IN THE SUPREME COURT OF NEW ZEALAND

SC 8/2007
[2007] NZSC 68

LAXMAN RAJAMANI

v

THE QUEEN

Hearing: 25 July 2007

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: G J King, T J Darby and C Milnes for Appellant
J C Pike and K B F Hastie for Crown

Judgment: 23 August 2007

JUDGMENT OF THE COURT

A The appeal is allowed.

B The appellant's conviction is set aside.

C A new trial is ordered.

REASONS

(Given by Tipping J)

Introduction

[1] The appellant, Mr Rajamani, was found guilty of the murder of his wife after his partial defence of provocation was rejected by the jury. His appeal to the Court of Appeal was dismissed.[1] His further appeal to this Court is based on three grounds: (1) that the Judge's directions on provocation were erroneous; (2) that the Judge misdirected the jury on the proper use they could make of certain evidence which had a potentially prejudicial hearsay dimension; and (3) that his trial miscarried because it was improperly completed with only ten jurors. As the third point is dispositive of the appeal we will address it first. We will discuss the other two points in that light.

Ten jurors

[2] Section 374(4A) of the Crimes Act 1961 provides:

> (4A) The Court must not proceed with fewer than 11 jurors except in the following cases:
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> > (a) If the prosecutor and the accused consent:
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> > (b) If the Court considers that, because of exceptional circumstances relating to the trial (including, without limitation, the length or expected length of the trial), and having regard to the interests of justice, the Court should proceed with fewer than 11 jurors; and in that case—
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> > > (i) The Court may proceed with 10 jurors whether or not the prosecutor and the accused consent:
> > >
> > > (ii) The Court may proceed with fewer than 10 jurors only if the prosecutor and the accused consent.

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1 *R v Rajamani* (Court of Appeal, CA140/06, 20 December 2006, Arnold, Randerson and Ronald Young JJ).

The effect is that, absent consent, the court must not proceed with fewer than 11 jurors unless there are exceptional circumstances and the court considers it is in the interests of justice to do so.

[3] A preliminary point arises concerning the scope of s 374(8), which provides that no court may review the exercise of any discretion under s 374. The question is whether a judge's decision to proceed with ten jurors is wholly unreviewable or whether the Court of Appeal can consider whether the grounds for exercising the power to proceed with ten jurors were present. The Court of Appeal held first that whether the grounds for exercising the power were present could be the subject of review on appeal, but second that there was a "high threshold" for such a review. The Court stated that an appellant was required to establish that "no Judge could have rationally concluded exceptional circumstances existed".[2] We consider the Court of Appeal was right on the first point but erred on the second.

[4] Section 374(8) precludes the review of the exercise of "any discretion" under the section. Whether exceptional circumstances exist is not a matter of discretion. It is a matter of fact requiring judicial assessment. The discretionary power vested in the court to proceed with ten jurors exists only if there are exceptional circumstances. If exceptional circumstances do exist, no court may review the exercise of the trial judge's discretionary decision whether it is in the interests of justice to proceed with ten jurors.

[5] The Court of Appeal was not, however, correct in the present case to conclude that appellate intervention could or should take place only if no judge could rationally have found the presence of exceptional circumstances. The appellate court can intervene if it considers the trial judge's finding of exceptional circumstances was wrong. Ordinary appellate principles apply. We cannot accept Mr Pike's invitation to uphold the Court of Appeal's approach. No precedent was cited to support it and there is no basis in principle to depart from ordinary standards of appellate review. The question in this case is therefore whether the trial Judge was wrong to find that exceptional circumstances existed for the purpose of s 374(4A).

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2 At para [18].

[6] Subsection 4A was inserted into the principal Act, as from 11 December 1997, by s 3 of the Crimes Amendment Act (No 3) 1997. Its enactment was prompted by the impending trial of Malcolm Rewa on 40 mainly sexual counts involving 27 complainants. His trial was expected to last some five months. There was therefore a real risk of more than one jury member becoming incapable or unable to continue sitting. If that were to happen, the trial could not have proceeded any further without the amendment. When introducing the Bill, the Minister of Justice stated that if the trial had to start again "the emotional cost to the victims would be considerable. It would also impose significant financial and opportunity costs for the justice system."[3] The explanatory note to the Bill spoke of the need "to ensure that lengthy or difficult trials" could be completed with ten jurors. It also spoke of an ability to proceed with fewer than 11 jurors "in certain limited circumstances". It is appropriate to construe the purport of the phrase "exceptional circumstances" against that background.

