IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

4/8

A.P. No.34/95

BETWEEN FAWCETT

Appellant

A N D POLICE

Respondent

Hearing: 31 July 1995

Counsel: Appellant in person
C.Q.M. Almao for the Respondent

Judgment: - 3 AUG 1995

JUDGMENT OF TIPPING, J.

Introduction

This appeal by Fawcett is against his conviction after trial in the District Court on a charge of assaulting a female. Mr Fawcett conducted his own case both below and in this Court. In support of his appeal he raised four matters: excessive judicial intervention; bias on the part of the Judge; wrongful exclusion of evidence; and the proposition that the Judge had wrongly rejected his claim to have acted in self defence.

Before I discuss the individual grounds of appeal, a brief description of what the case was essentially about will be helpful. To succeed in establishing the charge the prosecution had to establish that Mr Fawcett, as a male, assaulted a female. For present purposes it is sufficient to say that an assault is the intentional, that is deliberate, application of force by one person to the body of another person. In spite

of the fact that there was only one charge, the prosecution seemed to be suggesting that there were two assaults.

The first was said to have arisen when Mr Fawcett either pushed past or brushed past the complainant. He had visited her at her home. It was said that, contrary to most cases of this kind, when he went to leave she endeavoured to stop him from doing so. The second allegation of assault derived from the complainant's contention that Mr Fawcett had kicked her in the stomach. Nothing more needs be said about the first allegation because the Judge found that in doing what he did Mr Fawcett used no more force than was reasonably necessary in the circumstances as he saw them.

To establish the charge of assault in relation to the second incident alleged, the prosecution had to show first that Mr Fawcett did deliberately kick the complainant in the stomach and secondly that in so doing he used more force than was reasonably necessary in the circumstances as he saw them. There was a sufficient foundation for self defence to require the prosecution to negative the plea beyond reasonable doubt. Mr Fawcett contended first that the complainant was coming at him with a plastic rake and second that he did not kick her but simply put his foot out.

The Judge had considerable reservations whether the complainant was in fact carrying a rake, but held that, even if she was or Mr Fawcett honestly thought she was, the force he used was more than reasonable. The Judge therefore expressly found, on the evidence, that there was an assault by Mr Fawcett in the form of a kick to the complainant's stomach and that, even viewing the circumstances through Mr Fawcett's eyes, as the law requires, excessive force was used.

It cannot reasonably be said, nor was it so argued by Mr Fawcett, that the Judge erred in law. It is in relation to collateral matters

that Mr Fawcett takes his stand, coupled with the proposition that on the facts the Judge erred in finding the force excessive. The Judge's task was not made any easier by the fact that Mr Fawcett's defence was somewhat ambiguous. At one stage he appeared to be suggesting that the complainant was fabricating her allegations in order to get some tactical advantage in relation to a custody and access dispute in which the parties were engaged. Subsequently he suggested that the force he used was justified in the light of the fact that the complainant was coming at him with a rake. Of course Mr Fawcett deposed that his force was no more than putting out his foot, but the Judge expressly rejected that and found a deliberate kick to the stomach.

Judicial Interventions

Following an earlier pre-trial direction by Penlington, J., Mr Fawcett identified a large number of passages in the transcript of evidence where the Judge had intervened. I do not propose to discuss all of them individually. It is quite clear that, for the most part, the Judge's interventions were for the two fold purpose of trying to understand Mr Fawcett's case and of keeping the trial on the rails from the point of view of procedure and evidence. The gravamen of Mr Fawcett's complaint under this heading was that the Judge had intervened to such an extent as to prevent him from fairly putting his case, particularly in cross-examination.

There were places in which the Judge curtailed what Mr Fawcett wished to ask the complainant. On one aspect, which was the subject of discussion during submissions, there was some inconsistency in the Judge's approach but in the end I am left well short of the view that the way in which the Judge handled the case prevented a fair trial or led to any miscarriage of justice.

