NZLR

IN THE COURT OF APPEAL OF NEW ZEALAND CA 364/97

ORDER IN FORCE PROHIBITING PUBLICATION OF THE NAME OF THE PERSON DESCRIBED AS H AND ANY IDENTIFYING DETAILS

NOT RECOMMENDED

THE QUEEN

v

MARK DAVID JOYCE

Coram	Eichelbaum CJ Henry J Thomas J
Hearing	24 February 1998
Counsel	DSG Deacon for Appellant C L Mander for Crown
Judgment	24 February 1998

JUDGMENT OF THE COURT DELIVERED BY EICHELBAUM CJ

After a lengthy District Court jury trial the appellant was found guilty of assault and fined $500. He has appealed his conviction.

The offence took place at night in the Wellington Central Police Station, where the appellant was a constable. Another officer, H, had arrested the complainant, Harrison, for the theft of a jacket and taken him to an interview room while inquiries continued. Harrison, who had been drinking, was being abusive to various police officers. At his

request H took him to the toilets. As they returned, the appellant was walking down a corridor towards them. As they passed the appellant hit the complainant in the mouth. At trial the case for the appellant was that the complainant made a threatening move towards him, and that the appellant reacted by hitting the complainant in the mouth with his elbow, either by way of an unintentional reaction, or in self defence.

The appeal is on three grounds. First that the Judge misdirected the jury when he gave general directions in his summing-up on inconsistencies in oral evidence, second that he failed to direct the jury adequately on self-defence, and third that the verdict was unreasonable and could not be supported on the evidence.

Inconsistencies

Constable Morris gave important eye witness evidence for the prosecution. There was an inconsistency between her account and that of other witnesses regarding the direction of travel of the appellant and the complainant. According to Ms Morris the appellant was walking towards her while the complainant had his back to her, whereas the preponderance of evidence had it the other way around. In cross examination Constable Morris accepted that she had this back to front. The complaint focused on 2 sentences in the summing up but the relevant passage should be set out in full:

> When considering oral evidence you are entitled to take account what is being said and how it has been said. The assessment of witnesses is one of your most important tasks. You can take account of the impression given to you by a witness in judging whether you find his or her evidence truthful or reliable. Sometimes a witness, of course, can be truthful but might be considered unreliable because of circumstances affecting their evidence, conflicting statements, lapse of time, exaggeration, other reasons. Counsel have put before you various reasons why you should not accept evidence at face value and those are the kinds of things that logically you can take into account.
>
> In judging reliability of a witness you may look for other evidence particularly from an independent source which tends to support or contradict what the witness has said. You are allowed to consider whether you regard the testimony as plausible. Does it ring true, is it consistent with commonsense, is it consistent with other things that have been said. You are aware, and counsel have put it to you, that people do honestly register and recall different impressions about events that they have seen. You have, in this case, a vivid illustration of that and comparing the evidence of police officers who were present at the scene.

> Constable Morris agreed that she must have had the direction of travel, in her words, "arse about face" but she said that that was nevertheless how she recalled it. **You might find then that some inconsistencies or differences are not important and do not affect the truth of all the witnesses evidence. Other inconsistencies might seem to you to be material and it is for you to decide about that.** In the end you need only accept evidence against the accused which you think is the truth. If you are not satisfied about the truthfulness of certain evidence against accused then put that evidence aside.
>
> In this case, there are questions raised, in particular about the reliability of Constable Morris in relation to things that she alleges Mr Joyce said and the reliability of the evidence of Sergeant Sterling in relation to things that she alleged H said. I refer to the accused just by their surnames it is just more convenient. Those doubts are put in submissions before you, not on the basis necessarily that the witnesses are dishonest or untruthful but on the basis that the evidence, may be in your judgment, unreliable.
>
> The fact that they are police officers, of course, does not make them infallible because you need to consider your assessment of each witness generally and look at the circumstances in particular of those conversations when judging your reliability of the evidence. You can consider the context of the discussion, the significance of the subject manner. Decide whether you think there is any mistake or misunderstanding or not. Bear in mind the difficulties that most people have in repeating a conversation with any precision. The police officer, in that respect, is no different to anyone else. Just because a witness expresses certainty that does not mean that you have to accept his or her evidence. You can bear in mind also that witnesses may not have reliable recall of particular words but they may have a more reliable recall of the meaning and significance of what was said at the time.

In the appellant's submission the portion of the direction shown in bold belittled the significance of the error Constable Morris had made. Mr Deacon accepted that the Judge was using Constable Morris's position as an example of how inconsistencies could occur; but in his submission her evidence was so unreliable that it was inappropriate to associate it with any notion of mere inconsistency. However, we draw attention to the 2 sentences immediately following, where the Judge made it clear that if the jury was not satisfied about the truthfulness of any evidence, it should be put aside.

As always, criticism of a particular passage in a summing up has to be considered in the context in which that passage is set, and in the light of other relevant passages, and indeed the summing up as a whole. To enable the context to be seen fairly we have had to set out quite a lengthy extract. In addition, the Judge gave standard directions to the effect that the jury was solely responsible for deciding questions of fact, and to disregard any view the Judge might indicate on the evidence of any witness. In this setting the remarks under examination fell within the province of the type of guidance a Judge is

entitled to give; the directions on the subject did not contain any error of law, and overall were fair, balanced and thorough as indeed was the whole summing up. This ground fails.

