MEDIUM PRIORITY

IN THE COURT OF APPEAL OF NEW ZEALAND CA 153/95

THE QUEEN

v

BRYAN TEWAIRAWAHO PUI

Coram	**Eichelbaum CJ** **McKay J** **Thorp J**
Hearing	**22 February 1996**
Counsel	**P Eastwood for appellant** **J C Pike for Crown**
Judgment	**30 May 1996**

JUDGMENT OF THE COURT DELIVERED BY THORP J

Summary

The Court has dismissed an appeal against conviction for sexual violation by rape. The principal ground related to the prosecutor's cross-examination of the appellant on the contents of a statement made by the co-accused, which was not evidence against the appellant. Although disapproving of the manner of cross-examination the majority of the Court were satisfied that having regard to the Judge's directions to the jury, the latter would not have been left with any impression that what counsel put to the appellant in cross-examination was evidence against the appellant. Various other arguments were not upheld. The appeal against the sentence of eight years imprisonment has also been dismissed.

Background

On trial in the High Court the appellant was convicted of sexual violation by rape and sentenced to 8 years imprisonment. He appeals against conviction and sentence.

The appellant (aged 36) and the complainant (24) met for the first time at a party. According to her evidence, he engaged her in conversation, and persuaded her to go on to another party. She went in a car with the appellant and two others, the co-accused Newton Moki (aged 16) and his brother Roderick (15). According to the complainant, Newton drove. The car stopped at a riverbank where the appellant helped by Newton Moki overpowered the complainant. The appellant then raped her on the back seat of the car. The complainant made her way to the house of a friend who gave evidence of recent complaint. There was medical evidence consistent with forced intercourse. At the same trial Newton Moki was also convicted of rape, as a party.

The jury was shown video interviews with each of the accused. In his interview, the appellant gave an account denying that he had left the party with the complainant or been with her in the car. In his evidence at trial he accepted that much of what he had said in the interview was untruthful. His evidence was to the effect that it was the complainant's idea to go to another party, and that she had hopped into the car and the others had followed. At the riverbank the appellant had got out of the car a few seconds after it had stopped, gone around to the back of the car and sat on the boot. The two brothers then got out of the car and began fighting. After sometime the appellant decided to stop the fight. As he went to intervene he saw the complainant's legs sticking out of an open car door as if she were lying on its back seat. He told the brothers, who had stopped fighting of their own accord, that all four of them were proceeding on to the party, and they left the riverbank. At the scene he had not seen or heard any attack on the complainant and did not himself have any physical contact with her.

We deal in turn with the grounds on which the conviction appeal was presented.

1. The admission of the video interview of the appellant.

This was advanced on the basis that trial counsel should have objected to admission of this evidence. The appellant provided an affidavit, sworn the day before the hearing of the appeal, deposing (a) that he was not cautioned (b) he was told that if he went on camera he would be granted bail but if he did not, he would be locked up (c) that the detective (Mr Sheehan) said he just wanted to clear a few things up (d) that the complainant was not pressing charges (e) that the detective did not tell him that the video interview may be used in evidence. With reference to the last, the appellant further deposed that had he been told this he would have strongly objected to the interview being videotaped. On a perusal of the transcript of the interview it is plain that the assertions in (a) (d) and (e) are false, and (c) is improbable, given that the interview took nearly two hours (the transcript runs to 60 pages) without the appellant, a mature person with sufficient experience of the criminal justice system, not protesting at any stage that he had been misled or wished to stop the interview. Against this background one cannot have any great faith in the assertion under (b) especially measured against the affidavit of trial counsel, sworn last August, in which he said that he had not been instructed that the appellant had been unfairly coerced or cajoled into appearing on video. Counsel further deposed that having viewed the video prior to trial he did not consider there was any basis for challenging the admissibility of the interview, whether under the Judges' Rules, the Bill of Rights or otherwise. Against this background we are unable to uphold this ground.

2. Video interview of co-accused Newton Moki.

The contents of this interview were damaging in that basically Newton Moki's account supported the complainant's version of the appellant's conduct. The Judge gave standard directions to the effect that the interview was not evidence against the appellant. On a pre-trial application counsel for Moki argued unsuccessfully on various grounds that the evidence of the interview should be excluded. There is no tenable basis for arguing that counsel for the present appellant should or could have done anything more in this respect.