Mr Fawcett complained, in particular, at the Judge's statement (at page 22) that he, the Judge, did not "want a domestic here". As I read

the passage that was not an attempt to trammel the content of Mr Fawcett's questions, but rather his manner of questioning the complainant. Immediately afterwards the Judge asked Mr Fawcett to settle down. Mr Fawcett said he was sorry but was just trying to ascertain the facts. To this the Judge replied: "Well ascertain them calmly and with some measure of decorum". Clearly, therefore, the Judge was not precluding any particular line of questioning or any particular form of questioning. He was simply trying to maintain appropriate decorum, if I may borrow his word. In some places Mr Fawcett turned to the Judge for advice as to how he should conduct his case and his questioning. The Judge seems to me to have handled that situation in a perfectly fair and balanced manner.

Mr Fawcett complained also at the intervention by the Judge when he, Mr Fawcett, brought up the question of interim custody of the complainant's daughter. There was an objection by the sergeant prosecutor. The Judge inquired where Mr Fawcett was heading. He replied that he was trying to ascertain the complainant's reasons for laying the charge, the implication being that she was doing so in order to gain custody of her daughter. Any complaint about unreasonable curtailment on that front is immediately removed by the fact that a couple of pages later the Judge overruled an objection by the sergeant prosecutor and allowed questions concerning the complainant's motivation. All he did was to ask Mr Fawcett to ask his questions in a simple straight forward manner rather than "dragging all the wide ranging areas of your relationship into the questions".

I have given each of the passages referred to by Mr Fawcett careful consideration. Neither individually nor cumulatively am I left with the view that the Judge's interventions prevented a fair trial. Nor am I of the view that they resulted in any miscarriage of justice. As the Court of Appeal said in E.H. Cochrane Ltd v. MOT [1987] 1 NZ.L.R. 146, 150 the

ultimate question is whether a belief could reasonably be formed that the person convicted may not have received a fair trial. Emphasis is placed on reasonableness to ensure that "the heightened and subjective sensitivities of an individual embroiled in a dispute are not the criterion": per Cooke, J. delivering the judgment of himself and Somers, J.

Their Honours also observed that even under the adversary system a Judge is entitled to engage in a lively and active participation in the trial process, as Jefferies, J. put it in McClean v. MOT (Auckland M. 722/83 judgment 16/9/83), provided always that the Judge avoids descending into the arena. My overall impression, after having carefully read the transcript, having heard Mr Fawcett's submissions and those of Mr Almao, is that the Judge intervened purely for the purpose of trying to understand the nature of Mr Fawcett's case and to ensure that the rules of procedure and evidence were observed. In that latter respect Mr Fawcett actually received substantial latitude which would not have been afforded to a litigant represented by counsel.

Bias

Mr Fawcett's allegation of judicial bias was presented under four separate headings. First it was suggested that the Judge was biased in not allowing cross-examination to pursue its proper course. Next it was suggested that the Judge was biased because the complainant was an attractive, well dressed and articulate person. Then it was suggested that the Judge was biased because he had believed the complainant. Finally it was alleged that the failure of the Judge to intervene while the prosecutor was cross-examining Mr Fawcett somehow demonstrated bias on the Judge's part.

I am bound to say that these contentions, individually and cumulatively, are of no substance whatever. They only need to be stated to demonstrate their implausibility. I am satisfied that, viewed objectively, the

Judge's interventions during cross-examination were both understandable and proper. Whatever test one uses for bias - reasonable suspicion, real risk, real danger - the present case falls a long way short of the mark, as I indicated during the course of submissions.

Exclusion of Evidence

It transpired that Mr Fawcett's proposition that the Judge had wrongly excluded evidence did not mean exclusion in the sense of ruling inadmissible or regarding relevant evidence as irrelevant. It emerged during the course of his argument that what Mr Fawcett was really saying was that certain evidence which he, Mr Fawcett, regarded as of importance had not been expressly mentioned during the course of the Judge's oral judgment. There were overtones also, under the heading of wrongful exclusion, of a complaint that the Judge had wrongly rejected or accepted certain pieces of evidence. There is absolutely no requirement for a judicial officer when giving judgment to mention ever piece of evidence one party or another has given. A judgment must articulate the essence of what must be proved and then fairly address the evidence given on each side.

