IN THE SUPREME COURT OF NEW ZEALAND

SC 25/2007
[2007] NZSC 102

KURT JOHN OWEN

v

THE QUEEN

Hearing:	20 November 2007
Court:	Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ
Counsel:	D J Sharp and K L Goldsbury for Appellant Solicitor-General D B Collins QC and M D Downs for Crown
Judgment:	11 December 2007

JUDGMENT OF THE COURT

A The appeal is dismissed.

REASONS

(Given by Tipping J)

Introduction

[1] Section 385(1)(a) of the Crimes Act 1961 states that the Court of Appeal or this Court must allow an appeal against conviction if the Court is of the opinion that

the verdict of the jury should be set aside on the ground "that it is unreasonable or cannot be supported having regard to the evidence". The appellant, Mr Owen, failed to persuade the Court of Appeal[1] that the verdicts of the jury which found him guilty on five counts of sexual violation should be set aside on this ground. He appeals by leave to this Court raising matters both of fact and of law. It is convenient to deal with the legal matters which arise before considering the facts. We will first state the conclusions we have reached on those matters and then set out the factors which have led us to those conclusions.

[2] Leave to appeal was granted in this case so that the correct approach to s 385(1)(a) could be reviewed in this Court. The leading case is *R v Ramage*[2] in which the Court of Appeal said that a verdict will be unreasonable or not supported having regard to the evidence "if the Court is of the opinion that a jury acting reasonably must have entertained a reasonable doubt as to the guilt of the [appellant]".[3] Somewhat different articulations of the test propounded in *Ramage* have been employed in the Court of Appeal in the 23 years since that case was decided. In some cases the differences can be viewed as semantic but in others they are capable of suggesting substantive variations.

[3] In the present case the Court of Appeal said:[4]

> Put shortly, the question is whether the Court is of the opinion that a jury acting reasonably *must* have entertained a reasonable doubt as to guilt. It is insufficient that the reviewing Court may simply disagree with the verdict of the jury. And further, if the jury has received evidence which, if accepted, would support its verdict the verdict is not unreasonable: *R v McDonald* CA 142/04 29 July 2004.

The appellant argued that the way the *Ramage* test had been applied, at least in some cases, meant that if there was any evidence capable of supporting the verdict, it could not be characterised as unreasonable. Reference was made in particular to the *McDonald* articulation upon which the Court of Appeal relied in the present case.

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1 [2007] NZCA 87 (Hammond, Chambers and Arnold JJ).
2 [1985] 1 NZLR 392.
3 At p 393.
4 At para [22] (original emphasis).

The appellant submitted that this approach watered down the disjunction between the concepts of "unreasonable" and "not supported". Unreasonableness was not to be construed as limited to cases where there was no supporting evidence.

[4] We do not propose to refer to other cases in which different formulations have been adopted, particularly because in *R v Munro*[5] the Court of Appeal has itself very recently and helpfully conducted a comprehensive survey of the relevant authorities both from New Zealand, and from England, Australia and Canada.

Legal aspects of s 385(1)(a)

The Test

[5] Section 385(1)(a) contains two distinct, albeit overlapping, concepts. The first concerns a verdict which is unreasonable. A verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty. The second concept concerns a verdict which cannot be supported having regard to the evidence. That will be so when there is no evidence capable of supporting it. This can arise particularly when a specific factual ingredient of the offence lacks evidentiary support. It is unlikely that a case will have reached the point of a verdict of guilty if that is so,[6] but this ground is contained in para (a) both for historical reasons to be mentioned below, and because it must have been thought necessary to cater for that kind of case. Although they are distinct, the two limbs of s 385(1)(a) overlap because a verdict of guilty based on no evidence must necessarily be an unreasonable verdict. On the other hand a verdict of guilty based on some evidence is not necessarily a reasonable verdict.

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5 [2007] NZCA 510: see paras [4] – [90] in the main judgment delivered by Glazebrook J for herself, Chambers, Arnold and Wilson JJ. Hammond J delivered a separate judgment.