3. Failure to request severance

The prosecution case was that the rape was a joint enterprise between the two accused. There is no likelihood that severance would have been granted.

4. Evidence of Roderick Moki

The depositions did not include any statement by Roderick Moki, but the Crown subsequently provided a brief of his evidence which broadly supported the complainant, and implicated both accused. He did not appear at the trial, and the Crown applied for an adjournment so that he could be located. Trial counsel deposed that the appellant, who immediately prior to the trial was in custody, instructed him to oppose the application. In the circumstances we cannot give credence to the submission now made that he should have taken the opposite course.

5. Use of the Newton Moki interview in cross-examination

The appellant's complaint on this head was that, as Newton Moki's statement in his interview by the police was not evidence against the appellant, his counsel should have objected to the prosecutor's references to those statements in his cross-examination of the appellant, "and so should the Trial Judge".

We record that at the conclusion of the hearing of the appeal, we gave leave to the Crown to file a memorandum of further submissions on this issue, and to counsel for the appellant to file a memorandum in reply. We have received and considered the memoranda filed. The appellant's memorandum sought to go into other matters as well, including the question of Roderick Moki's evidence, and in this last respect counsel put before us a transcript of a videotaped interview conducted with that person. We do not accept that there is any case for extending the scope of the supplementary argument beyond that indicated at the time of hearing.

The complaint necessitates further examination of the course of the trial and, most particularly the appellant's cross-examination both by counsel for Newton Moki and by the prosecutor.

The first relevant event occurred at the end of the Crown opening. In opening the prosecutor had read to the jury an extract from the Newton Moki interview which included material inculpatory of the appellant. At the end of the opening, the Judge interrupted proceedings to give the jury the following direction:

> "Madam Foreman, members of the jury...
>
> I will in due course be directing you on all matters of law but I think it is necessary before we embark on the evidence now just to draw to your attention one of those matters at this stage. That arises from Mr McDonald's reference and reading to you of an extract from the Police interview with Newton Moki.
>
> As I will be telling you later, it will be your duty to deal with each of these two accused persons separately and it is part of that rule of law that the evidence as to what Newton Moki told the Police is not, and I repeat *not,* evidence which you can use when you come to consider Mr Pui's case. It is relevant only to Newton Moki's own case and nothing else. I will be repeating that later to you and dealing with it in a little more detail but I simply ask you to keep that in mind."

At the conclusion of the Crown case the appellant, as the first-named accused, was the first to be invited to elect whether or not he would call evidence. He elected to do so and gave evidence on his own behalf. In examination-in-chief he acknowledged that his denials to police at interview that he had driven the car to the riverbank were a lie. He explained his denials as resulting from his "freaking out" and still being "half stoned".

He was then cross-examined by counsel for Newton Moki. At Case p 67, lines 17-32 counsel put to the appellant a number of statements made by Newton Moki in that interview which clearly inculpated the appellant and then asked him:

> "What do you have to say about all that?... Well as far as I'm concerned he'd have been lying, the same as I was, to Detective SHEEHAN and he probably would have been freaking-out in the same way I was.
> Are you saying that he made all that up?... Yes, because I didn't say any of that to him."

Shortly after that at Case p 67 line 37 the cross-examination continued:

"You heard Miss Matthews' evidence where she said to the effect that NEWTON came up to her and said he was sorry?... She must have been bullshitting.
And you heard NEWTON say that on the tape. Is he bullshitting too?... Yes
Mr PUI, do you say that everything that Newton told us today on the tape is a lie?... Most of it is a lie.
Well, the fact that you, Newton, Roddy and Miss Matthews were in the car is not a lie, is it?... No.
The fact that he drove down there is not a lie is it?... No.
And the fact that the two boys, RODDY and NEWTON were fighting, that's correct, isn't it?... Yes.
And the lie is that you said to him "She wants it. She [w]ants it"?... I didn't say that, sorry.
That's a lie?... Yes.
And you said to him "Grab hold of her. Grab her!"?... I didn't say that, that's a lie.
And when he says he saw you on top of you, that's a lie?... Yeah, that's a lie.
And you spent the majority of your time down there sitting on the boot of the car with your back to everyone?... Yes."

