NZLR

NOT RECOMMENDED

IN THE COURT OF APPEAL OF NEW ZEALAND CA 231/98

THE QUEEN

v

ROGER JEAKINGS

Coram: Gault J
Robertson J
Laurenson J

Hearing: 30 November 1998 at Auckland

Counsel: W Scotter for Appellant
A Perkins for the Crown

Judgment: 30 November 1998

JUDGMENT OF THE COURT DELIVERED BY ROBERTSON J

The appellant stood trial in the District Court at Hamilton on one count of attempted rape and eight counts of indecent assault. The jury found him guilty of the attempted rape charge and five of the counts of indecent assault. He had been discharged on one count during the course of the trial and the jury returned verdicts of not guilty on the other two.

The complainant in this case was his younger daughter.

The appellant was born in 1934, married in 1960 and there were two children, one born in 1965 and the complainant in 1969.

Some of the charges related to a period when the family lived in New Plymouth up until 1978 and others from 1979 onwards when the family lived in Hamilton.

The appellant and his wife separated on 5 December 1996. The complainant went to the Police the following day.

Mr Jeakings was arrested in July 1997 having been spoken to by a Police Constable and emphatically denying any inappropriate sexual activity with his daughter. At the initial interview he was asked why his daughter would make allegations like this and he said :

> "16-17 years [the complainant] was, I put my foot down [my wife] was giving her money and other things we couldn't afford it. I distanced myself from her at the time [the complainant] would have made the complaint when [my wife] and I split."

At trial Mr Jeakings gave evidence. He again categorically denied any of the allegations made against him. He noted that the relationship between himself and his daughter had deteriorated markedly when she became pregnant and the appellant was unwilling to support her. He alleged that his daughter later had misappropriated family funds by the unauthorised use of her mother's cheque book and credit card and as a result the appellant had had the locks on the family home changed so as to prevent the complainant from having free access to the house. He said there had been virtually no contact between that daughter and himself for some four years prior to the separation from his wife, although his wife continued to maintain contact.

Evidence was also given for the defence by the elder sister of the complainant which confirmed the difficult relationship. The appellant's wife was living with this daughter. The elder daughter was supportive of her father's denial of any inappropriate behaviour.

The appeal was advanced on the basis that there had been a miscarriage of justice arising from four identified matters :

1. The failure of trial counsel to conduct the appellant's case according to the appellant's express instructions.

2. The failure of trial counsel to address the jury clearly and to the appellant's best advantage in his closing address.

3. The trial Judge's direction to the jury on the question of credibility of witnesses and a disproportionately long summary by the Judge of Crown counsel's closing address.

4. The Judge's failure to discharge the jury or send them to a hotel for the night prior to midnight on the final day of the trial when they were deliberating.

Trial counsel's failure to carry out instructions

This aspect of the appeal was advanced on two grounds :

(i) A failure to cross-examine specifically on the appellant's belief that the complainant had gone to the Police in order to win her mother's sympathy at the time that the mother had gone to live with her elder sister in Australia.

(ii) Trial counsel's failure to put to the complainant the fact that many of her accusations had marked similarities to passages in a book entitled "The Courage to Heal" which the appellant believed was the inspiration for her allegations,

Trial counsel swore an affidavit on 20 November in which he admits that he was specifically instructed to put the separation to the complainant as the reason for her allegations and that he forgot to do so.

Notwithstanding this revelation it is impossible to read the transcript of the trial without the clearest perception emerging that the appellant was contending that the case was about false allegations made up by her as a result of resentment and animosity which had built up over a number of years. This is particularly apparent from the thrust of trial counsel's address to the jury and there was substantial material in the transcript of evidence which enabled such submissions to be made.

As Mr Perkins properly notes, there was uncontroverted evidence however which was not consistent with that approach. Although at first blush it appeared that there was a degree of coincidence between the date of the parent's separation and the date of the complaint being made, the evidence was that there was no contact between the complainant and her mother for four months after that and the complainant did not know of her parent's separation at the time she made the complaint.

Further, there is evidence from the complainant's husband that early in their relationship he had been told that she had been molested by her father when she was a girl. There was also evidence from the complainant's elder sister which suggests

complaint having been made well before the separation of the parents, by the complainant.

