ORDER PROHIBITING PUBLICATION OF NAMES, ADDRESSES OR PARTICULARS IDENTIFYING COMPLAINANTS

IN THE SUPREME COURT OF NEW ZEALAND

SC 42/2005
[2006] NZSC 3

SCOTT SIMEON THOMPSON

v

THE QUEEN

Hearing: 13 December 2005

Court: Blanchard, Tipping, McGrath and Henry JJ

Counsel: G J King and C J Milnes for Appellant
J C Pike and A Markham for Crown

Judgment: 15 February 2006

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS

(Given by Blanchard J)

Introduction

[1] Mr Thompson was convicted at a jury trial in the District Court at Hamilton of eight offences involving physical violence against his domestic partner and two of sexual offending against her young daughter. His appeal to the Court of Appeal on several grounds was dismissed.[1] The further appeal to this Court by leave is on the single ground of whether there was a miscarriage of justice as a result of prejudicial material being revealed in evidence given by the complainant partner during her extensive and vigorous cross-examination by Mr Thompson's trial counsel.

[2] The Court for this appeal was constituted with four members under s 30(1) of the Supreme Court Act 2003.

The material in issue

[3] The appellant and the complainant first met in 1998 when she visited Linton prison where he was serving a sentence of imprisonment. She made regular visits to him in that prison. After he was moved to Waikeria prison in 1999 she shifted her residence to Otorohanga in order to be near him. Three of the charges – on two of which he was actually acquitted – related to assaults said to have occurred during her visits to him at Waikeria. A defence pre-trial application for severance of these counts was dismissed.

[4] The remaining charges of violence against this complainant related to the time after he was released on parole in February 2002, some three and a half years after they had first met, when he began living with the complainant and her three daughters. The last four of these incidents took place on 29 October of that year.

[5] In her evidence-in-chief, the conduct and content of which was not the subject of any criticism by counsel for the appellant, the complainant described a course of violence towards her by Mr Thompson beginning at Waikeria. Necessarily, therefore, the jury had to be made aware that Mr Thompson had been

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[1] CA445/04 16 June 2005 (Hammond, Baragwanath & Potter JJ).

serving a lengthy prison sentence. They were not, however, told at any stage of the nature of any of his prior offending. Although reference was made both in the Court of Appeal and before this Court to some 11 matters which were mentioned or occurred during defence counsel's cross-examination, which had taken almost a day, Mr King, who did not appear below, accepted that only four points could arguably be said to have given rise to a miscarriage of justice. They were the allusions by the complainant (a) to the appellant's earlier imprisonment in Australia, (b) to the fact that he had been serving a seven year sentence when the offending against her began, (c) to his gang association and (d) to his use of P (pure methamphetamine) while he was living with her.

[6] Mr King's assessment was realistic. We share the view of the Court of Appeal that these four issues are the only matters which could be of any possible moment. Indeed, we can immediately go further, for it is most unlikely that knowledge of the exact length of the sentence Mr Thompson had been serving in Linton and Waikeria could have had any impact at all on the jury, which had to be told how long the prison visits continued before he was paroled and could have worked out for itself that he must have been serving a substantially longer sentence which could only have been imposed for some serious offending. Little more need be said about that.

[7] The complainant's only reference to the fact that Mr Thompson had been in prison in Australia came in answer to questioning by defence counsel concerning how well Mr Thompson had known some people who had attended a party at which he and the complainant were present and, according to her, comment had been made about injuries said to have been inflicted by him. It was being suggested to the witness that the people at the party were her friends, not friends of Mr Thompson. She responded that he had known one of those persons well "from being in prison in Australia". The jury thus learned that Mr Thompson had not been a first offender when sentenced to imprisonment in New Zealand.

[8] The mention of gang association was in answer to a question asked by defence counsel about why the complainant and Mr Thompson had on a certain occasion gone to Hamilton rather than Otorohanga to look at a car. She explained

that they had gone to Hamilton "'cos he wanted some things for his Tribesmen top. He wanted some yellow felt and some suede and that, to make a number 13 to put on his jacket". Nothing further was said in evidence about any gang association.

