitted as an exhibit. Whether the Judge allows the jury to have copies of the transcript, as distinct from merely hearing it read, must be a matter for his discretion in the particular case, bearing in mind the requirements of justice and any risk of unfairness to the accused."

Provision of the transcript to the jury both during trial and deliberation was approved in that case. The issue was again visited by this Court in ***R v Edwards*** [1991] 7 CRNZ 528, where the trial Judge's decision to allow transcripts to be used during deliberation was approved. Some fifty minutes of recording was involved in that case. The procedure was there described as a sensible course to take. A similar course was also approved by this Court in respect of the videotape interview of an accused person in ***R v Accused*** CA250/91 [1992] 2 NZLR 52.

The following factors are relevant to the present appeal:

1. The transcripts comprised 332 pages containing extracts from some 48 tapes;

2. They were provided to the jury at an early stage of the trial and remained with them until retirement, all with the consent of defence counsel;

3. Their accuracy was confirmed in evidence by a police officer who had listened to them for approximately 280 hours;

4. The officer was cross-examined without restriction, and in particular on the accuracy of the reference to "coke";

5. The jury were properly directed as to the use to be made of the transcripts on two occasions, once when they were initially provided to them and again in the course of the summing up.

In support of her general submission that the procedure resulted in a miscarriage of justice, Ms Clark relied on a number of matters which require consideration. First it was contended that the transcribing officer had not qualified himself as an expert for that purpose. He had, as already mentioned, deposed to 280 hours of listening to the tapes which in itself would establish a qualification (*Menzies* p47). More importantly, he was not cross-examined on this issue and no objection was taken either to the admissibility of his evidence or to the use of the transcripts throughout the whole course of the trial including the adducing of all evidence, counsels' addresses and the summing up.

Second, the booklet of transcripts was not formally produced as an exhibit. Again *Menzies* at p46 makes it clear that this technicality does not vitiate their use by the jury. Furthermore, their use was in fact consented to by counsel and in the circumstances absence of formal production is in our view irrelevant. This was not a case of introducing new evidence after the case had been closed.

Third, it was suggested that defence counsel were deprived of the opportunity of addressing the jury in closing on the dangers of the use of the transcripts. It is difficult to understand this complaint. The transcripts featured throughout the hearing and were in the jury's possession and available to them as a source of note-taking. If there was any such danger counsel could be expected to address on it, regardless of the exhibit status of the transcripts, even if they were not to be taken into the jury room.

Fourth, the accuracy of the transcripts was not fully tested. This complaint is also difficult to understand. The only purpose in providing them in the first instance was to assist the jury in properly assessing the content of the taped conversations. Their accuracy was a matter to be canvassed in the usual way as in fact happened in the course of the officer's cross-examination.

Fifth, it was said that there was a danger that the written word rather than the spoken word would wrongly be relied upon by the jury. This, it was submitted, applied particularly to the alleged reference to "coke" in MT30. We do not think there was in reality any such danger. The jury were instructed that the transcripts were only to be accepted if found to be correct from their own listening to the tapes. It can also be noted in this regard that the request for the transcripts only came in conjunction with a request to have a different tape, MT28, replayed.

A further later request was made in respect of tape MT36. Neither of those contained the one passage now sought to be highlighted.

We are not persuaded that there is any substance in these complaints. It is common ground that this was a case where the transcripts could be of assistance to the jury in determining what was said in the tapes. There was no basis for holding that the Judge erred in allowing them to go to the jury after retirement in response to their request.

It was also submitted that the jury should have been directed as to the use which could be made of them at that point but in the circumstances there was no danger the jury would have disregarded the earlier directions given them. It can also be noted that counsel did not request such a direction at the time the ruling was made.

We are satisfied that no miscarriage of justice has resulted. The appeals against conviction are accordingly dismissed.

Sentence

The appellant Bonita Nina Marsters having filed a notice of abandonment, her appeal is deemed to be dismissed.

The appellant Richard Marsters was sentenced to 3½ years imprisonment on the charge of conspiring to supply methamphetamine, and 2½ years concurrent on the charge of conspiring to supply cocaine.

At sentencing the Judge accepted that there was only one recorded conversation relating to cocaine and that its intended supply was to one of the

appellants. He described this offence as at the lower end of the scale of class A offending. He also accepted that there was no evidence that extensive quantities were involved in the conspiracy relating to methamphetamine. Nevertheless it is common ground that the telephone tapes were indicative of a continuing involvement in class B drug dealing embracing an activity where the class C drug cannabis also featured. There was, however, no indication that the appellants received substantial profits from these operations which appear to have been associated with organised gang activities and to be directed to the local domestic market. The Judge rightly observed that cocaine dealing requires some emphasis to be given to the aspect of deterrence.

This appellant is 35 years of age. He has a lengthy list of previous offences, those particularly relevant being ten which were cannabis related. For those fines, periodic detention and imprisonment have previously been imposed. Despite his record the appellant received a favourable pre-sentence report which disclosed positive features. However, it is now trite to say that in general little weight is to be given to personal circumstances when serious drug dealing is at issue.

In submitting that the sentence was excessive Ms Clark referred us to ***R v Owen*** (CA473/93, judgment 10 May 1994), and ***R v Moroney & Ors*** (CA448/92 & Ors, judgment 26 May 1993).

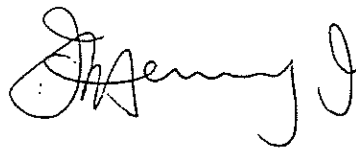
In ***Owen*** a sentence of 2½ years imprisonment was upheld for conspiring to supply methamphetamine. Owen had been in possession of small quantities of the drug in plastic bags. He had no previous relevant convictions. In ***Moroney & Ors*** this Court applied a starting point of 2½ years to the appellant Milicich for conspiring to supply heroin resulting from a homebake operation. He was involved in dealing in small quantities. Mr Raftery also referred us to ***R v Bailey &***

Cummings (CA189 & 200/84, judgment 17 October 1984), where sentences of 3½ years and 2 years imprisonment were substituted for 4½ years and 3 years on a charge of conspiring to supply class B drug cannabis resin.

Those cases are of course not directly comparable but are nevertheless in line with the present sentences which are also within the range generally applied to class A and class B offending which is towards the lower end of the scale. It is important to remember that this was multiple drug offending and the effective sentence had to reflect its totality. Viewed in that way we are unable to say that the overall sentence of 3½ years imprisonment is excessive for what the Judge described as an agreed pattern of drug dealing.

Ms Clark also submitted that there was disparity between these two appellants. The test is now well established (*R v Rameka* [1973] 2 NZLR 592, *R v Lawson* [1982] 2 NZLR 219). We have carefully considered her submissions which were responsibly made but we do not consider that it can be said that an independent observer would conclude that something had gone wrong with the administration of justice. The Judge having had the benefit of presiding at the trial was entitled to regard this appellant with his background as the dominant person in the conspiracies. He was also entitled to give weight to the female appellant's expressed remorse and preparedness to address her own drug problems as evidenced in her letter to the Court and further in the particular circumstances of this case, to her family responsibilities.

The appeal against sentence is therefore also dismissed.



Solicitors
Chadwick Bidois, Rotorua, for Appellants
Crown Solicitors, Auckland, for Crown