6 Bearing in mind in particular the powers now contained in s 347 of the Crimes Act.

History

[6] Section 385(1)(a) was modelled on s 4 of the Criminal Appeal Act 1907 (UK).[7] It was introduced into New Zealand law by our Criminal Appeal Act 1945. In England s 4 was generally administered (before the ground was changed in 1968[8]) on the basis that "unreasonable" and "cannot be supported" were distinct concepts, albeit in some cases they tended to be run together. In *R v Smith* Lord Reading CJ commenced his judgment with these words:[9]

> The appellant was convicted on an indictment which charged him with Overbury, who pleaded guilty, with stealing and receiving gold on three occasions. He was convicted, and it cannot be said that in law there was no evidence fit to be submitted to the jury, or on which the jury could convict. But Mr. Young says that, taking all the circumstances into account, it was not a satisfactory verdict, although possibly there was some evidence to support it, and that it was an unreasonable verdict.

And in *R v Hopkins-Husson*, Lord Goddard CJ said:[10]

> If there is evidence to go to the jury, and there has been no misdirection, and it cannot be said that the verdict is one which a reasonable jury could not arrive at, this Court will not set aside the verdict of Guilty which has been found by the jury.

Lord Goddard's formulation was recently approved by the Privy Council when it gave judgment in an appeal from Jersey which has retained the unreasonableness/not supported ground previously contained in the English s 4.[11]

[7] The decision of the New Zealand Court of Appeal in *R v O (No 2)*[12] provides another example to the same effect. The Court said:[13]

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7 It was this Act which established the first Court of Criminal Appeal in England: see *English Criminal Appeals 1844 – 1994* by Rosemary Pattenden (Clarendon Press, 1996). At p 6 the author describes the Act as having had a "long gestation and difficult birth". Parliament had been asked to consider 31 bills on the subject between 1844 and 1906. The 1907 Act was passed despite strong opposition from most of the judiciary to appeals on fact (see Pattenden, pp 22 – 25 and pp 27 – 33). One of the main opponents in the years leading up to the passing of the Act was Lord Alverstone CJ who in 1906 told the House of Lords that his strong opposition was "entertained by all his brethren in the King's Bench" (Pattenden, p 25).

8 By the Criminal Appeal Act 1968 (UK).

9 (1914) 10 Cr App R 232 at p 233.

10 (1949) 34 Cr App R 47 at p 49.

11 See *Attorney-General for Jersey v Edmond-O'Brien* [2006] 1 WLR 1485 at para [22].

12 [1999] 1 NZLR 326.

13 At p 333 (original emphasis).

> Under New Zealand law, the question in terms of s 385(1)(a) of the Crimes Act 1961 is whether the verdict in question should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence. Simply because a verdict can be supported on the evidence does not of itself mean it cannot be unreasonable on the grounds of inconsistency with other verdicts.

[8] The reason why s 4 was drafted with these overlapping disjunctive grounds seems at least in part to have been the historical distinction between errors of law and errors of fact. Before the establishment in England of the Court of Criminal Appeal, an appeal lay from a verdict of guilty to the Court for Crown Cases Reserved.[14] The only basis was error of law and the appeal depended on the trial judge being prepared to reserve the point. To find a person guilty with no evidence to support that conclusion was regarded as an error of law.[15] If there was some evidence, however slender, to support the verdict, it could not be challenged for error of law. Hence no qualitative review of the evidence was available.

[9] The enactment in 1907 of the "unreasonableness" criterion introduced a limited right of appeal on fact. The "unsupported" criterion, which came ultimately to be administered in much the same way in some cases as the unreasonableness criterion, preserved the former no evidence (error of law) ground of appeal, even though analytically it was not strictly necessary to do so because, as we have said, a verdict based on no evidence must necessarily be an unreasonable verdict. Furthermore, appeals were also expressly authorised under the 1907 Act on questions of law and on the basis of a miscarriage of justice on any ground. Analytically therefore, s 4 involved conceptual overlap and tautology from the outset.

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[14] Established in 1848. Prior to that the only way to challenge a criminal conviction was by the very limited means of a writ of error which, after 1848, was only rarely used. Under the earlier procedure the reviewing court simply examined the written record of the trial to determine whether any error of law appeared on the record which contained only the charge, the plea, the verdict and the sentence: see Pattenden, p 6, footnote 11, citing Sir James Fitzjames Stephen in *A History of the Criminal Law of England* (1883), vol I, p 214.

[15] See *Encyclopaedia of the Laws of England* (1897), vol IV, Crown Cases Reserved, p 45 where "absence of legal evidence" was said to be a ground of appeal available as error of law. The authors interestingly observe that the state of the law at that time was defective in that "no provision is made for judicial consideration of the perversity of juries in a criminal case, except in so far as the Court for Crown Cases Reserved can pronounce that there has been a mistrial". That pronouncement was confined to "no evidence" situations. This defect was remedied by the 1907 Act. Later cases endorsed the proposition that to proceed on "no evidence" was to err in law: see *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at p 36 per Lord Radcliffe, adopted by this Court in *Bryson v Three Foot Six Ltd* [2005] 3 NZLR 721 at para [26].