[9] Drug taking by Mr Thompson was referred to by the witness three times. The first was in response to counsel's question about whether she had formed the view that the relationship was a mistake. She said Mr Thompson was someone for whom she had waited three years and five months and who was "totally violent and a drug addict". The second reference came in cross-examination about her account of an incident in which she said Mr Thompson had stamped on a box of children's toys, burnt the broken toys in an incinerator and violently assaulted her. Defence counsel put it to the witness that this incident had not happened. She responded "Yes, it did, he was high on P". Clearly she was seeking to explain his strange behaviour on that occasion. The third reference came when counsel was endeavouring to establish that the complainant had tried to end the relationship by reporting Mr Thompson to the police on a spurious allegation. Counsel suggested to her that Mr Thompson's attitude to her had not in fact changed between the beginning of October 2002, when he had ceased working, and the end of October, to which she said:

> Yes, the three weeks he was off work he had shot up his arm $2,000 worth of P.

The trial ruling and the summing up

[10] At this point in the trial cross-examination was suspended while defence counsel made an application to Judge Maze seeking to have her declare a mistrial because of the prejudicial effect of the complainant's statements. In a careful ruling the Judge declined this application. She described the cross-examination as having been "a firm and at times a very aggressive attack" on the complainant's credibility. She observed that early in the cross-examination she had indicated the need for counsel to be cautious when there were already signs that the witness "was well able to withstand significant attack". She said that the issue must be what harm would flow from continuation of the trial in light of the matters raised. She took the view that the jury could be adequately directed to deal properly with the evidence in respect of each matter charged. In relation to the reference to imprisonment in

Australia and the length of the New Zealand sentence, she said that in the context of the trial there was already significant reference to the accused serving a sentence of imprisonment and that she had already told the jury that they should draw no adverse inference from this. It was, in her opinion, a matter well capable of being dealt with by a firm and clear direction. The reference to the Tribesmen top was "an answer to an open question in cross-examination, and an answer that had some logic from the witness' perspective … she was simply providing the answer to the question why". Trial counsel complained about only the last of the statements concerning methamphetamine. The Judge said that while it may have been more than counsel was expecting to receive by way of an answer to his question, counsel had been on notice that the witness alleged that the accused used pure methamphetamine. The putting of the question, in the way it was done, had invited a denial of the proposition (that there had been no difference in the accused's attitude to the witness) and a reason why. To the witness it was a logical answer. Again, the Judge considered that it was matter that could be dealt with by a direction.

[11] In her summing up Judge Maze did indeed address the jury about what she termed some irrelevant material, which she briefly identified. She told the jury firmly to disregard this material as being probative of nothing which the jury had to decide and incapable of establishing any of the elements of the offences which the Crown must prove beyond reasonable doubt. She described it as "utterly irrelevant". It is unnecessary to set out the direction in full as Mr King had no criticism to make of its content. His argument was that the matters now in issue were simply not capable of being dealt with by any direction, the prejudice being, he said, too great, so that a mistrial should have been declared.

The Court of Appeal judgment

[12] Having found, in disposing of a ground not pressed in this Court, that there was ample evidence to justify conviction, the Court of Appeal turned to the present ground and expressed its agreement with the trial Judge that the introduction of the material, when understood in context and balanced by a strong direction to which no exception could be taken, did not entail miscarriage. It reviewed various aspects of

the way in which the cross-examination had been conducted by trial counsel and the replies he received, describing it as a "slugfest". It pointed out, as Judge Maze had done, that the impugned answers were directly responsive to the questions counsel had asked and had not been a gratuitous attempt by the witness to demean the appellant in the eyes of the jury. The defence had elected to embark on a bruising cross-examination which would inevitably irritate the complainant, who was in a humiliating and embarrassing position. The Court said that the fairness of a trial is non-negotiable but that in an adversarial contest a party which elected to play hard cannot complain at a vehement response. Generally speaking, the Court said, cross-examining counsel and the client on whose instructions the cross-examination is undertaken must accept its inevitable consequences. The Court referred to the New Zealand Law Commission's report on juries[2] and its conclusion that they are fair minded and will comply with a clear direction on how they are to treat material that is potentially prejudicial.