The second issue related to the failure to refer the complainant to passages from this book. Trial counsel confirmed that the appellant had given him the book but as there was no evidence to suggest that the complainant had read the book (which would be the only basis upon which it would have probative value) trial counsel had concluded that it was not prudent to raise this issue and cross-examine on a point in which there was no certainty as to the answers he would receive. Counsel's evidence was that having discussed that concern with the appellant the appellant accepted his advice. That must be conclusive on this point.

In respect of both of these aspects the decision of this Court ***R v Pointon*** [1985] 1 NZLR 109 is the starting point. Mr Scotter also referred to more recent decisions including ***R v M*** (CA 291/92, 26 May 1993).

Although the Court will not speculate as to the outcome of such questioning the fundamental issue is whether there is an error which on an objective analysis could have had a significant effect on the trial. Even without the appellant's specific consent, counsel's decision not to cross-examine on the book was undoubtedly a matter within the discretion of competent and responsible counsel in these circumstances. Any discussion about such a book was thwart with difficulty and the real potential for serious detriment to the appellant's position. The issue of false complaint and possible reasons for it was extensively explored at trial. We find no miscarriage of justice having arisen from this issue.

Failure to address the jury clearly

Mr Scotter submitted that there were two aspects to this head of the appeal - one specific and one general. The specific arose from the failure to deal with the matters raised under the first heading. However on a careful analysis of the entire transcript it is clear that relevant matters were ventilated and adequately presented for consideration by the jury.

Regrettably this is one of those many cases which degenerate into the unproductive argument as to why a person would make an allegation if it were untrue. Bearing in mind the onus of proof and standard of proof a preferable approach would be to begin with the consistent denial which has been made by the appellant and advise

the jury that they could only convict if they were sure that such denial could not reasonably be true. If they reached that point they must still turn to the evidence of the complainant (and anything which supports it) to determine whether that was sufficient to provide proof beyond reasonable doubt the essential ingredients of each count in the indictment. We are satisfied that the issues which were accordingly in contention were adequately placed before the jury and no specific complaint is sustainable.

The complaint of general failure is advanced upon the basis that the approach adopted by trial counsel, neither as to structure or context, was consistent with the approach which is suggested as being good technique in standard trial advocacy handbooks. Advocacy is an art. Counsel must always tailor their approach to the case and particularly their address to the jury to the circumstances of the case and the evidential issues which arise in it. In terms of the ***Pointon*** approach we reject the proposition that there was any fundamental failure by trial counsel to highlight the weaknesses and inadequacies of the Crown case or to indicate the factors in the defence case which should have persuaded the jury from being satisfied of essential ingredients to the requisite standard. It may well be that other counsel would have approached this case differently but there is nothing in this aspect of the appeal which would provide the foundation for the contention that there was a miscarriage of justice.

Unusually there was available for us a transcript of the address of defence counsel. Mr Scotter invited the Court to read and assess this in a general way to acquire an understanding of its thrust and import. We have done so and are not satisfied that it is so deficient or inappropriate as to have interfered with the appellant's right to be convicted only within a fair and just trial process. It is always incumbent on counsel for an appellant who challenge the integrity of any facet of a trial to provide demonstrable and palpable supporting material and that has not been done here.

The Judge's summing up

Under this heading it was contended that the Judge had summed up to the jury in a way which suggested that they should believe the complainant and disbelieve the appellant. The particular passage complained of is as follows :

> "You will, of course, be influenced by a witnesses demeanour, and the way that that witness gave evidence. You should allow for the fact, though, that some people speak better in public. Some people do not respond well to the pressure of the Court room. You should guard against the tendency to think that those that speak best, or are the most confident, or positive, are necessarily the most accurate or honest. Those who are retiring, who are shy, can sometimes be more honest than those who seem confident in a public place. The meek, the

> hesitant, those who admit some fallibility can also be accurate and honest, and I will remind you of those things."

Counsel before us submitted that the Judge was contrasting the appellant and probably the older daughter on the one hand with the complainant on the other and that the jury would have known that the Judge was referring to the complainant when he used the words "retiring, shy, meek and hesitant."

Counsel submitted that those words, particularly the word "meek" are too emotive. He submitted that they have sympathetic overtones (even biblical in the case of the word meek) and the jury could well have inferred from them that the Judge was encouraging them to believe the complainant rather than the appellant or the elder daughter.

