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N2LR

IN THE HIGH COURT OF NEW ZEALAND
WANGANUI REGISTRY

T. No. 2/84

1335

REGINA

v.

S ROWSE

(Rape; Threatening to kill; Possession of a firearm)

Counsel: J.G. Rowan for Applicant
P.A. Moran for Crown

Judgment: 26 OCTOBER 1984

JUDGMENT OF QUILLIAM J

This is an application for costs pursuant to the Costs in Criminal Cases Act 1967.

The accused was charged with three offences arising out of an incident on 2 March 1984, namely, rape, threatening to kill, and committing an offence while in possession of a firearm. The depositions were taken on 17 and 18 April. On that occasion the complainant gave evidence in the course of which she said that the accused had had intercourse with her without her consent and in circumstances which she described in detail. The prosecution case included also evidence of both oral and written admissions made by the accused that he had had intercourse with the complainant in circumstances which a jury would be entitled to find amounted to an absence of consent.

The accused was committed for trial and appeared in the High Court at Wanganui on 7 May before Greig J and a jury. The trial occupied some eight days and resulted in a disagreement. The complainant gave evidence in accordance with her deposition, including the allegation that there had been an act of intercourse. In the course of the trial objection was taken to the admissibility of the oral and written admissions but following a voire dire this evidence was admitted and was duly given.

The retrial commenced before me on 6 August. The complainant gave evidence which was generally in conformity with her previous evidence except that she was not prepared to say that an act of intercourse had occurred. She was questioned at considerable length by the Crown Prosecutor in an endeavour to get her to repeat the evidence she had previously given, but it became clear she was not prepared to do so. The evidence she gave was capable of supporting a finding that the accused had indecently assaulted her but it went no further. In the end I discharged the accused under s 347 of the Crimes Act because there could be no conviction for rape unless there was, first, evidence of penetration and this essential ingredient was lacking. The Crown accepted that although there may have been evidence which could have supported a charge of indecent assault it was the offence of rape which was the real basis for the trial and so there was no point in leaving the case with the jury on some lesser charge.

At the first trial before Greig J there was no application for legal aid. By the time it came to the retrial the funds avaiable to the accused were exhausted and so an application for legal aid was made and was granted. Accordingly no question of an order for costs arises in respect of the retrial. The present application could have been dealt with by Greig J or myself. As a matter of

convenience it has come before me but I have discussed it with Greig J before arriving at a conclusion.

Section 5 (1) of the Costs in Criminal Cases Act provides that where any defendant is acquitted of an offence the Court may "order that he be paid such sum as it thinks just and reasonable towards the costs of his defence."

Section 5 (2) provides that, without limiting or affecting the Court's discretion under subs (1), the Court shall have regard to all relevant circumstances and, in particular, to the matters set out in that subsection. It is acknowledged, on behalf of the accused, that none of the particular matters set out in subs (2) can be advanced in support of the present application. It is nevertheless argued that there remains a residual discretion under subs (1) and that this discretion should, in the present case, be exercised in the accused's favour by an award of costs. I accept that there is such an overriding discretion which may be exercised notwithstanding that none of the matters in subs (2) apply. It is likely, however, to be only in an exceptional case that this will be exercised and there is, as far as I know, only one case in which that has been done.

That was the case of R v Cameron (unreported, Auckland, 18 February 1975, No. T.205/74), a decision of Mahon J. In that case the accused was charged with causing bodily injury by dangerous driving. The charge arose out of an incident in which the complainant was knocked down on a pedestrian crossing by a bus. It was alleged that the bus had driven on to the intersection against a red traffic light and at a time when the complainant was crossing in accordance with a pedestrian light. The researches of the defence showed that the lights had been incorrectly set so that there was no pause between the red light and the pedestrian crossing light as there ought to have been. The

result was that there was support for the accused's evidence that he had not driven through the red light. Although Mahon J was not prepared to find in favour of the accused on any of the matters in s 5 (2), he nevertheless exercised his general discretion under s 5 (1) to make an award of costs. This was because, although the matters discovered by the accused were unknown to the Police and had not been able to be investigated by them, nevertheless it appeared the accident may not have been due to any fault on the part of the accused. It should be observed that this was a situation altogether different from that arising in the present case.

When the application first came before me it was advanced mainly upon the basis that the case had been a difficult and complex one involving considerable research on behalf of the accused and, in particular, in respect of psychiatric matters concerning the accused. I indicated at the time that I doubted very much whether the fact that a case was difficult or complex was likely to be a reason for an award of costs. The memorandum now submitted on behalf of the accused in effect renews the application on a similar basis. The application is resisted by the Crown on the ground that the accused had confessed to an act of intercourse without the consent of the complainant. Although the accused had sought to repudiate that confession the evidence relating to it had been admitted. Accordingly, even though there was a defence raised on the basis of the accused's psychiatric condition, there still remained substantial evidence that the allegation made by the complainant was well founded.

For the purpose of dealing with an application for costs it is not, of course, appropriate to make any final assessment of the evidence or the witnesses. Accepting that there is a wide discretion conferred by s 5,

I think it is nevertheless the case that the broad guiding principle will be that costs will be awarded where, for any reason, it appears that it was inappropriate for the accused to have had to face the expense of a trial. One can imagine that it was upon just such a consideration that Mahon J thought it proper to award costs in Cameron's case. I can see no parallel to that case here. It may be that in the end a jury could have taken the view that there ought not to be a conviction notwithstanding the confession, but the charges arose out of an incident which the accused himself has acknowledged to have involved non-consensual intercourse.

In these circumstances I do not consider the case is an appropriate one for the award of costs and the application is declined. I should add that Greig J has authorised me to say that he agrees with this judgment.

Solicitors: Rowan, Takarangi & Co., WANGANUI, for Applicant

Crown Solicitor, WANGANUI, for Crown