IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CRI 2009-416-29

PETER SNOWDEN
Appellant

v

POLICE
Respondent

Hearing: 5 March 2010

Appearances: L Hemi for appellant
R Collins for respondent

Judgment: 17 March 2010

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3.30 pm on Wednesday 17 March 2010

Solicitors:
Rishworth Wall & Mathieson, Gisborne
Crown Solicitor Gisborne

[1] Mr Snowden appeared in the Gisborne District Court on 11 June 2009 for summary trial on charges of threatening to injure with intent to intimidate and of male assaults female. At the conclusion of the trial Judge Connell found both charges proved.

[2] On 6 October 2009 Mr Snowden was sentenced by Judge Tompkins to four months imprisonment on the male assaults female charge, and to a concurrent term of one months imprisonment on the threatening conduct charge. Mr Snowden now appeals against conviction but not against sentence. He is currently on bail awaiting the outcome of this appeal.

Background

[3] On 26 February 2009 the appellant arrived home somewhat the worse for wear. He had been drinking for some time. The appellant shared the house with his sister, Christine, their father, and Christine's daughter. Another sister, Theresa, lived next door.

[4] An altercation developed. It was loud enough to attract the attention of neighbours, including a Mr Logan who lived over the back fence. Although it was dark, the lights were on in the house and the curtains were open. Accordingly, Mr Logan was able to see into the appellant's home. He saw a male person going backwards and forwards throughout the house; he then saw the male grab a female round the neck, pushing and shoving her. The male and the female were screaming and yelling at each other. Mr Logan considered that the male was the aggressor in the confrontation.

[5] The police were called, apparently by a second neighbour. Constable Lexmond was the first officer on the scene. By then Mr Logan had discontinued his observations. Constable Lexmond looked into the window and saw a man in an agitated state arguing with a female. At one point he heard the male say to the female that he was "going to fucking do you in, in a minute". No police officer saw

any assault. The prosecution case in respect of the alleged assault depended entirely upon the evidence of Mr Logan, with circumstantial support from Constable Lexmond.

[6] Subsequently the police entered the house. By then, Theresa had arrived from next door.

[7] The appellant was eventually arrested and charged. The police alleged that both the assault and the threatening conduct involved Theresa, who was accordingly named as the complainant in the informations before the Court.

The District Court hearing

[8] At the trial there was evidence for the prosecution from police officers who attended the scene and from Mr Logan, who plainly made a very favourable impression upon the Judge. During the course of his oral judgment, Judge Connell remarked that:

> … It seems to me, as I listened to his evidence, that Mr Logan was an observant witness. His evidence was cogent and his evidence to me was clear and, more importantly, he was not prepared to say things that he did not see or did not observe, and was quick to say so when certain things were put to him.

[9] The defence case was that the alleged assault simply did not occur. The appellant gave evidence in his defence, along with both Christine and Theresa. Each of them accepted there was something of a rowdy disagreement in the house that night, but Christine in particular said that such scuffling as occurred was a result of her endeavours to try to get the appellant to return to his own room. The appellant referred in evidence to certain minor scratch marks which he had sustained during the course of the incident.

[10] The Judge subjected the evidence to a thorough review during the course of his oral judgment, which concluded with a finding that the assault alleged by the prosecution had indeed taken place, and that the appellant's guilt on the second charge was also established. But the Judge considered that the prosecution was in

error in alleging that Theresa was the victim. Rather, he found that the evidence demonstrated it was Christine who was the subject of the appellant's attack, and who was the target of his threats.

[11] Having reached that conclusion, the Judge continued:

> [28] Is that the end of the case? In my view, no, because I have come to a very firm view of it. I do not accept Mr Snowden's evidence in terms of his rejection of what happened here. I accept Mr Logan's version of events. I certainly accept Constable Lexmond's version of events. They saw what they did. They both gave evidence in a very clear and confident manner about what they were able to see. I certainly concerned myself with that issue of identification, but the clarity of the observations and the circumstances around them, and again as I have commented – both effectively made the same observations about the circumstances of what they saw in terms of light on, curtain open, window open, yelling and so on – and they have recounted that with commendable detail in my view.
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> [29] The way I intend to resolve it, because I have no doubt at all that it was Christine who was the subject of the assault, and it was an assault, (I do not accept what Mr Snowden says about it) is to, on my own motion, amend the charges. In terms of the male assault female charge, the amendment is that the charge will now read – being a male assaulted a female, namely Christine Snowden. The same amendment is made in respect of the named complainant in the other information.
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> [30] Having now given the opportunity to the defence to either have the prosecution witnesses give evidence again or re-call their own witnesses in defence of the two amended charges, Mr Simperingham has determined and told me that the defendant will not want any further evidence called by the prosecution, nor does he wish to give any further evidence or call any further evidence.
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> [31] It will be understood on my finding of these facts, there will be a conviction entered in respect of both charges, being satisfied as I am beyond a reasonable doubt that there was an assault on Christine Snowden and there was this threatening to injure with intent to intimidate.