In the end, from the evidentiary point of view, this case was within a very narrow compass. First the Judge had to decide whether an assault had been proved. Then he had to decide what were the circumstances as Mr Fawcett believed them to be. Finally he had to decide whether, in those subjective circumstances, such assault as he found proved, represented reasonable or excessive force. I cannot see any foundation for the complaints which Mr Fawcett made under this heading but I must mention one specific point that featured quite extensively during the submissions.

The point relates to the complainant's first statement to the Police. It came to be called the 24 hour statement during argument because it was a statement made by the complainant approximately 24 hours after

the events in question. Mr Fawcett complained that during the course of the hearing this statement was not produced. There was a later statement amounting to the complainant's brief of evidence which was produced. It was in fact read out verbatim as recorded in the transcript. Mr Fawcett produced a letter written by solicitors then acting for him asking for pre-trial disclosure of certain material in terms apt to include the complainant's 24 hour statement.

It appears that all the Police disclosed was the complainant's witness brief. It is patently clear, however, from the transcript, that the 24 hour statement was in Court during the course of the hearing. When the Police witness said it could not be produced the context clearly demonstrates that he was referring to the fact that it could not be produced formally in evidence because of the rules of evidence. I do not consider that he meant it could not be produced because it was not there. It patently was there and I see no reason why Mr Fawcett could not have asked to look at it there and then if he had wished to pursue the matter.

Be that as it may, he has had some six months since the case was heard in the District Court before the hearing of his appeal in which to obtain a copy of the 24 hour statement if he wished. No such copy was tendered to me by Mr Fawcett. The only possible use of the 24 hour statement would have been if it was significantly different from the witness brief which formed the basis of the complainant's evidence. Nothing was presented to me to suggest that there was any significant difference between the two statements and indeed Mr Almao for the Crown informed me that there was no material difference between the two. Again I am satisfied that there is no foundation for any suggestion that the trial was unfair on this account or that there has been a miscarriage of justice.

Self Defence

In relation to the merits of the self defence argument, Mr Fawcett correctly pointed to the legal principle that when people are called on to act in self defence and their conduct is retrospectively examined, the degree of force which they have used must not be judged too finely. As it was put in Kerr [1976] 1 N.Z.L.R. 335, 342 the trier of fact should not weigh to a nicety the amount of force that is used. There can be no suggestion that the Judge failed to appreciate or failed to apply that principle. He expressly directed himself in the appropriate manner.

He found as a fact that Mr Fawcett kicked the complainant. He then went on to hold that even if she was armed with the plastic rake the force which Mr Fawcett used, namely a backward kick to her stomach which caused her to be partially winded was excessive. It was inherent in the complainant's evidence that the kick was a substantial one knocking her backwards and causing her to fall to the floor.

The Judge correctly applied the law. The facts, as he found them, were dependent essentially on his view of the honesty and reliability of the evidence of the two principal parties, namely Mr Fawcett and the complainant. There can be no suggestion that the evidence was insufficient to support the Judge's findings of fact. Nor can there be any suggestion that on the evidence the findings of fact were unreasonable.

The high water mark of Mr Fawcett's argument on this aspect of the case was that he thought that the complainant was armed with a plastic rake. The Judge gave him the benefit of the doubt in that respect and assessed the reasonableness of the force which he used on that basis. Mr Fawcett argued that to hold the amount of force which he had used to be excessive in the circumstances as he saw them was weighing the case too finely. The Judge thought otherwise and I am quite unpersuaded that he was wrong in coming to that view. It was a conclusion which was

perfectly open to the Judge and is not one with which an appellate Court is entitled to interfere.

Mr Fawcett presented his case with commendable thoroughness. He may rest assured that I have carefully considered all the points which he raised. My conclusion is that the trial was fair and that no miscarriage of justice has occurred. The Judge correctly applied the law to the fact as he found them. His factual conclusions were well open to him on the evidence. The appeal is dismissed. Charitably the Crown did not seek any order for costs.