[10] The difference between error of fact and error of law was referred to implicitly in an early case under the English s 4, *R v Hancox*.[16] Pickford J, giving the judgment of the Court of Criminal Appeal, said:[17]

> This Court has said that it does not proceed on such lines as these – look at the evidence, see what conclusion the Court would have come to, and set aside the verdict if it does not correspond with such conclusion. There have been cases where the Court has thought fit to set aside a verdict on a *question of fact alone*, but only where the verdict was obviously and palpably wrong. Such cases are rare.

[11] The historical rationale for the unreasonable/not supported dichotomy in the English s 4 is referred to by Rosemary Pattenden in her work to which we have already referred.[18] She notes that in 1972 a law reform committee in Scotland recommended removal of the words "cannot be supported having regard to the evidence" from the corresponding Scottish legislation on the ground that these words had always been interpreted in relation to sufficiency of evidence and as this was a question of law they were superfluous. This equation of "sufficiency" of evidence with a question of law must mean that sufficiency was here being equated with the "no evidence" ground for error of law first adopted by the Court for Crown Cases Reserved.[19]

[12] It is now appropriate to recognise that the "cannot be supported" limb of s 385(1)(a) has no practical significance. An "unsupported" verdict must necessarily be an unreasonable verdict. An unreasonable verdict has insufficient evidence to support it. A verdict with no evidence to support it is simply at the outer end of a continuum. Henceforth it will suffice simply to apply the unreasonableness limb.

Munro

[13] We return to the decision of the Court of Appeal in *Munro*. We propose to discuss the main judgment in that case only to the extent necessary for present purposes. We would endorse the following aspects of the decision in *Munro*:

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16 (1913) 8 Cr App R 193.
17 At p 197 (emphasis added).
18 See footnote 7 above, p 143.
19 See footnote 14 above.

(a) The appellate court is performing a review function, not one of substituting its own view of the evidence.

(b) Appellate review of the evidence must give appropriate weight to such advantages as the jury may have had over the appellate court. Assessment of the honesty and reliability of the witnesses is a classic example.

(c) The weight to be given to individual pieces of evidence is essentially a jury function.

(d) Reasonable minds may disagree on matters of fact.

(e) Under our judicial system the body charged with finding the facts is the jury. Appellate courts should not lightly interfere in this area.

(f) An appellant who invokes s 385(1)(a) must recognise that the appellate court is not conducting a retrial on the written record. The appellant must articulate clearly and precisely in what respect or respects the verdict is said to be unreasonable and why, after making proper allowance for the points made above, the verdict should nevertheless be set aside.

[14] At paras [86] and [87] of the main judgment in *Munro* the Court stated the test to be applied under s 385(1)(a) in these terms:

> The correct approach to a ground of appeal under s 385(1)(a) is to assess, on the basis of all of the evidence, whether a jury acting reasonably ought to have entertained a reasonable doubt as to the guilt of the appellant. We consider the word "ought" is a better indication of the exercise to be conducted than the word "must" used in *Ramage*. It emphasises the task that the Court has to perform. This test also, in our view, accords with the statutory wording.
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> We consider that McLachlin J's comments in *R v W(R)*[20] encapsulate the main elements of the test. The test is not whether the verdict is one that no jury could possibly have come to. A verdict will be deemed unreasonable where it is a verdict that, having regard to all the evidence, no jury could

[20] [1992] 2 SCR 122.

> reasonably have reached to the standard of beyond reasonable doubt. The Court must always, however, keep in mind that it is not the arbiter of guilt, and that reasonable minds might disagree on findings of fact – see the comments in *Biniaris*[21] and those in *Mareo*.[22]

[15] We agree with the Solicitor-General's submission that the third sentence in para [87] captures the substance of the correct approach. We did not understand the appellant, ultimately, to be suggesting any materially different test. We would not adopt the concept of a verdict being "deemed" unreasonable. It either is unreasonable or it is not. The word "deemed" suggests a reluctance to find a verdict actually unreasonable.

