

**IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY**

CRI-2009-409-000064

PAUL ANTHONY KING

v

DEPARTMENT OF CORRECTIONS

Hearing: 5 November 2009

Appearances: Appellant in person
S J Jamieson for Respondent

Judgment: 16 November 2009

RESERVED JUDGMENT OF HON. JUSTICE FRENCH

Introduction

[1] Mr King seeks to overturn his conviction for breach of a condition of home detention.

[2] The conviction arose out of an incident when Mr King, who was serving a sentence of home detention, was given permission to have lunch with his mother at a café on Mothers' Day.

[3] The case for the prosecution was that the approval extended only to meeting his mother at the designated restaurant and travelling from the home detention address to the restaurant and back again by the most direct route. It was alleged that

Mr King, in breach of the direction notice, had deviated by going to his mother's address both before and after the lunch.

[4] It was common ground that the written direction notice for the approved absence stated he was to travel to the restaurant by the most direct route and not to make any unapproved stops.

[5] At the hearing Mr King gave evidence. He claimed that before he signed the direction notice, his probation officer, Mrs Fitzgerald, had verbally agreed he could go to his mother's residence to collect her for the lunch and then drop her back again. Thus, the stop at the mother's address was an approved stop. Mr King further contended he was only at his mother's address for a matter of a few minutes.

[6] Mrs Fitzgerald however testified that the approval was for Mr King to meet his mother at lunch, not to take her to lunch, and that there had never been any prior discussion about him going to his mother's address. Mrs Fitzgerald also testified that an electronic monitoring report (the Chubb report) showed Mr King had stayed at the mother's address for more than 20 minutes.

[7] Mrs Fitzgerald also gave evidence of a telephone conversation she had with Mr King the day following the lunch when she had phoned him for an explanation having received the Chubb report. According to her evidence, during the phone conversation he admitted he had been at the mother's address for at least 20 to 30 minutes.

A. Following that date I phoned him to discuss with him the fact that he had been detected of having spent at least half an hour at his mother's address on the way home.

Q. And what did he say to you during that conversation.

A. He acknowledged that that had happened that he had picked his mother up on the way to the café and that he had dropped her off on the way back.

Q. Did he make any statement to you about why he had done that or what his thinking was around that.

A. He said that he didn't think that it was unreasonable that he would do that and that with the cost of petrol at that time he felt that it was

reasonable to pick her up and take her to it and the fact that it was Mother's Day.

Q. And what did you say to him in response to that.

A. I made it clear that on his approved absence that he had said, and he had signed it, that it said that he must not stop, make any unapproved stops...

[8] In his decision, the Judge said he was unable to accept the defendant's evidence, which he described as not credible, and unreliable.

[9] The Judge preferred the evidence of Mrs Fitzgerald. He accordingly found the charge proved and ordered Mr King to appear for sentence if called upon within a period of six months.

Grounds of appeal

[10] Mr King raised a number of grounds of appeal. They can be conveniently summarised as follows :

- i) In breach of its disclosure obligations, the prosecution had withheld the Chubb report. The non-disclosure was highly prejudicial because the Chubb company was never called and Mrs Fitzgerald allowed to give hearsay evidence about the report. Mr King was thereby denied the opportunity of being able to cross examine the Chubb company itself and question the accuracy of the readings.
- ii) He was unfairly prejudiced by the Judge's refusal to grant him an adjournment on account of the fact his lawyer Mr Brown was unavailable due to an accident. Instead, Mr King was represented by another lawyer Mr Kerr who did not have sufficient time to prepare and who was unfamiliar with the case. This prejudiced Mr King because:
 - a. he would have liked to cross-examine Mrs Fitzgerald about a previous mistake she had made with direction

notices, something that did not happen due to Mr Kerr's unfamiliarity with the file;

- b. if the Judge had known of Mrs Fitzgerald's previous mistake, his assessment of her reliability might have been different;
- c. Mr Kerr was unaware that Mr Brown had advised he (Mr King) only needed to testify in his own defence if the prosecution produced the Chubb report.

iii) The evidence of the telephone conversation that took place between Mr King and Mrs Fitzgerald should not have been admitted, because Mrs Fitzgerald failed to caution him when she rang him, in breach of the New Zealand Bill of Rights Act 1990.

