IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

12/7 T.23/91

~~1208~~
1257

R E G I N A

v.

C

Hearing: 4 & 5 July 1991

Counsel: B. Dickey for Crown
M. Bungay QC and J. Bergseng for Accused

(ORAL) JUDGMENT OF PENLINGTON J.

This is an application under s.347(1) of the Crimes Act that no indictment be presented against the accused, Cc . A draft indictment is now before the Court which reads as follows:-

> "The Crown Solicitor at Rotorua charges that C on the 29th day of November 1989 at Rotorua wilfully attempted to pervert the course of justice by knowing that WISEMAN had stated that WISEMAN was the driver of a vehicle involved in a motor vehicle accident on Ashpit Road on the 29th day of November 1989 when in fact the vehicle was driven by himself".

It contains one charge of attempting to pervert the course of justice brought under s.117(d) of the Crimes Act. That section reads:-

> "Everyone is liable to imprisonment for a term not exceeding seven years who:
>
> ...
>
> (d) wilfully attempts in any other way to obstruct, prevent, pervert or defeat the course of justice."

The section is not to be read as a ejusdem generis with paragraphs (a) (b) and (c) of s.117.

Paragraph (d) includes all attempts to obstruct, prevent, pervert or defeat the course of justice not covered by paragraphs (a) (b) and (c). See R.v. Coneybear [1966] NZLR, 52, 56.

The term 'course of justice' relates to the whole process of the administration of justice. The words include investigation of offences, the obtaining of evidence from a witness or potential witnesses, the preparation of evidence for the hearing in Court, the laying of charges, actual or possible legal proceedings, and the process of giving evidence in Court.

To wilfully attempt to pervert the course of justice requires proof beyond reasonable doubt of conduct that shows a tendency and an intention to pervert the course of justice. See R. v. Machin [1980] 3 AllER 151; R v. Murray [1982] 2 ALLER 225; R v. Vreones [1891] 1 QB 360, 369.

Accordingly, there must be proof first, that there was an intention to pervert the course of justice, i.e. an intention to do something which was designed to lead to a false conclusion if the matter went the whole way and secondly, that what the accused did, without more, had a tendency to produce the result of perverting the course of justice.

The gist of the offence is conduct which may lead to, and is intended to lead to, a miscarriage of justice whether or not a miscarriage of justice actually occurs. The conduct can take the form of words spoken by the accused. R v. Taffs [1991] 1 NZLR 69 is an example of a charge under s.117(d) in which words, in the form of threats, intended to lead a potential witness not to give evidence or to alter his proposed evidence formed the basis of the charge.

The factual background to this application is as follows. There was a motor accident on 29 November 1989 involving one car. There were five persons travelling in the car at the time of the accident.

Mr Bungay, who appeared in support of the present application, informed me that the applicant will admit, for the purposes of trial, and pursuant to s.369 of the Crimes Act:-

(a) that the accused was the driver of the car at the material time; and

(b) that he was a disqualified driver at that time.

The other persons in the car were a man called Wiseman, a flatmate of the accused named Mills and two young women. The two young women were injured in the accident. An ambulance was called. After a lapse of about 20-30 minutes from the time of the call, the ambulance arrived and took the two injured women away to hospital. Neither the Police nor the Transport Department attended at the scene of the accident on 29 November 1989.

The accused then went with Wiseman and Mills to Wiseman's place. On the following morning Wiseman attended at the Transport Department. He there said he was the driver of the car which had been involved in the accident. The accused did not accompany him.

Several months later Wiseman received a summons. He had been charged with careless driving causing injury. He thereupon took legal advice. As a result of that advice he made a statement to the Transport Department. The prosecution against him for careless driving causing injury was not proceeded with.

A little later Wiseman was charged with attempting to pervert

the course of justice. He pleaded guilty and was fined $1,000 in this Court.

At the commital proceedings against this accused, Wiseman gave oral evidence. Additionally, there were signed statements tendered from Mills and a Traffic Officer Hunt. The intended count alleges that the accused committed these offences on 29 November 1989, the day of the accident.