Self-Defence

The appellant submitted that in dealing with self-defence, the Judge did not adequately direct the jury on mistaken belief. We set out the most relevant passages:

> The second [matter to decide] is, what were the circumstances as Joyce believed them to be? It is necessary to consider what he thought or what he believed about those circumstances. So you have been referred to his use of force report, his formal statement to Inspector Orr and his sworn evidence in court. Those are all statements that he made that touch upon the question of his belief, what went on in his own mind relating to the circumstances immediately before the encounter in the corridor. You can consider that evidence and any other evidence that is admissible against Joyce from which you can infer what he must have known or believed.

and:

> The question raised by the defence is to be disproved by the Crown, it is that Joyce perceived a sudden movement which made him sufficiently apprehensive of danger to raise his arm against Harrison and to contact or strike him. As his case has been put to you, the question to be disproved by the Crown is not whether Harrison really did lunge at Joyce or whether he, in fact, gave any sign of doing so but whether Joyce momentarily thought that Harrison lunged or made a sudden movement that impelled him on the spur of the moment to use force in self-defence.

We have emphasised the words and phrases most pertinent to this argument. Mr Deacon submitted that the Judge ought to have included a direction specifically dealing with the question of mistake. He referred to the model direction, approved by the English Judicial Studies Board, set out in the judgment of the Privy Council in *Beckford v R* [1988] AC 130, 145:

> "Whether the plea is self-defence or defence of another, if the defendant may have been labouring under a mistake as to the facts, he must be judged according to his mistaken belief of the facts: that is so whether the mistake was, on an objective view, a reasonable mistake or not." (145)

This model concisely explains the subjective element of self-defence; that it is the defendant's perception of the facts that counts, mistaken though it may be, and even if the mistake is an unreasonable one. However, as usual Judges are not restricted to a particular formula; the question is whether the concept was conveyed adequately. In this instance we have no doubt that it was. In the first of the extracts we have quoted, a succinct passage of 5 sentences, the Judge referred to the appellant's belief or state of mind on no fewer than 6 occasions. The second passage reinforced the message; the issue was not whether the complainant really lunged at the appellant, but whether the appellant thought he had. Absent actual use of the word "mistake" this made the point as clear as it could be. Finally, the topic was mentioned again at a later stage when the Judge was dealing with the appellant's case. Here he said:

> [Counsel] reminded you that the Crown must disprove the question that Joyce mistakenly acted in self-defence believing he was in some danger from Harrison. If you think it reasonably possible that Joyce had such a belief then it does not matter whether or not his belief was reasonable by objective judgment. It is a question of what he believed....

It is true of course that in general, where a particular direction is required it will not be sufficient for the Judge to convey this to the jury simply by referring to counsel's submissions. Here however the subject was a matter of law where the Judge repeated counsel's version of it, without any suggestion of disapproval, in terms which accurately conveyed the legal proposition. We add that the summing up nowhere suggested that the mistaken belief had to be a reasonable one. This point too is without merit.

Before leaving this issue we refer to Mr Mander's submission, in his written synopsis, that had the Judge framed his directions on the basis of a mistake by the appellant he would have been criticised for suggesting that the appellant was not to be believed when he said he thought he was about to be attacked. The appellant did not at any time concede that he had made a mistake in this respect. While as put the submission is sound, any risk of the kind envisaged can be avoided if the Judge takes care to present "mistake" as an alternative thesis to the defendant's primary stance.

Unreasonable Verdict

The appellant submitted that, having regard to the totality of the admissible evidence against the appellant, the verdict of the jury could not be supported. In oral submissions Mr Deacon stressed the position of the injury, ie. to the left of the lower lip. At the relevant moment the appellant was on the complainant's right. However, it seems to us that a relatively small movement of the complainant's head in the appellant's direction could have accounted for the result. Mr Deacon further argued that while speaking literally there was some evidence to support the verdict, in its totality the prosecution case was such that a reasonable jury must have entertained a doubt. Neither accident nor self defence could be regarded as negated.

We are unable to accept the argument. Although the critical witnesses, namely Harrison and Constable Morris, were well cross examined, and shown to be mistaken or wrong on some aspects, the jury was entitled to accept their version of the essential part of the events, in particular that the complainant did not make any movement towards the appellant. Coupled with the evidence of some incriminatory remarks made by the appellant, which the jury likewise was entitled to accept, there was a sufficient basis for the jury to be satisfied beyond reasonable doubt that the possibility of an unintentional reaction was excluded, and that the appellant's assertion of thinking the complainant was about to attack him was incapable of belief.

In the course of this part of his argument Mr Deacon referred to what he described as the potent inadmissible evidence against the appellant, comprising statements by the co-accused H. It should be recorded that a pre-trial application for severance based on this ground was dismissed, a decision with which this Court declined to interfere on appeal. Mr Deacon submitted that the Judge's directions on the point did not go far enough. Again, we have to disagree. On two occasions the Judge directed the jury when the topic arose during evidence, and he dealt with it again in summing up, in full and adequate terms.

Notwithstanding some weaknesses, a reading of the case against the appellant as a whole leaves an impression of quite a strong body of evidence pointing to guilt. We do not find the verdict surprising.

All the points taken having failed the appeal is dismissed.

CJ

Solicitors
Tannahills, Wellington for appellant
Crown Solicitor, Wellington