NZLR

LOW PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND 16/2 C.A. 342/95

THE QUEEN

46

v

LAVERY

Coram: Eichelbaum CJ
McKay J
Thorp J

Hearing: 13 February 1996 (at Wellington)

Counsel: Appellant in Person
B M Mackintosh for the Crown

Judgment: 14 February 1996

JUDGMENT OF THE COURT DELIVERED BY THORP J

This is an appeal, brought by the appellant Mr Lavery in person, against his conviction by a jury of the theft of a Mitsubishi van, the property of a Mr and Mrs McIver.

At the trial Mr Lavery was represented by counsel. The defence put to the jury on his behalf was that of colour of right, or in other words that he had an honest belief that he had become the owner of the van.

At various periods between 1992 and April 1994 Mr Lavery lived in Wellington in a de facto relationship with a Ms Love, a daughter of Mr and Mrs McIver. In July 1992 he bought a Datsun motor car which he put in Ms Love's name. At that time she could not drive, but it was intended that she should get her licence and should use that car.

Early in 1994 the McIvers left Wellington for Paeroa. They left their Mitsubishi van with Mr Lavery and Ms Love for their use, as the McIvers had no present need of it. There was no specific arrangement for the van's return to the McIvers.

In April 1994 Ms Love and Mr Lavery separated. Arguments then developed between them about the disposition of property and about the custody of their infant son. Following discussions with Mr Lavery, Ms Love took the Datsun with her and he retained possession of the van.

There were also discussions between the McIvers and Mr Lavery, both before the separation and after it, about the use of the van and the provision of parts required for it. It was Mr Lavery's contention at trial that from these discussions he understood that the McIvers were agreed that Mr Lavery and Ms Love were to retain the van as their property. From that position, he said, he believed that the arrangements he made with Ms Love following their separation meant that she took any interest he had in the Datsun and that he was to have any interest she otherwise would have had in the van.

However, while the McIvers agreed they had contemplated giving the van to Ms Love and Mr Lavery, they denied that they had done so: and in August 1994 they demanded its return. When Mr Lavery declined to return it they laid a complaint with the police. This in turn resulted in Mr Lavery being charged in the alternative with the theft or conversion of the van.

At the trial the Judge directed the jury that the Crown could only succeed on the theft charge if it satisfied the jury that Mr Lavery when he declined to return the van to the McIvers did not have an honest belief that he was entitled to act as he did. After in excess of four hours deliberation the jury found Mr Lavery guilty of the theft of the van.

Mr Lavery filed quite lengthy and detailed points on appeal, and amplified these yesterday in his oral submissions to the Court. While obviously he had spent considerable time in the preparation of those submissions, they do not fall easily into recognisable grounds of appeal. However we believe the submissions can, without prejudice to his position, be grouped under the following headings:

Ground One: There was no evidence that after demand was made on Mr Lavery in late August 1994 for the return of the van, he either moved the van or prohibited the McIvers from uplifting it:

Ground Two: Defence counsel failed to conduct the defence in accordance with Mr Lavery's instructions:

Ground Three: The prosecutor had misled the jury at trial about the registration of the van: and

Ground Four: The summing up over-emphasised the case for the Crown, and failed to adequately put the defence case.

Ground One

This submission does not take into account the fact, made clear to the jury during the summing up, that the basis upon which the Crown's allegation of theft was made was not a taking of the van by Mr Lavery, but his conversion of it to his own use.

As to this, it was not denied by Mr Lavery that when the demand was made upon him in late August 1994, he declined to accede to that demand and at the time said: "The van belongs to me". The charge alleged theft "between 1 July 1994 and 1 September 1994". In those circumstances earlier delays on the part of the McIvers in demanding the return of the van, and any absence of or inadequacy in the evidence about the movement of the van after that time, would be irrelevant. That is because the statement given at the time of the demand in late August fell within the period specified in the indictment, and was clear evidence both of a denial by Mr Lavery that the van was then the property of the McIvers and of a claim that it then belonged to him, Mr Lavery.

Ground Two

The complaint that Mr Lavery's counsel did not conduct the case according to instructions given to him by his client was the principal ground urged for this appeal. It was put on a number of different bases. Dealing with these in the order in which they were considered in the points of appeal, these complaints were:

1. That counsel had disregarded instructions given to him as to the manner in which he should exercise his right to challenge jurors.

Mr Lavery advised that just prior to the empanelling of the jury he had instructed his counsel that he wished all Maoris and all jurors living in Tawa to be challenged. His reasons for those instructions, he said, were that Ms Love was a Maori and was at the time of the trial living in Tawa.