[16] As earlier noted,[23] the Court of Appeal in the present case appears, by adopting *McDonald*, to have treated unreasonableness as confined to lack of any supporting evidence.[24]

[17] The Court of Appeal was right in *Munro* to reject the English lurking doubt test. It was framed against a ground of appeal which referred to the verdict being "unsafe or unsatisfactory".[25] In any event, the lurking doubt test invites an approach which is instinctive rather than analytical. There is, in the end, no need to depart from the language of Parliament. The question is whether the verdict is unreasonable. That is the question the Court of Appeal must answer. The only necessary elaboration is that expressed earlier, namely that a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty. We do not consider it helpful to employ other language such as unsafe, unsatisfactory or

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21 [2000] 1 SCR 381.

22 [1946] NZLR 660.

23 At para [3] above.

24 For the avoidance of doubt, we also mention that in para [21] of the main judgment in *Munro*, their Honours said:

> It is clear from *Ramage* and the authorities cited in that case that an appellate court may find a verdict to be unreasonable or unsupported by the evidence even where there is some evidence to support it and there has been no misdirection.

This statement tends to equate the concepts of unreasonable and unsupported in what we respectfully consider to be an unhelpful way. It also conveys at least a linguistic contradiction in terms – a verdict cannot logically be unsupported by the evidence when there is some evidence to support it.

25 As introduced by s 2(1)(a) of the Criminal Appeal Act 1968 (UK).

dangerous to convict. These words express the consequence of the verdict being unreasonable. They should not be used as tests in themselves.

Bill of Rights Act

[18] Although the New Zealand Bill of Rights Act 1990 was not mentioned by counsel, we have considered whether the construction we have placed on s 385(1)(a) is consistent with the Bill of Rights Act. The relevant substantive provision is s 25(h) which gives everyone convicted of an offence the right to appeal according to law against the conviction to a higher court. New Zealand domestic law affords that right in present circumstances through Part 13 of the Crimes Act which contains s 385. The scope of the appeal on fact, as we have defined it, is consistent both with the New Zealand domestic requirement found in s 25(h) and with New Zealand's obligations under the International Covenant on Civil and Political Rights.[26] There is no suggestion in the international jurisprudence that the right of appeal mandated by our s 25(h) and corresponding international provisions should, in the case of factual issues, be different in character or more extensive than that provided by s 385(1)(a).

The circumstances of the present case

[19] We will now discuss the circumstances of the present case to the extent necessary to consider the factual issues raised. The five counts all related to the same complainant. She and the appellant were both in the seventh form at their respective high schools in the same city. They had known each other for about seven years and were friends. The appellant knew that the complainant had a long-term boyfriend who was elsewhere at the time. We take the following narrative substantially from the judgment of the Court of Appeal, as there was no dispute about its accuracy.

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[26] See art 14(5).

[20] On 9 April 2005 the appellant and the complainant were both socialising separately with friends. The appellant was at a bar and the complainant was at a party with a female friend. At 10:30 pm the appellant sent a text message to the complainant asking her where she was. Messages passed between them, as a result of which the appellant agreed to join the complainant at the party. By 11:40 pm he had not arrived. The complainant sent him a text asking where he was. At 12:15 am he replied "Ill pick u up and we go home". Ten minutes later the complainant called him on his cellphone. The appellant said he was on his way. He arrived at 12:40 am, and paid off the taxi in which he had come. By this time the complainant had lost track of her female friend.

[21] For the next 40 minutes or so, the appellant and the complainant were either looking for the friend, as the complainant asserted, or wandering aimlessly, as he asserted. During this period, unknown to the complainant, the appellant was sending what the Court of Appeal described as suggestive text messages to three other women. These messages rather gave the lie to the appellant's claim that his sexual activity with the complainant was pre-arranged. As the appellant and complainant were walking, they passed a motel. The appellant went into the motel at about 1:15 am and booked a room for one. The complainant remained on the street. There was a dispute at the trial as to why the complainant then entered the motel room. She said that she wanted to use the bathroom and the telephone. The appellant said that he and she had agreed to have sex and that they went into the motel room for that purpose.

[22] The complainant's evidence was that once she had entered the motel room she sat on the bed to use the telephone. The appellant asked to cuddle her. She refused. He pulled her clothes off and forcibly restrained her. She said that he then sexually violated her in a number of different ways and she managed to escape from this ordeal only after the appellant fell asleep. It was not disputed that she grabbed some of her clothes and ran naked and barefoot out of the motel room, carrying her top, pants and cellphone. She left her underwear and shoes behind. She also left the door ajar for fear, she said, of waking the appellant when shutting it.