[7] In his ruling the trial Judge noted that at the time he discharged the second juror, the two week murder trial was into its second week. It was in fact the Tuesday of the second week. The Judge then recorded the opposition of the accused to proceeding with ten jurors. He mentioned that the Crown had submitted that it would be difficult to reschedule a two week case of this kind within a reasonable time period. The Crown had also referred to the extensive number of witnesses (37) who had already been called. One of those witnesses was from Sydney. He was a reasonably important witness and a close associate of the accused. Having rehearsed the circumstances in that way, the Judge stated his conclusion in these words:

> I have considered the matters that counsel have raised. I consider that there are not only exceptional circumstances relating to the need to discharge the second juror but there are also exceptional circumstances relating to this trial given that it is a two week trial, given the stage the trial is at and given the number of witnesses who have been called so far so that it is appropriate in this case with regard to interests of justice to continue with the 10 jurors who have faithfully served to date.

[8] The Court of Appeal approached the matter on the "no rational Judge" basis earlier described. As that approach was wrong we do not consider it helpful to

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[3] Hon D A M Graham (6 November 1997) 564 NZPD 5208.

discuss the way in which the Court found that this criterion for intervention was not established.

[9] In argument in this Court Mr Pike, for the Crown, focused primarily on the position of the witness from Sydney. He realistically found it difficult to assert that the other matters approached the level of exceptional circumstances. Counsel was correct because they are really matters of unexceptional administrative inconvenience. At two weeks, the length of the trial, and hence of the potential retrial, cannot possibly be regarded as exceptional. Nor can the number of witnesses. The only point of any possible force concerning the witness from Sydney relates to the inability of the Crown to compel his attendance. There is, however, nothing in the material before the court which gives any direct support for the presence of a real risk of non-attendance by this witness. The fact that his evidence may be thought unhelpful to Mr Rajamani's case affords only indirect and rather speculative support for the Crown's concern that he might not be willing to attend. We do not consider this factor, either alone or in combination with the other features of the case, gives rise to the necessary exceptional circumstances. To find the present circumstances exceptional would set the standard significantly too low.

[10] The Judge erred in the conclusion to which he came. The completion of the trial with ten jurors deprived Mr Rajamani of his right to be tried by no less than 11 jurors. A miscarriage of justice was thereby occasioned. The miscarriage is substantial and the proviso to s 385 cannot therefore be invoked to save the conviction.

Provocation issues

[11] Mr King, who presented this aspect of the appellant's case, raised three concerns about the Judge's directions to the jury on the topic of provocation. The first was that the Judge had told the jury provocation was not available if the accused had acted "deliberately". The second was that the Judge's directions suggested that loss of the power of self-control was akin to automatism. The third was that the

Judge had directed, contrary to *R v Timoti*,[4] that the provocation had to be such as to induce the hypothetical person to act as the accused had acted, rather than simply to have lost self-control to the point of forming and acting on a murderous intent. We will address these three issues in turn.

"Deliberately"

[12] The Court of Appeal did not consider that the Judge's use of the word "deliberately", in the provocation context, might have misled the jury. In our view there is force in Mr King's submission that a real risk existed that the jury might have been misled to the prejudice of the appellant. We recognise the points made by the Court of Appeal and by Mr Pike about the importance of the context in which the impugned directions were given. But we are still left with the view that the risk the jury may have been materially misled is too great. The key direction in this respect is the Judge's statement:

> So it follows that if the accused deliberately decided to kill the deceased and acted on that intention it could not be said that her death was provoked by loss of self control…

[13] If the Judge had used the word "planned" rather than the word "decided", the direction would have been more acceptable. This is undoubtedly what the Judge meant. He was endeavouring to say that a planned or premeditated killing could not be said to have been a killing induced by provocation. But, even allowing for the context and the circumstances of this case, the Judge's words could have been understood as suggesting that if the accused made a deliberate decision to kill he could not in law have been provoked. Any such understanding of the direction would have been wrong in law and prejudicial to the accused. A deliberate, that is intentional, killing is, of course, open to the partial defence of provocation.

Extent of loss of self-control

[14] The complaints under this head focused on two passages in the summing up:

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4 [2006] 1 NZLR 323 (SC).