Trial counsel, having obtained a waiver of confidentiality from Mr Lavery, completed an affidavit responding to his criticisms of counsel's conduct of the defence. This was filed by the Crown. On this point his affidavit acknowledged that he had received an instruction to challenge jurors from Tawa. At that time Mr Lavery had not indicated that his instructions extended to the Maori component of the jury, and that matter was not the subject of specific comment in counsel's affidavit.

As to the instruction to challenge jurors from Tawa, counsel deposed:

(a) That he had asked the appellant if he knew anyone on the jury list, and had been told that he did not;

(b) That: "A list of witnesses to be called by the Crown was read out by the Crown Prosecutor in front of the jury and the normal warning was given by the Judge. At no stage did any of the jurors indicate that they knew anyone."; and

(c) That he thought it preferable "that the jurors that were empanelled adequately suited the profile of juror we were seeking. I also ended up challenging four people and only had two challenges left."

If defence counsel elects to disregard clear instructions given by a client, the Court must necessarily consider whether that action may have prejudiced the accused or prevented his defence being put as he wished it to be put.

In this instance Mr Lavery told us that at least three jurors resident in Tawa were empanelled. Mr Lavery did not know whether other jurors from Tawa were on the jury list or whether it included any, and if so how many, jurors of Maori descent. In those circumstances an endeavour by counsel to observe strictly the instructions received from his client would have prevented him from exercising the right of

peremptory challenge for any other purpose or in the fashion which he believed would most assist the defence, and this in order to meet concerns on the part of his client for which counsel might well have thought Mr Lavery had no firm basis in fact.

Counsel would, of course, have known that he had a maximum of six peremptory challenges. He would also have known, whereas the appellant, who told us he had no experience of criminal jury trials, would not have known, that an endeavour to ensure that both classes of persons indicated were kept off the jury might fail both because of the likelihood that more than six of the persons on the list were in one or other category, and because the particulars appearing on the list might be inadequate to identify them. Counsel would also have known that such an endeavour would necessarily prevent the exclusion of jurors in respect of whom more cogent reasons might appear for concern that their presence on the jury would not be to the accused's advantage.

It would no doubt have been better if counsel had explained to the appellant at the time his view about the request he had received: but there may have been very little opportunity to do that.

More importantly, the duty of counsel in relation to advice received from his client as to the mode of conduct of the trial must depend upon the terms of the instructions received, and whether these made it clear that they were not simply expressing a client's views on a particular matter but were intended to be directions which should be observed and implemented by counsel, whether or not that would redound to the client's advantage. We would have difficulty regarding the advice received by counsel from his client in this case, as it has been related to us, as coming within the latter category.

Further, we cannot construe counsel's failure to accept his client's request as action which was likely to have redounded to the appellant's overall disadvantage. It would have been a very different matter had there been any evidence that a juror within either class nominated by the client who had been allowed to take his or her place on the jury was in fact biased, or even likely to be biased, against the appellant's interest. The position is, however, that Mr Lavery has no grounds at all for asserting actual bias. In that respect the case is no different from that generally encountered in the smaller provincial courts, where it is to be expected that some members of the jury would have some knowledge either of the parties or of some witness in the action. That cannot be a

sufficient basis on which to ask the Court to find a likelihood that a miscarriage of justice has occurred.

2. Counsel failed to make plain the appellant's contention that the claim for the return of the van was initiated by Ms Love for the purpose of aiding her in the parties' on-going domestic and custody disputes.

The case on appeal discloses that in fact that issue first arose in the trial during the cross-examination of Ms Love. Page 14 of the case records an objection by the prosecution to the investigation of the disputes between Mr Lavery and Ms Love, and the Court's ruling upon it, as follows:

> "OBJECTION (Ms Boon)
>
> With respect sir, the issue in this case is about Mr and Mrs McIver's property and I think my learned friend is perhaps labouring issues between Mr Lavery and Ms Love.
>
> THE COURT
>
> I think the jury is most interested in the van, and if the issues that you're exploring now impinge on the van in any way, that's fine. If they don't, then I think they should be -- I appreciate sometimes in disputes of this kind they can be wide ranging, but I really do want to have a limit so that unless and until the van is involved I think we leave things alone."

After that ruling had been made, defence counsel nevertheless endeavoured to examine the Love/Lavery disputes, and from them to consider a dispute over a television set which had been bought under hire purchase in the name of Mr Lavery but was intended to be for the use of the McIvers. As to this, defence counsel made the point that the allegation of theft of the van had been made by the McIvers on the day the television set was removed from their possession. That led to a further objection by the Crown and a further ruling by the Judge, again seeking to restrict the enquiry to issues relating to the van.

Then during the appellant's evidence-in-chief (at p46 of the case), when Mr Lavery sought to discuss the disputes between himself and Ms Love, there was an interjection from the Bench asking defence counsel to note "that this is not the Family Court".