[12] As will be observed from the foregoing passage, and as was common ground, the appellant, for whom Mr Simperingham appeared as counsel, was given an opportunity following amendment of the charge, to require that the case be effectively reheard. Having conferred with Mr Simperingham, the appellant decided not to take up the rehearing opportunity. His decision not to do so is recorded at [30] of the judgment.

The argument for the appellant

[13] Certain grounds of appeal advanced in the appellant's written synopsis of argument were abandoned at the hearing. In particular, Mr Hemi accepts that the substitution of one complainant for another was authorised by s 43(1) of the Summary Proceedings Act 1957, being the mere amendment of a particular: *New Zealand Police v Irwin* HC Napier AP18/94, 22 September 1994. Because s 43(2) was never invoked, the procedural requirements of s 43(3) were not engaged.

[14] At the hearing of the appeal Mr Hemi advanced two arguments:

a) The Judge in the exercise of his discretion ought not to have accepted Mr Simperingham's indication on behalf of the appellant that a rehearing was not required; rather the Judge ought, of his own motion, to have directed a retrial;

b) The Judge ought to have considered self-defence, and to have directed himself appropriately as to whether self-defence was available to the appellant.

[15] A further underlying thread ran through Mr Hemi's argument. It was that Mr Simperingham had failed to cross-examine Mr Logan adequately, with the result that the opportunity to damage Mr Logan's credibility was lost, and the possibility of a successful self-defence argument was obscured. But Mr Hemi stopped short of advancing counsel incompetence as a discrete appeal ground.

[16] The appellant having waived privilege, Mr Simperingham was briefly examined and cross-examined at the hearing of the appeal regarding his conduct of the trial in the District Court.

Discussion

[17] I am satisfied that this appeal must fail. The first argument, namely that the Judge ought in his discretion to have refused to accept the appellant's decision not to

seek a rehearing, is a somewhat remarkable proposition. Mr Hemi advanced no authority for the contention that where, as here, a defendant was represented by very experienced counsel, the Judge should nevertheless over-ride instructions formally conveyed in open Court by counsel to the Judge in the defendant's presence. Moreover, it is instructive that Mr Hemi chose not to cross-examine Mr Simperingham about the decision to decline the opportunity of a rehearing. No doubt that decision had something to do with the very favourable impression Mr Logan had made as a witness. Mr Simperingham spoke about that during the course of his evidence at the hearing of the appeal. He described Mr Logan as a witness:

> … who is superb for the prosecution. He was non-partisan and his recollection of events was vivid and compelling. The difficulty I faced was the fact his evidence was so strong for the prosecution …

[18] Mr Simperingham added that during his relatively brief cross-examination of Mr Logan, one or two unexpected disclosures were made; for example Mr Logan volunteered the information that the appellant had said to him on a previous occasion in court something that amounted to an apology.

[19] Mr Simperingham concluded that an extended cross-examination was risky. No doubt that consideration was at the forefront of his advice to the appellant not to seek a rehearing.

[20] Mr Hemi was also critical of Mr Simperingham's decision to limit his cross-examination of Mr Logan in respect of possible visual obstacles between him and the interior of the appellant's home. There was, as well, a suggestion from Mr Hemi that Mr Simperingham ought to have explored with Mr Logan possible motives to lie on oath.

[21] As to the first of those points, Mr Simperingham gave a cogent explanation in his evidence on appeal for his decision to cut his cross-examination short. With respect to the second point, s 37 of the Evidence Act 2006 imposes restrictions on counsel's ability to cross-examine a witness as to veracity in circumstances where there is no proper basis for an attack on that witness. No such basis was suggested by Mr Hemi.

[22] Moreover, counsel incompetence is not alleged in this case, and I must confess to some difficulty in associating Mr Hemi's criticisms of Mr Simperingham with what I understood to be the argument on appeal.

[23] Finally, there is the question of self-defence. As Mr Collins submits, self-defence was simply not available to the appellant in this case. His evidence, and that of his sisters, was to the effect that there was no assault of the type alleged by the prosecution, and that the contact between the appellant and Christine was limited to a minor scuffle initiated by her. Given that the appellant asserted that he had committed no assault at all, the question of self-defence simply did not arise. The appellant's case was not run in a way that gave rise to the possibility of a self-defence argument, and there was no evidential basis for it.

Result

[24] None of the arguments advanced by Mr Hemi is of any substance. The appeal must accordingly fail, and is hereby dismissed.

[25] The appellant must resume his sentence of imprisonment. For that purpose he is to report to the Gisborne Police Station between 9 and 10 am on Friday 19 March 2010.

C J Allan J