

[2] Mr Ghotbi appeals against his conviction on the ground that he suffered a miscarriage of justice resulting from the refusal of his trial counsel, Rodney Hooker and Michelle Clark, to follow his instructions that he wished to give evidence in his defence.

[3] Mr Ghotbi also filed an appeal against sentence. However, Mr Mansfield did not pursue that appeal in submissions or argument and we are satisfied that the sentence was well within range.

Background

[4] In view of the confined nature of the issue arising on appeal we need only to provide a summary of the Crown case against Mr Ghotbi.

[5] The charges arise from events which occurred in late July 2009. Mr Ghotbi was then aged 22 years and studying at Auckland University of Technology. He is of Iraqi descent. He had arrived in New Zealand with his family as a refugee when he was 17 years old. He describes himself as a devout Muslim who does not consume alcohol or drugs because of his commitment to his faith. He was living with his parents and one sibling on the North Shore.

[6] The complainant, B, was then a school girl aged 15 years. She lived near Manurewa in South Auckland. She had travelled into the city one Saturday evening with a group of friends. She planned to attend a birthday party. But she was barred from entry because she was under age. She then caught a taxi home. However, she left the taxi at the intersection of Queen Street and Karangahape Road. She had only travelled a short distance. She had run out of cell phone credit and had insufficient funds to meet an estimated fare of \$100.

[7] B's version of what followed is that she encountered Mr Ghotbi, who was sitting in his father's car in Liverpool Street, just off Karangahape Road. That area of the city is reputed to be frequented by prostitutes and their clientele. Mr Ghotbi was accompanied by a prostitute whom he had arranged to meet. After a brief discussion with Mr Ghotbi and the other woman, B got into the car on the

understanding that he would drive her home. Instead he drove the vehicle elsewhere. At some stage the other woman, who was seated in the front passenger side, left the car.

[8] B was originally seated in the back of the car. She moved to the front passenger seat in response to threats from Mr Ghotbi. He drove her towards Manurewa down the southern motorway. During the journey Mr Ghotbi started to touch B's leg. His contact progressed against her resistance to pulling her underwear and then digitally penetrating her vagina on a number of occasions. He also exposed his penis and again against her resistance forced her to hold it. She was unable to leave the vehicle at any point.

[9] Eventually B directed Mr Ghotbi to a house near where she lived. She knew a party was being held there. She suggested that they both attend as a pretence for going to the address. Once Mr Ghotbi stopped the vehicle B was able to escape. She fell while running away and cut her knee. She made contact with friends who observed that she was in a distraught state.

[10] Mr Ghotbi was later apprehended. He made a statement to the police which Mr Mansfield describes as confused. He did, however, admit sexual activity with B of the nature she alleged but asserted it was consensual. He said that he had agreed to her request made at Liverpool Street to drive her to the party in exchange for an offer to provide sexual services.

District Court

[11] Mr Hooker and Ms Clark were assigned as Mr Ghotbi's counsel on legal aid. Ms Clark appeared for him in the District Court when he was first charged and remanded in custody. He was released on bail in early August 2009 following an application by Ms Clark.

[12] Mr Hooker and Ms Clark conferred frequently with Mr Ghotbi in the period leading up to trial on 8 March 2011. Ms Clark attended to interlocutory and other Court appearances. Mr Hooker was primarily responsible for briefing Mr Ghotbi's

evidence, explaining the trial process, advising him on pleas and preparing his defence. On 4 March 2011, just before the trial opened, Mr Ghotbi provided Ms Clark with his written narrative of events. English is not of course his first language. But his statement was expressed in reasonably articulate and direct terms. We shall return to this document.

[13] B was the principal Crown witness at trial. A number of other witnesses were called. At the conclusion of the Crown case Mr Hooker or Ms Clark advised the Court that Mr Ghotbi would call evidence from two witnesses. Briefs from both were read by consent.

Appeal

[14] As indicated, the issue is narrow. Mr Ghotbi says that throughout the period leading up to and during the trial his instructions to Mr Hooker and Ms Clark remained constant – that he wanted to give evidence in his defence. He says, however, that his counsel failed to follow his instructions. Without consultation they did not allow him an opportunity to go into the witness box. They unilaterally prevented him from giving his exculpatory side of the story. He says that a miscarriage of justice has resulted. He filed an extensive affidavit in support; his sister, Mariam Ghotbi, also swore an affidavit.

[15] Mr Ghotbi participated in the hearing before us by video link from Spring Hill Prison. Ms Preston cross-examined him at some length. Initially he was assisted by a Farsi interpreter. But it soon became apparent that he was able to comprehend and answer questions in English. Where necessary, he called on the Farsi interpreter for assistance.

[16] Mr Hooker and Ms Clark deny Mr Ghotbi's allegation. While Mr Hooker accepts that he consistently advised Mr Ghotbi against giving evidence, he says that he left the final decision to his client. Both counsel say they met with Mr Ghotbi for this specific purpose at the end of the Crown case; and that after listening to their advice Mr Ghotbi instructed them that he did not wish to give evidence.

[17] Mr Hooker and Ms Clark swore affidavits. Both were cross-examined.

Decision

[18] It is common ground that the fate of Mr Ghotbi's appeal will be determined by our credibility finding on the factual conflict between Mr Ghotbi and his counsel. More particularly, the decisive question is whether counsel did meet with Mr Ghotbi at the end of the Crown case for the purpose of giving advice and taking instructions. This difference is not one on which one side or the other might reasonably be mistaken. Mr Ghotbi is adamant that the meeting never took place; Mr Hooker and Ms Clark are equally certain to the contrary. Only one account could possibly be credible.