The appellant was then cross-examined by the prosecutor. The first six pages of his cross-examination show the prosecutor emphasising the extent of the untruths in the appellant's statement to the police and do not call for further comment. At Case p 74 the prosecutor made brief reference to an allegation by Newton Moki that he had been directed by the appellant to drive to the riverbank, and asked whether the appellant was saying that Moki was a liar.

Then at Case p 76, after eliciting from the appellant that his position was that the complainant had "made it all up", the prosecutor proceeded to make repeated references to a transcript of Newton Moki's interview which he must have been holding in his hand. The relevant passage reads:

"Are you telling this jury she has made all that up?... yes, I'm saying she's made it up.
And that Mr NEWTON MOKI has made it all up, when he says that is what you did?... He didn't say anything like that.
'She wants it. She wants it'. That's all she was saying to me.
What else did he say to you 'Go get it'. Yeah. I went over and grabbed her Bogie [the appellant] came over'. Nowhere were you... (reads from transcript of NEWTON MOKI's interview) 'I jumped in the car and talked to her. Bogie... (reads) ... and pulled her pants off'?... I did not.
'Bogie pulled her pants off... (reads) slowly opened her legs up'?... I did not.
'Took her pants off, hopped on top of her'?... I didn't do any of that. THAT'S A LOT OF RUBBISH!
When you've finished, he says, in answer to Detective Sheehan's question 'Did he mention anything about shooting the girl?... (reads)... Where's the gun. Where's the gun. Shall we kill her in the river'... No I DIDN'T. No I DIDN'T.
'Why did he say that? Because she was screaming?... She wasn't screaming.
And he says the only reason he held her down was because you were standing over him?... No I wasn't.

> That's why I put it to you, Mr Pui, that YOU are saying that NEWTON MOKI is also lying?... He is lying when he said that.
> To a large extent, Ms Matthews' story as to what happened, what you did, raped her... I DID NOT RAPE HER.
> And what Mr NEWTON MOKI says, you raped her, are the same?... I do not care what they've said. I DID NOT RAPE HER!
> You must have thought about this, Mr Pui. Ms Matthews, the minute she gets out of the car goes down 80 or 90 metres to her friends' place and cries 'RAPE'?... I don't know what she says or where she went to.
> So she's lying too is she?... I don't know where she went to.
> Mr NEWTON MOKI is interviewed at 10.24. 12 hours after these events. If your version is correct, Mr Pui, somewhere in that 12 hours Miss Matthews and he have got together to make this up so it fits?... I don't know that.
> You've never thought of that! You see, the versions fit like that (demonstrates) to that extent. That you raped this girl?... I DID NOT RAPE HER.
> Well if you're right... I AM RIGHT.
> they must have got together and made this up against you?... I am right."

Newton Moki elected not to give evidence.

During his summing up the Judge twice directed the jury that in considering the position of the appellant they must disregard what was said by Newton Moki in his interview by the police -

> "it is of no help to you in deciding whether or not Mr Pui committed the rape of the girl - put it to one side."

There was no specific reference in the summing up to the cross-examination of the appellant, either by counsel for Newton Moki or by the prosecutor.

Although no complaint was made of the cross-examination of the appellant by counsel for his co-accused, Newton Moki, it is necessary to consider whether complaint could have been made about the cross-examination, for it first put before the jury the extent of the appellant's acceptance or non-acceptance of Newton Moki's statements to the police.

In our view, counsel for Moki was entitled to cross-examine the appellant for the purposes:

(1) of seeking his acceptance of Moki's statements and thereby giving them evidentiary status; and

(2) of indicating Moki's objection to contrary evidence given by the appellant, as unless this were done Moki would have been open to criticism in the event that he later elected to give evidence, at that time still an open question, and in the process contradicted the appellant's evidence; or

(3) of shifting responsibility from Moki onto the appellant, and for that purpose attacking the appellant's credibility.

While there is room for criticism of the manner and extent of the cross-examination of the appellant by Moki's counsel, any such criticism can only be minor, and, not such as would have called for intervention by the Court.