Mr Scotter before us acknowledged this was not his strongest point. With respect to counsel we consider that this submission lacks balance and objectivity. The Judge clearly had an obligation to assist the jury in determining how they would assess the testimony of crucial witnesses. It is unduly sensitive to try to draw such conclusions from that passage.

The other aspect of this ground was that the Judge in summarising Crown counsel's closing address spoke for a period which is recorded at approximately 12 pages whereas his record of the defence case was just over 7 pages. We find such analysis an unhelpful exercise. If a Judge is going to provide a summation of what was said by each counsel that summation will depend in part on the length, nature and structure of what each counsel said.

It is not infrequent that good defence counsel will address on one critical issue for only a few minutes even after there has been a long, detailed and marathon address from the Crown. If that is what is in all the circumstances most likely to achieve an acquittal then it is not sensible to suggest that the Judge must pare down his summation of what the Crown said and pad out what the counsel for an accused has said to make

them of comparable length. It is not the length of what is said but the quality of it which will be the hallmark of its value.

The Judge had an obligation to ensure that the jury understood the critical points advanced on each side.

The summing up is a fair, adequate and objective summation of each point of view. Nothing material is pointed to as having been omitted or misunderstood and we find no substance in this point.

Length and circumstances of jury deliberation

The jury retired at 10.50 am on a Monday morning. During the afternoon they asked two questions which were briefly answered. At 8.25 pm in response to an indication that there was not unanimity they were given a conventional direction.

They returned shortly after midnight with verdicts.

It is submitted that the factors discussed by this Court in ***R v Sampson*** [1989] 2 NZLR 280 and especially ***R v Hapeta*** [1995] 1 NZLR 6 are apposite in the present case.

It is unhelpful if not misleading to try and draw simple comparisons from other cases. We were told that the jury room in this case was 19.576 metres square whereas that in ***Hapeta*** had been 16.5 square metres. In ***Hapeta*** there was evidence about the inadequacies of the air conditioning and the time factors were quite different.

The heart of the appellant's case is that there was "a real risk that the lateness of the hour might have driven jurors to come to a decision they might not otherwise have made so they could complete their job and get home."

We have had the benefit of a report from the trial Judge. Neither in that, nor in any other aspect of the case, is there any basis for concern about the effect on the jury of the time taken, the lateness of the hour or the nature of the jury room.

The jury received the direction from the Judge about difficulty in reaching verdicts at 8.30. At that stage they knew that they did not have to continue deliberating indefinitely.

Some Judges when giving the direction at 8.30 might have indicated that if the jury needed substantially more time they could retire overnight and return to their deliberations the following morning. Although midnight may have been near the outer limit of the period in which the Judge should have permitted the jury to continue deliberating (he was monitoring their progress), we are not satisfied on the totality of the material that any miscarriage of justice occurred. The length of time, the fact that it was becoming late and the fact that the jury room was marginally smaller than the standard discussed in evidence in ***Hapeta*** do not in and of themselves furnish sufficient reason. The jury having been advised at 8.30 of the possibility of being discharged it follows that they continued with their deliberation because they were making progress.

There was a subsidiary aspect of this point. In their communication to the Judge at 8.25 the jury have said :

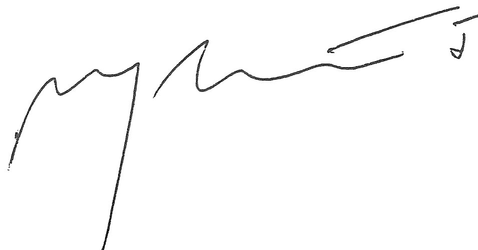
> "We have one group of people who have made firm decisions and are still open to discussion. One group of people who are undecided and still open to discussion. We need help."

It is submitted that this was an indication the jury was seeking something more specific than the Judge did, or could properly provide in the circumstances. With respect we do not see this form of communication as indicating that any different approach than normal was required. Juries not infrequently ask for help in this way and the Judge's response was appropriate.

Conclusion

We find no substance in the individual complaints nor do the cumulative effect of the various issues support any miscarriage of justice having occurred.

The appeal is accordingly dismissed.



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