The Crown case is that, at the scene of the accident and before the arrival of the ambulance, the accused spoke to Wiseman so as to intentionally bring about a situation which was perverse to the course of justice, the accused being motivated to do so because he had been driving while disqualified.

When Wiseman gave evidence on the taking of depositions, he did not refer to what had happened on the roadside after the accident and before the arrival of the ambulance.

In Mills' written statement, he said:-

> "The next morning Cc and Wiseman had a discussion about the accident. I understood Wiseman was going to town to say he was the driver in place of Cc ."

There was no evidence of any interview with the accused or of any admissions made by him to any person.

After the commital for trial in this Court, the Crown supplied the accused's counsel with a proof of further evidence which it intended to adduce from Wiseman. The proof is signed by Wiseman and dated 12 March 1991.

It is to be noted that the two female passengers are not to be called and that Mills does not refer at all to what was said, if anything, on the roadside after the accident. This means that the only evidence concerning what happened on the roadside

is that contained in the supplementary proof of evidence from Wiseman. The relevant parts of Wiseman's proof of evidence read as follows:

> "The three males got out of the car. We then got the girls out of the car. Cc then started to get very upset. He started to hit the car by punching it with his fists and generally freaking out. He was yelling and screaming and swearing but I cannot recall the exact words. I do recall that Cc was getting upset because he had previously been in trouble. He indicated he did not want to get caught for this accident or for driving the car. I cannot recall, after this period of time, exactly who first came up with the idea but it was decided that I would go into the Ministry of Transport the next morning and say I was driving the car. I am sure that everyone in the group knew about this arrangement. I am also sure that everyone understood that it was so that would not be caught for driving the car. I cannot recall the exact words that were spoken about this arrangement. I am sure that Cc helped come up with the plan for me to admit driving the car to keep Cc out of trouble. I am certain that all of the others in our group knew about and agreed with the plan also. I do know that all of these plans came together a very short time after the accident because both girls knew about the plan before the ambulance arrived."

A little later he indicated that the men left the scene through the assistance of another motorist. He then went on to say in his proof:

> "There was no further planning between Cc and me. We did not discuss it on the way home as far as I can recall. I stayed at the same house as Cc that night but I do not recall any further discussion about the accident or my planned visit to the Ministry of Transport the next morning."

Mr Bungay, in support of this application, submitted:-

1. that if an offence was committed by the accused then it had to be completed before the arrival of the ambulance as there was no discussion on the matter thereafter;

2. that Mills' evidence can be disregarded as it is equivocal as to whether Mills was present to hear the accused and Wiseman speak to one another on the morning of 30 November. It could be hearsay. As well, it does not establish the basis of Mills' understanding that Wiseman was going to town to say he was the driver in place of C(;

3. that the Crown case rests on the events at the roadside and that there is no evidence or no sufficient evidence of what the accused said or did at that time;

4. that at most, the evidence discloses preparation but nothing more. It does not establish an attempt.

Mr Dickey, in opposing the application, contended:-

1. that the accused had committed an offence of driving while disqualified;

2. that the Crown case was one of a deliberate attempt to conceal that offence. See Sharp v. Stringer [1937] 26 Cr.App.Rep. 122;

3. that the evidence established a deliberate attempt on the part of the accused on 29 November 1989 to bring about a situation which was perverse to the course of justice.

The accused plainly committed an offence namely, driving whilst disqualified. He is prepared to make admissions for the purposes of trial which would satisfy the elements of that offence. R v. Kane [1967] NZLR 60 is clear authority that if a person persuades another to tell a completely false story to a law enforcement agency and to conceal the nature of an incident which is under investigation by that agency then that is an offence within s.117(d). But, of course, the prosecution must be able to prove beyond reasonable doubt the act of persuasion.

In argument Mr Dickey conceded that the high-water mark of the prosecution case, on the evidence, was Wiseman's statement namely, "I am sure that C(helped to come up with

the plan for me to admit to driving the car to keep
C(out of trouble".