[13] The Court then added a remark which Mr King said has been a cause of some general concern to defence counsel: [3]

> Had the passages complained of been introduced by the prosecution in chief there would be great force in Mr Tennet's submissions. But the defence having elected to make the allegations in the way they were advanced has courted the responses.

Miscarriage of justice?

[14] As this Court pointed out in *Sungsuwan v R*,[4] the fundamental question which an appellate criminal court must address is whether, in terms of s 385(1)(c) of the Crimes Act 1961, there has been a miscarriage of justice, no matter how that may have occurred. It is not a matter of allocating blame for the situation which arose at a trial. In some cases the Court may find that what has occurred is that a line of cross-examination has been deliberately pursued for tactical reasons notwithstanding the potential for prejudice in the responses elicited. In such a case, however, the ultimate question, even if the defence could fairly be said to have courted the answer,

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2 *Juries in Criminal Trials* (NZLC R69 2001).
3 Para [65].
4 [2005] NZSC 57.

must still be whether the responses are such that a miscarriage of justice has occurred. When the passage from the Court of Appeal set out in paragraph [13] above is read in the context of the whole of the Court's judgment we do not understand the Court to have taken any different view of its task. We suspect that in fact the Court's remark concerning a hypothetical prosecution examination in chief was intended merely to cover the improper introduction by a prosecutor of prejudicial material and to emphasise that if this occurred there could be good reason to say, without more, that a miscarriage had occurred. No more should be read into the Court of Appeal's judgment. It is to be noted that the trial Judge in her ruling placed no weight on the fact that the matters in issue arose in the defence cross-examination. She correctly concentrated on what had been said, rather than on how the disclosures came about.

[15] Mr King endeavoured to persuade us that in concluding that in this case there had been no miscarriage the trial Judge and the Court of Appeal had erred in principle or were plainly wrong in their assessment. He submitted that the Court of Appeal had placed too much emphasis on the cause of the prejudicial material being before the jury and not enough emphasis on the effect of that material. He accepted, however, that the trial Judge had concentrated on that effect and that the real issue on appeal was whether there was good reason to interfere with the trial Judge's conclusion, in the exercise of her discretion, that such illegitimate prejudice as there might be could be removed by an appropriate jury direction. Mr King contended that both Judge Maze and the Court of Appeal had given insufficient weight to the prejudicial effect. Particular caution was required, he said, where severance of the charges relating to incidents in a prison had been refused and, as well, the appellant was facing charges of sexual offending in the same trial. Counsel should not be dissuaded from asking tough questions in cross-examination for fear that if a witness chose to make disclosures which were illegitimately prejudicial to the accused, the Court would say that this was simply a result of counsel's choice of questions and would not intervene. That would, Mr King said, create a real dilemma for defence counsel.

[16] Whether or not to discharge a jury which has heard a witness disclose illegitimate prejudicial material is for the discretion of the trial Judge on the

particular facts. An appellate court will not lightly interfere with the exercise of that discretion. It depends on the nature of what has been admitted into evidence, the circumstances in which it has been admitted and what, in the light of the circumstances of the case as a whole, is the correct course.[5]