The Judge's first ruling on this topic recognised appropriately that, while the disputes between Mr Lavery and Ms Love could in some respects be relevant to the issues before the jury, they could only be so if a connection were established. As he put it, "the jury is most interested in the van ... unless and until the van is involved I think we leave things alone".

This ruling having been given early in the trial, and repeated on two subsequent occasions when defence counsel or the accused himself revisited the topic of the domestic disputes, we do not believe counsel can be open to serious criticism for failing to pursue those topics further. Further, we would agree with defence counsel's view that there would have been dangers to the appellant in any more extensive examination of them.

3. Counsel failed to cross-examine about numbers of specified matters. There were, in particular, complaints of failure to cross-examine about Ms Love's retention of the car seat, about the generosity of the McIvers towards their children and their church, and about the option of referring the dispute to the Disputes Tribunal.

As to the first and second of those matters, counsel's affidavit acknowledges that it was initially suggested that these should be investigated in cross-examination. However he asserts that after discussion, during which he questioned the wisdom of such action, the suggestions were not repeated. As to the third topic, counsel asserts correctly that when he sought to investigate this topic the Judge ruled (at p43 of the case) that it was irrelevant to the issues the jury would have to decide. It follows that on this topic also counsel cannot be criticised for failure to pursue it further.

Other complaints of limited cross-examination come hard up against differences between counsel and the appellant as to the nature of the instructions given to counsel. This Court cannot determine those conflicts on the papers. In any event there is nothing on the papers which indicates to us that the investigation of the topics listed by the appellant would have borne one way or the other on the jury's determination of the central issues, let alone that the failure to examine those topics further gives ground for concern that there may have been a miscarriage of justice.

4. Counsel failed to call witnesses whom the appellant had asked be called in his defence.

On this point the appellant obtained and filed affidavits from one of his brothers, from a police officer not engaged in the case setting out his opinion that the dispute was essentially a domestic dispute which "could have been dealt with in another way", and from a sister of the appellant as to discussions she had with the appellant, with Ms Love, and with Mr McIver.

Once again, the affidavit of defence counsel challenged the appellant's contention that he had given instructions that the witnesses should all be called. More importantly, the affidavits now produced from the proposed witnesses do not in any instance set out material sufficiently cogent either to warrant admission as fresh evidence, according to the fresh evidence rules, or for believing that had such evidence been admitted, and much is plainly not admissible, it was likely to have led to a different result.

All in all, we do not believe that the way in which the defence was conducted by counsel can be said, to use the language of ***R v Pointon*** [1985] 1 NZLR 109, to have amounted to "radical mistakes" in the conduct of the defence.

Ground Three

The prosecution had misled the jury by stating that the certificate of ownership of the van remained in the McIvers' name.

At trial the original certificate of ownership of the van, which showed it as being registered in the name of Mrs McIver, was produced as an exhibit. In cross-examination the appellant was asked the question: "They [the McIvers] have never signed any change of ownership papers have they?" And replied: "Not that I know of".

On this topic defence counsel deposed that:

> "... the Appellant told me that he had obtained fresh ownership papers for the van. These were obtained on the 30th September 1994, one day after he was spoken to by the Police on 29th September 1994. He led me to believe that he had not obtained these legally. I did not think it would be helpful to my client's case to have the matter of the fresh ownership papers put before the jury."

When these matters were put to Mr Lavery yesterday he said that he did not challenge that the certificate which had been put before the Court was a valid document, but asserted that it was, in his view, lawful for him to obtain a duplicate certificate from the authorities, particularly as Mr McIver had told him that he did not know where the original certificate was. He said in those circumstances he had been able to persuade the authorities to record a transfer of the registration to himself without obtaining the signature of the previously registered owner as transferor.

In our view, counsel was fully justified in his view that it would not be helpful to the appellant's case to have the fact that he had obtained duplicate ownership papers immediately after he was spoken to by the police put before the jury. Indeed, the fact that the argument has been put before this Court has not assisted the appellant's claim that he had an honest belief that he was entitled to do what he did.

Ground Four

That the trial Judge in his summing up unduly emphasised the Crown case and failed to put the defence case adequately.

The crucial issue for determination by the jury was correctly identified by the Judge in his summing up as being whether or not Mr Lavery's claim to have honestly believed he was entitled to act as he did was credible. The Judge emphasised that this issue was to be determined by the jury looking "at it through Mr Lavery's eyes, not objectively by trying to consider whether a reasonable person would act as he acted".

The appellant, as was his right, elected to have the case against him determined by a jury of his fellow citizens. It was. The verdict shows that they disbelieved his claim of honest belief and that they accepted the contrary evidence of his former partner and her parents. That was a determination which the jury was fully entitled to make, and which this Court is neither entitled nor inclined to disturb.

The appeal is accordingly dismissed.