[11] I turn now to consider each of these matters.

Non-disclosure of Chubb report

[12] Contrary to Mr King's submissions, it appears clear the Chubb report was in fact disclosed. It was sent by fax to his lawyer, Mr Brown, on 26 September 2008, some six months prior to the hearing. Further, Mrs Fitzgerald's brief of evidence was also sent to his solicitor well before the hearing. The brief of evidence contains a passage about the Chubb report. I am satisfied the evidence was not withheld as claimed by Mr King.

[13] No objection was taken at the hearing on grounds of hearsay.

Judge's refusal to grant an adjournment

[14] For the purposes of the appeal, Mr King waived solicitor/client privilege, and accordingly I had the benefit of an affidavit from Mr Kerr who represented Mr King at the District Court hearing.

[15] Mr Kerr says he received the file two days prior to the hearing, not (as Mr King submitted) the day of the hearing. The affidavit also contradicts Mr King's assertion that Mr Brown was of the view he would only need to give evidence if the Chubb report was produced as an exhibit. Mr Kerr says it was clear from Mr Brown's instructions Mr King would need to give evidence and that Mr King had always been fully aware of this.

[16] There is no suggestion Mr Kerr considered he was unprepared. Mr Kerr says he was advised by Mr Brown the case was straightforward.

Failure to cross-examine Mrs Fitzgerald about previous mistake

[17] It is correct there was no cross-examination of Mrs Fitzgerald about previous mistakes.

[18] Mr King says Mrs Fitzgerald was so unreliable she could not even remember whether she had been to Europe or not.

[19] This latter submission is a reference to a comment made by Mrs Fitzgerald in evidence, so that was before the Judge.

[20] The context in which that occurred was when Mrs Fitzgerald was asked whether or not the discussion she had with Mr King about the lunch occurred after she had just returned from Europe.

Q. Ms Fitzgerald I understand that before this event you had been away and you had just returned is that correct. Before this happened you had been away on leave and you had just returned.

- A. Um, I'm not sure actually. I may have been, I can't, I'm sorry I can't remember now. I had been, actually I had been overseas yes, but I arrived back at the beginning of May.

[21] As that transcript makes clear, it was an issue of timing. Mrs Fitzgerald did not forget ever having been away to Europe.

[22] Further, I am satisfied that even if Mrs Fitzgerald had been cross-examined about a previous mistake Mr King now alleges she had made in a previous directions notice, that would not have detracted from her credibility or reliability. She was adamant there had never been any prior verbal discussion about going to the mother's home. She also testified she did not even know where the mother lived.

Failing to caution

[23] At the time she phoned Mr King, Mrs Fitzgerald had in her possession the Chubb report which showed his bracelet number as having been in the vicinity of the mother's address for 30 minutes.

[24] Mr King contends that because Mrs Fitzgerald was ringing to question him about a possible criminal offence, she should have cautioned him as required by s23 of the New Zealand Bill of Rights Act.

[25] I disagree. In my view, Mr King was not under a separate detention at the time of the phone call such as would be required to trigger the application of s 23.

[26] In any event, even if the evidence of the telephone conversation had been excluded, it would not have been determinative of the outcome. The case essentially stood and fell on whether Mrs Fitzgerald had given Mr King prior verbal approval to go to his mother's address, or whether he had unilaterally decided to adopt that action. While evidence of the admissions made in the phone call was certainly relevant, the crucial testimony was Mrs Fitzgerald's account of the pre Mothers Day meeting which the Judge accepted.

[27] It was essentially an issue of credibility, and in my view the Judge was entitled to reach the finding he did with or without the evidence of the phone admissions.

[28] I consider that none of the arguments raised by Mr King are grounds for interfering with the Judge's decision.

[29] The conviction is therefore confirmed.

[30] In relation to sentence, Mr King submitted he should have been convicted and discharged, given the relatively trivial nature of the breach.

[31] However, there was undisputed evidence Mr King had already received a warning for failing to comply with an earlier directions notice. Further, the sentence that was imposed did reflect the fact that this was not a particularly serious breach, the Judge specifically referring to the fact Mr King was actually back home in time, despite the unauthorised detour.

[32] In my view the sentence cannot be characterised as manifestly excessive.

[33] The appeal against both conviction and sentence is dismissed.

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