It follows that, before any cross-examination by the prosecutor had taken place -

(a) Moki's statement to the police was properly before the jury as part of the evidence against Moki; and

(b) the extent of the appellant's acceptance or rejection of Moki's version of events was also before the jury as an incident of the cross-examination by Moki's counsel.

It is against that background that the prosecutor's cross-examination of the appellant has to be assessed.

We believe it would have been proper for the prosecutor to cross-examine the appellant for the purposes:

(1) of getting acknowledgement or adoption by the appellant of Moki's statements, which would of course have converted them into evidence admissible against the appellant; or

(2) failing that, of getting the appellant's rejection of the Moki position, either to use the appellant against Moki or so far as the inquiry and contradiction would bear on his credibility;

provided his cross-examination observed the rules which govern the limits of cross-examination.

It is plain enough that a person solely accused cannot be cross-examined about the contents of statements made by a third party who is not giving evidence. That point was recently re-stated in this Court in *R v Lintott* (CA 168/95, decision 25.9.95) in which the prosecutor in cross-examination of the appellant had asked a series of questions which indicated that a man called Miller had informed the police of matters prejudicial to the events. Miller was not called as a witness. At pp 11-12 of its judgment the Court said:

> "Questioning in this form, suggesting as it does to the jury that there is a witness available to give such evidence, is inappropriate and should not be allowed. It is a breach of the procedural note on use of hypothetical questions in cross-examination **[1985] 1 NZLR 386.** Reference may also be made to **Archbold, Criminal Pleading Evidence and Practice 1995 reissue Volume I 8-101.**
>
> The resulting position is similar to what occurred in **R v Halligan [1973] 2 NZLR 158** where the accused had been charged with indecent assaults on two young girls. The younger of the complainants failed to give evidence in detail of all the events which had allegedly taken place. This material however was placed before the jury in the form of questions which had been asked by the Detective of the accused during interview. The Court said (161) that the child's evidence should not be reinforced by a side-wind introducing supporting material from an inadmissible source."

It is, however, an inevitable concomitant of a multi-accused trial in which evidence adduced from individual accused in cross-examination is available as evidence against their co-accused and in the circumstance that such trials may become as much a contest between accused as between the Crown and individual accused, that the limits of cross-examination may be more extensive than is the case in separate trials.

The topic was considered by the Court of Criminal Appeal in *R v Rice* [1963] 1 QB 857. R and H were charged with conspiracy. Statements by H to the police which implicated R had been ruled inadmissible or were *prima facie* questionable. In his cross-examination of H the prosecutor, after obtaining H's agreement that one of his statement was voluntary, then put to him a series of leading questions based on the allegations in that statement which were prejudicial to R. R appealed on the ground that the Crown's use of H's statement was improper. At p 868 the Court said:

> "The decision in *Rex v Treacy* in no way supports any contention that the fact that a voluntary statement has been made cannot or should not be established or revealed in a cross-examination of its maker : on the contrary such a statement made by one of several co-defendants can undoubtedly be used by the Crown in cross-examining him as a tool to extract from him in the form of evidence upon oath all that he has formerly said against any co-defendant. On the other hand, while information derived from an induced statement may be used, the fact that it was provided in a statement may not be revealed to the jury, since evidence of, or revelation of that fact tends in common sense to lend weight to the subsequent evidence and is excluded,..."

Probably the strongest support for the appellant comes from *R v Windass* (1989) 89 Cr App R 258. W and his co-accused F were charged with conspiracy to steal. Entries in F's diary were inculpatory both of her and of W. The prosecutor somehow arranged that the jury had copies of the relevant portions of F's diary in their hands, and then with one copy in his hands asked W

> "to explain, almost sentence by sentence, the highly damaging statements, inadmissible against him, which the maker of the document had written". (p 263)

The Court held:

(1) that it was improper to ask a witness what a third person meant by statements made by that third person; and

(2) that while the prosecutor was entitled to ask W questions relating to the matters alleged by F, he was not entitled to link those questions with F's diary, which was a document inadmissible against him.

We have already held that the prosecutor was entitled to cross-examine for the purposes of getting the appellant's acknowledgment, adoption or rejection of Moki's statement, but believe there is merit in the complaint about the manner in which the cross-examination was conducted and that this was in breach of the principles of *Halligan* and *Windass*.