[23] As she ran down the street towards a nearby petrol station two young men observed her, describing her as "quite terrified" and looking back to see if someone was following. After the complainant reached the petrol station the two young men approached her. They said she was crying, frightened and struggling for breath. Their evidence was that she immediately complained that she had been raped by the appellant. On reaching the petrol station the complainant rang her parents, to whom she also made the same complaint. She and they drove to the police station.

[24] At 6:45 am the police went to the motel. They found the door still ajar. The appellant was asleep. The bed was pushed well out of its usual position. There were spots of blood on the sheets and the duvet, and the complainant's underwear and shoes were still on the floor. After speaking to a lawyer the appellant acknowledged that he had had sex with the complainant. He asserted he had done nothing wrong, saying that she had wanted to have sex with him and came to the motel for that purpose. His evidence at trial was essentially to this effect.

[25] The complainant had undergone a medical examination at 4:45 am. She had bruising on both her upper arms and there was a tear to her anus which was still bleeding. There was no dispute at the trial that the sexual activity had taken place. The issues were whether the complainant had consented and whether the appellant believed on reasonable grounds that she was consenting.

[26] The Court of Appeal came to the conclusion that the verdicts of the jury were not unreasonable. The Court expressed the view that this was a paradigm jury case and "somewhat unsurprisingly" the jury had clearly preferred the complainant's account of what had occurred.

[27] Mr Sharp, who did not appear below, raised everything that could possibly have been raised on the appellant's behalf. He pointed out that both parties had consumed considerable quantities of alcohol in the course of the evening. He subjected the text messages and their timing to close analysis. At 1:21 am the complainant received a text from her long-term boyfriend. She responded at 1:27 am under pressure, she said, from the appellant, and during the sexual attack. She said in her response that she had just got back to her friend's place and was going to

sleep. The appellant contended first that the text had been received and responded to prior to the start of the sexual activity and the complainant had deliberately lied to her boyfriend. He also relied on the apparent normality of this text message and contended that this was not consistent with its having been sent at a time when the complainant was being subjected to an extended sexual attack.

[28] The complainant explained the terms of the text on the basis that she had been told what to say by the appellant. That was an explanation which the jury was entitled to accept. It cannot possibly be said that in the light of all the evidence it was unreasonable for them to have done so. The appellant's assertion that he did not know enough to have been able to instruct the complainant to text in these terms was not such as to preclude the jury from accepting the substance of what the complainant said. The timing issue was fully before the jury and the verdicts cannot be said to be so incompatible with the evidence in this respect as to make them unreasonable. The Judge summed up fully and fairly on the issues upon which the appellant now relies. It cannot therefore be said that the jury were unaware of the need carefully to address them.

[29] In his submissions Mr Sharp focussed primarily on the issue of the appellant's belief in consent. This no doubt reflected the fact that the jury was certainly entitled to find beyond reasonable doubt that the complainant did not in fact consent. Counsel took the Court carefully through passages in the evidence which he submitted should have left the jury with a reasonable doubt on the subject of the accused's belief. The jury obviously considered either that the appellant did not believe the complainant was consenting or that any such belief was not based on reasonable grounds. Either view must have depended very much on the jury's assessment of the complainant's evidence.

[30] In that respect certain facts were independently verified. These included the way in which the complainant left the motel room when the appellant, as he accepted, was asleep. This was strongly consistent with her evidence of what had occurred. Her demeanour and actions, as observed by the two young men, who also verified her naked state, demonstrated that they considered her to be frightened and very distressed. It is significant that they had her under observation before she saw

them. Her immediate complaint of rape is also entirely consistent with her description in evidence of what the appellant had done to her. The police found the motel door ajar, as the complainant said she had left it. The jury were presented with evidence which, overall, gave considerable credence to the complainant's oral testimony. The medical evidence, while not necessarily probative of non-consensual sexual activity, was certainly consistent with it.

[31] The complainant's testimony laid what might be thought to be a strong basis for concluding that her conduct cannot have led the appellant to believe that she was consenting. If, however, the jury nevertheless thought it was reasonably possible that he did so believe, there was ample evidence for them to conclude to the necessary standard that such a belief was not based on reasonable grounds. We have given careful consideration to everything which Mr Sharp said about the facts of this case. We are, however, not persuaded that the Court of Appeal erred in concluding that the appellant had failed to demonstrate that the verdicts were unreasonable. In short, having regard to all the evidence, the jury could reasonably have been satisfied to the required standard that the appellant was guilty on all counts. The appeal must therefore be dismissed.

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