[17] Having reviewed the record of the trial, we agree with the Courts below that any illegitimate prejudice in this case was capable of being cured, and was indeed cured, by the trial Judge's direction, of which no criticism from a defence perspective either was or could fairly be made. Trial counsel's challenges to the credibility of the complainant's evidence could be said at times to have been in danger of transgressing the prohibition against insulting or needlessly offensive questioning found in s 14 of the Evidence Act 1908. The Court of Appeal plainly saw the need to remind counsel of that limitation on aggressive cross-examination. But it is clear that the Court came to its ultimate conclusion by looking at the matters of which complaint is now made by Mr King and at the direction given to the jury and assessing whether there had been a miscarriage. It was satisfied that the introduction of the evidence, when understood in context and balanced by a strong direction, "did not entail miscarriage".[6]

[18] We agree with that view. We are satisfied that no error of approach by either the trial Judge or the Court of Appeal has been demonstrated, and in particular there was no undue emphasis on the way the impugned evidence came to be received. In a trial which in part concerned assaults alleged to have occurred inside a prison over a period which was consistent only with the service by the accused of a lengthy term of imprisonment, the references to the exact length of that term and the fact that it was not the accused's first time in prison added very little of a prejudicial nature. It had already been necessary for the jury to have been given information from which it would have known that Mr Thompson had at least one prior conviction for some form of serious criminal offending. It is also likely that from the lifestyle which had to be described to them they would have suspected that he had a gang association. Whether or not that is so, in the context of this trial such additional information,

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5 *R v Weaver* [1968] 1 QB 353, 359-360 (CA).
6 At [71].

which received no emphasis at all, would be unlikely to have had any real influence on the verdicts.

[19] This is not a case in which a prosecution witness has for her own purposes gratuitously introduced significant illegitimately prejudicial material. It is readily distinguishable from those cited by Mr King, *R v McLean (Colin)*[7] and *Arthurton v R*,[8] in which highly prejudicial and irrelevant evidence was unexpectedly introduced by a prosecution witness, seemingly for the purpose of damaging an accused who was entitled to rely upon his good character. In *McLean* reference was made by the complainant to a complaint of rape against the accused by his former wife of which he had actually been acquitted. In *Arthurton* a police sergeant had been asked to confirm, as was a fact, that the accused had no previous convictions and had, quite improperly, chosen to say that she could not really say and that she knew he had been arrested and charged for a similar offence. In the present case there was no misconduct of that kind by the complainant. Her answers were directly relevant to questions asked of her as part of the defence case which challenged her credibility, and obviously enough Mr Thompson was not relying upon his own good character. It was not a situation in which the witness has taken matters into her own hands by introducing damaging and irrelevant material and has thereby affected the fairness of the trial so that the guilty verdict cannot be allowed to stand.

[20] In this case the references to drug use by the appellant were a consequence of the line of cross-examination which was being deliberately pursued, seeking to contradict the complainant's account of Mr Thompson's violent behaviour. The complainant's testimony that his conduct towards her was a product of his drug taking was admissible evidence. It was certainly prejudicial but it was her explanation of his assaults on her. It was directly relevant to an issue raised by the defence. Counsel was aware that the witness alleged drug taking by Mr Thompson. The answers she gave cannot have come completely out of the blue. There was then a strong direction from the trial Judge to ignore the reference. If any criticism can be made of this, it is that in relation to drug use the direction may have been unduly favourable to the defence, for the Judge told the jury that what had been said about

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7 [2001] 3 NZLR 794 (CA).
8 [2005] 1 WLR 949 (PC).

drug use was not probative and was "irrelevant material" which could not be used by it to establish any of the elements of the offences.

[21] We have borne in mind that the disclosures were made by the complainant in the course of a trial in which the appellant was charged not only with offending against her but also with sexual offending against her child and that there was already potential for the jury to be influenced by the fact that some of the alleged assaults occurred in a prison environment and therefore by its knowledge that Mr Thompson was not a person of unblemished character. However, these considerations do not persuade us that the trial was unfair. The disclosures bore no relationship to any of the evidence which was probative of the sexual offending; and the jury actually acquitted the appellant on the majority of the prison charges, which indicates that it was not prejudiced against him merely because he had been a serving prisoner.

Result

[22] The appeal accordingly fails and is dismissed.

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