The result of the cross-examination was to obtain from the appellant

(i) a series of unequivocal denials of all the allegations made against him by Moki and

(ii) the appellant's opinion that Moki had made those statements because, like the appellant, he had at the time been "freaked out".

We do not in any way support the manner in which the prosecutor's cross-examination was conducted, or its repeated references to particular passages read out from the transcript of Moki's interview.

Had M's statements and the matter of the appellant's acceptance or rejection of those statements not already been before the jury the prosecutor's manner of cross-examination would have compelled consideration of a mis-trial. But that was not the situation; and it would be artificial and unrealistic to assess the significance of his cross-examination as if it had introduced those matters to the jury.

In the end, we believe the essential question has to be whether the jury may, because of the manner of the prosecutor's cross-examination, have been left with the impression that what he put to the appellant from Moki's statement was evidence against the appellant. On that point the order of relevant events was:

(i) the prosecutor read out part of Moki's statement in his opening, that material, of course, being evidence available against Moki;

(ii) because that material was not only inculpatory of Moki but of the appellant the Judge then intervened and made plain to the jury that that material was "not and I repeat not, evidence which you can use when come to consider Mr Pui's case. It is relevant only to Newton Moki's own case and nothing else":

(iii) counsel for Moki cross-examined the appellant about his acceptance or non-acceptance of Moki's statement;

(iv) the prosecutor cross-examined the appellant on the same topic; and

(v) the jury was told twice during the summing up that Moki's statements had no evidentiary standing against the appellant.

This was not such a case as *R v Treacy* (1944) 30 Cr App R 93 where counsel was endeavouring to get evidence which had been ruled inadmissible in by a side-wind. Nor was it like *R v Cross* (1990) 91 Cr App R 115 or *Lintott* in both of which counsel's conduct suggested that a witness was available who would contradict the appellant's account when that was not the case. The jury here was aware that Moki's statement were not evidence against the appellant and that he, Moki, was not giving evidence.

In *R v Rice* at p 869 the Court, having noted that the material in the challenged statement had first been revealed by cross-examination by co-defendant said -

> "It is possible that in some hypothetical future case where the circumstances are different a similar objection might prevail";

but concluded that in the case before it

> "no injustice or unfair effect (had) resulted from the adoption of an abnormal or by no means universally desirable procedure of presentation".

Having regard to the history of events set out earlier, the majority of the Court do not believe that the jury would have been left with an impression that Moki Newton's statements were available as evidence against the appellant, and consider that the reasoning which in *Rice* led the Court to dismiss the appeal, notwithstanding its disapproval of the mode of cross-examination, is equally applicable to this case.

The third member of the Court is of the view that in the absence of any explanation of the scope of the permissible effect of the Crown's cross-examination, the jury must have been left in doubt how to reconcile the Judge's direction that Moki's statement was not evidence against the appellant, with the vigorous use made by the prosecutor, without objection, of Moki's version of events. In the absence of sufficient directions he would regard what occurred as a material irregularity.

In accordance with the majority view this ground of appeal fails also, with the result that the appeal against conviction is dismissed.

The Appeal Against Sentence

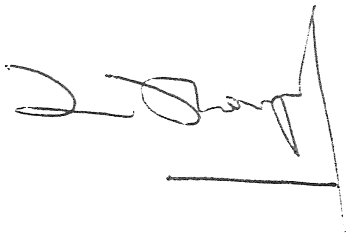
The appeal against sentence is totally without merit.

The Judge was entitled to sentence the appellant, as he did, on the factual basis that he was the person who had committed the rape, with the much younger Newton Moki assisting at the appellant's instigation. There is certainly no ground for complaint about the Judge's treatment of the appellant's criminal history, which included two convictions for sexual assault, as merely "precluding any question of leniency being extended to you on this occasion".

In those circumstances, the sentence of eight years imprisonment was, if anything, lenient.

The appeal against sentence is also dismissed.

We record that although Thorp J retired on 3 May 1996, his participation in the delivery of this judgment is authorised by Section 25A of the Acts Interpretation Act 1924.



Solicitors
Crown Law Office, Wellington