> [55] To amount to evidence of provocation at law the conduct must lead to a sudden and temporary loss of self control. It must cause the person who kills to lose their ability to reason. He must be in a state where he is no longer the master of his own mind. He must act instinctively and in an uncontrolled fashion. That loss of self control must continue from the time of provocation to the time of killing. Provocation is not available to a person who is motivated by anger or who acts out of revenge or in a deliberate, calculated or reasoned way. The loss of self control does not have to follow immediately the provocative act or acts but depending on the circumstances a delay between the provoking conduct and the killing may negate evidence of provocation.
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> …
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> [60] Is it reasonably possible that one or more of the acts that you find have occurred as a matter of fact could have caused him to lose his power of self control? Could the effect have been to bring him to a state that he ceased to act rationally and ceased to be the master of his own mind and conduct? That is an extreme state. To lose the power of self control is much greater than merely getting angry, even very angry.

[15] These passages must be read in conjunction, albeit they would have been heard by the jury about one minute apart. The Court of Appeal concluded overall that no miscarriage of justice had occurred on the provocation front.

[16] We consider the appellant's concerns about these directions, particularly the first paragraph, have force. The references to losing the ability to reason and acting instinctively are problematic, at least in combination. They suggest a state approaching loss of conscious volition. The statement that provocation is not available to a person who is motivated by anger is unsupportable. If taken literally it would almost abolish the partial defence. Almost everyone who is provoked is angry. The concept of ceasing to act rationally coupled with that of an extreme state again might be taken to suggest something akin to automatism. The Judge was undoubtedly seeking to give the jury as much help as he could on the subject of provocation, which always raises difficulties. His decision to introduce a number of different ways of expressing what it meant to lose the power of self-control was, however, potentially hazardous. In the result some of the ideas which he deployed were apt to create the wrong impression on this aspect of provocation and one, that relating to anger, was clearly wrong. We consider the directions given in this case could well have led the jury into an improper understanding of the legal test for what is ultimately a factual issue – whether the accused did in fact lose his power of self-control.

The Timoti point

[17] When directing on what in *R v Timoti* this Court called the evaluative issue,[5] the Judge asked the jury to consider whether the hypothetical person would have been able to maintain his self-control "and resist reacting as the accused did in the circumstances of this case". Unfortunately, this is contrary to what was said in *Timoti* to be the appropriate direction.[6] The correct approach is not to compare the reaction of the hypothetical person with what the accused actually did; but rather to inquire whether the provocation was sufficient to induce the hypothetical person to lose the power of self-control to the point of killing with murderous intent.

[18] There is force in Mr Pike's submission that in the particular circumstances of this case the misdirection cannot have caused a miscarriage of justice. The relevant conduct of the accused involved little, if anything, more than the single knife stroke which caused his wife's death. His conduct was not marked by persistence. There was, therefore, little prejudice to the accused in the Judge's reference to the hypothetical person being able to resist reacting as the accused did. It is, however, unnecessary to make any final decision whether, had this point stood alone, it would have justified a retrial.

Conclusion on provocation

[19] Different minds may well have different views about whether taken singly the concerns we have identified represent material error and, if so, whether they justify a retrial. In any event, looked at collectively, we consider the points give rise to a miscarriage of justice in respect of which it is not appropriate to apply the proviso. Hence the appeal should also be allowed and a retrial ordered on the basis of misdirections on the subject of provocation.

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5 *Timoti* at para [33].
6 At paras [35] and [36].

The hearsay point

[20] Evidence was given at the appellant's trial of statements made by the appellant's wife in the period leading up to her death. The admissibility of these statements is not in issue. It is the direction the Judge gave about the use to which this evidence could be put that is criticised. The crucial evidence was that on several occasions prior to her death the deceased said that Mr Rajamani had threatened to kill her. The Judge directed the jury that this evidence was relevant to Mr Rajamani's state of mind and to provocation generally.

[21] The Court of Appeal accepted that this direction was wrong. The evidence was admissible to prove the deceased's state of mind, but not that of the accused. The Crown did not suggest that the evidence was admissible for that purpose at common law. The Court of Appeal nevertheless considered there was no real risk that the Judge's misdirection had occasioned a miscarriage of justice. We cannot agree. In this case there was more than a failure to direct on proper use; the Judge's direction invited improper use. The defence of provocation must have been undermined by the improper use of this evidence to show the state of the accused's mind. Used in that way the evidence suggested that the killing was planned and premeditated. The degree of prejudice inherent cannot be regarded as insubstantial. There was therefore, on this point also, a real risk of a miscarriage of justice. It would not be appropriate to apply the proviso. Mr Rajamani's retrial will take place under the Evidence Act 2006. We propose to say nothing about how its terms should be applied to the circumstances of this case. This dimension was understandably not dealt with below and we too did not invite submissions on it.

Conclusion

[22] For the reasons given the appeal is allowed. The conviction is set aside and a new trial is ordered.

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