[19] Mr Hooker has a clear memory of the meeting. He said that at the conclusion of the Crown case the Judge granted him a brief adjournment. The purpose was to advise Mr Ghotbi and take instructions about giving evidence and Ms Clark. He met Mr Ghotbi in a private room adjacent to the hearing room and not in the cells. He asked Mr Ghotbi whether he wished to give evidence; Mr Ghotbi's response was firmly in the negative. He then returned to the Court and advised the Judge that the defence would call limited evidence from two other witnesses. Mr Hooker recalls that he made a handwritten note of the meeting with Mr Ghotbi which he has since lost.

[20] Mr Hooker accepted that he had proceeded to that point on the premise that Mr Ghotbi was unlikely to give evidence. This position was consistent with Mr Hooker's advice to Mr Ghotbi throughout. His cross-examination of Crown witnesses was careful not to commit Mr Ghotbi to either course. In his assessment Mr Ghotbi would not have presented as a good witness. He was concerned that what he described as Mr Ghotbi's unrepented and somewhat arrogant attitude towards B would assume prominence if he gave evidence. His defence may have been damaged as a result. An exchange of text messages between Mr Ghotbi and B shortly after the events reinforced that opinion.

[21] Mr Hooker was particularly troubled by the content of Mr Ghotbi's own statement sent on 4 March 2011 – he spoke of B in derogatory and disrespectful terms. He doubted that he would perform well under cross-examination. So, as the trial transcript discloses, Mr Hooker settled on a strategy of challenging B's reliability or credibility. His purpose was to undermine the Crown case by establishing a credible factual narrative for raising a reasonable doubt about B's consent or Mr Ghotbi's reasonable belief in it. He sought to expose the inherent implausibility of B's account.

[22] Ms Clark confirmed Mr Hooker's evidence. In answer to a question from Mr Mansfield she recalled a distinctive feature about the meeting with Mr Ghotbi at the end of the Crown case. Mr Ghotbi was in formal custody. During the trial he was normally held in the cells behind the Court whenever an adjournment occurred. However, the prison officers informally varied that arrangement by allowing the meeting to occur in another room. She assumed that indulgence was extended as a courtesy to her as a female.

[23] Ms Clark said that she heard the short discussion between Mr Hooker and Mr Ghotbi; that Mr Hooker asked Mr Ghotbi if he wished to give evidence; and that Mr Ghotbi replied in the negative. She did not recall his precise words. But she was in no doubt that he had freely chosen and communicated his instructions.

[24] Ms Clark recounted that she had appeared frequently as Mr Hooker's junior in criminal trials; that he followed an invariable process of conferring with the defendant at the end of a prosecution case; that his purpose was to obtain final instructions on whether evidence should be called, even if a provisional view had been formed; and that Mr Hooker always left the final decision to the defendant.

[25] Defence counsels' account is supported by the trial transcript. It records that the Crown case concluded sometime after 3.25 pm on Friday, 11 March 2011; that counsel addressed the Court about the defence evidence; that the Court adjourned at 3.28 pm; that the Court resumed at 3.40 pm and that the jury returned at 3.43 pm when Ms Clark opened. Mr Hooker agreed with Mr Mansfield that this adjournment

coincided with the traditional afternoon tea break. But he was unshaken in his recollection that he made its specific purpose known to the Judge.

[26] As noted, Mr Ghotbi denied that such a meeting occurred. He rejected the accounts given by his former counsel. He was emphatic that neither Mr Hooker nor Ms Clark had ever sought his instructions during the trial about giving evidence, and certainly not at the end of the Crown case.

[27] We did not find Mr Ghotbi to be a credible witness. In reaching this conclusion we have made allowances for the fact that English is not his main language. However, he was prone to divert questions by resorting to gratuitous accounts of his innocence and criticisms of B and his counsel. He also exposed two important inconsistencies:

- (a) First, Mr Ghotbi said Mr Hooker was dismissive in the face of his unswerving determination to give evidence. However, Mr Hooker produced a verbatim note of Mr Ghotbi's comments at a meeting before trial. In summary, it recorded Mr Ghotbi's acknowledgement of Mr Hooker's advice that he was not obliged to give evidence and he was leaving the ultimate decision to Mr Hooker.
- (b) Second, in answer to Ms Preston's questions Mr Ghotbi said that when they met B told him she was a prostitute and aged about 21 years; and that that he made this clear from the outset to Mr Hooker and Ms Clark. However, his written statement on 4 March 2011 recited only that he thought B was a prostitute. The difference was material.

[28] Mr Ghotbi's written statement tended to confirm for us Mr Hooker's impression of his credibility as a witness. He adopted the essence of the statement before us. His explanation for why a previously unknown 15 year old girl would within a few minutes of meeting volunteer sexual services in exchange for a car ride defies credibility. His account of her allegedly amorous overtures is highly implausible – not only in its tone but also in its detail. His rationale for sending her

derogatory text messages immediately after events does not ring true. In this respect we observe that if Mr Ghotbi had given evidence of his insistence that B told him she was a prostitute and had spoken of her in terms similar to those used in his statement there was a real risk of the jury drawing an adverse inference about his subsequent conduct towards her.

[29] Mr Hooker and Ms Clark were clear and unequivocal. We have no hesitation in preferring their evidence. There is no possible basis for concluding that as officers of the Court each would either independently mislead us about whether a critical meeting took place or collude for the same purpose. A meeting of that nature – for the purpose of taking a defendant’s instructions – is consistent with best practice. We cannot accept that in a case like this Mr Hooker and Ms Clark did not arrange such a meeting or later lied about its existence. We reject Mr Ghotbi’s account to the contrary.

Result

[30] The appeal against conviction and sentence is dismissed.

Solicitors:
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