Mr Dickey frankly conceded however that he could not point to evidence of what the accused actually said on the roadside. There is certainly no other evidence which tends to establish what happened on the roadside and, in particular, what was said by the accused. Mr Dickey also conceded that he could not say whether Mills was present when the accused and Wiseman had their discussion on the morning after the accident. Even if Mills was present when the accused and Wiseman spoke together, there is no evidence of any admission against interest by the accused and there is no evidence of an admission against interest by him to any other person.

The accused's highly emotional display at the scene of the accident is understandable and supports the motive contended for by the Crown. But, it does not establish what the accused said or did. There is no suggestion that the accused created an incriminating document on the roadside and, in any event, that would be highly unlikely.

Essentially, the case for the prosecution rests on an allegation that the accused said something which resulted in Wiseman going to the Transport Department and claiming, wrongly and contrary to fact, that he was the driver at the time of the accident.

The Crown cannot, however, prove what the accused said. This case depends on what the accused said at the roadside. The fact that Wiseman went to the Transport Department and said he was the driver on the morning after the accident does not prove what the accused said at the roadside.

Having regard to R v. Ramsay [1965] NZLR 1084, it is not surprising that Wiseman was prosecuted.

Likewise, Wiseman's actions do not establish that they were done in pursuance of a plan initiated by the accused.

I also make two observations in respect of the draft indictment. I note that it is alleged that the offence took place on 29 November and that the perversion relied on is knowledge that Wiseman "had stated" he was the driver.

These allegations do not seem to march with the way the Crown proposes to present its case to the jury. In any event there is certainly no evidence that, on 29 November 1989, Wiseman had made such a statement or that the accused had knowledge of such a statement. As at that date Wiseman had not made any statement. He did not do so until the following day.

I refer to Murray (supra) at p.228 where Lord Lane CJ delivering the judgment of the Court of Appeal, Criminal Division said:-

> "In the view of this Court, there must be evidence that the man has done enough for there to be a risk, without further action by him, that injusice will result. In other words, there must be a possibility that what he has done 'without more' might lead to injustice. It seems to us that he does not himself have to introduce the evidence into the process of justice, as counsel for the appellant invites us to rule, It is sufficient that what he has done 'without more' has a tendency to produce that result."

In my view the evidence does not establish what the accused did or said or that what he said was enough for there to be a risk that, without further action by him, an injustice would result.

If the test is as stated by Henry J. in R v. Ostermann (unreported judgment, Auckland Registry, T.143/85, 26 February 1986), then it has not been satisfied in this case. In Ostermann (supra), Henry J. held that the word "attempt" as used in s.117(d) must be accorded the same interpretation as in

other parts of the Crimes Act. That meaning was "to try and accomplish an object". Henry J. held that there had to be proof of an intentional act which went beyond preparation done for the purpose of perverting the course of justice and constituting what could properly be classed as an attempt.

Here, there is no proof of an intentional act in the form of a verbal statement or otherise which went beyond preparation - if it even amounted to that - which was done for the purpose of perverting the course of justice.

The relevant principles applicable on an application such as this were stated by Wilson J. in R v. Myers [1963] NZLR 321. In that case His Honour said:-

> "Under the provisions of s.347(1) of the Crimes Act 1961 a Judge is given complete discretion to direct that no indictment be presented, or, after presentment, that the accused should not be arraigned thereon."

A little later he said:-

> "Thus, if after reading the depositions, the Judge is satisfied that it is unlikely that any jury, properly directed, would convict, or, a fortiori, that it would be wrong for a jury to convict the accused, it appears that the discretion may properly be exercised.

I have considered the depositions, the additional proof of evidence of Wiseman and the proposed admissions for the purposes of trial.

I conclude that it is unlikely that, a jury, properly directed, would convict the accused and, further, I think that it would be wrong for a jury to convict on the evidence available.

Accordingly, I exercise my discretion under s.347(1) of the Crimes Act. I direct that no indictment be presented and that the accused C(be discharged.

[signature] J.

Solicitors:

Crown Solicitor, Rotorua, for Crown;

Trotter McKechnie Quirke & Morrison, Rotorua, for Accused