IN THE SUPREME COURT OF NEW ZEALAND

SC 36/2007
[2007] NZSC 66

PALMIRO MCDONALD

v

THE QUEEN

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: C W J Stevenson for Applicant
F E Guy Kidd for Respondent

Judgment: 21 August 2007

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

[1] The applicant applies for leave to appeal to this court, his appeal against conviction for wounding with intent to injure having been dismissed by the Court of Appeal on 20 April 2007.[1] The applicant was tried on two charges before Judge Dawson and a jury at Palmerston North. He was found not guilty of assault with a weapon but found guilty of assault with intent to injure. Both charges related to incidents involving the same complainant, with whom the applicant was in a relationship.

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1 [2007] NZCA 142, O'Regan, Arnold and Ellen France JJ.

[2] Two grounds are advanced in support of the application for leave to appeal further the conviction on the charge of wounding with intent to injure. First, it is said that the trial Judge was wrong to decline an application by the defence under s 339(1) of the Crimes Act 1961 to leave to the jury a charge of assault in addition to the charge of wounding with intent to injure, on the basis that such charge is included in the more serious charge. The second ground advanced is that the complainant and her father in their evidence referred to the applicant's earlier conduct towards the complainant, which entailed assaults but which had not resulted in convictions. A further point concerns hearsay evidence given by the father. It is said that a mistrial should have been granted on the application of the defence. Notwithstanding the firm direction given by the Judge that they must ignore such references, the applicant contends that the prejudice in the inadmissible evidence occasioned a miscarriage of justice.

[3] Both the points sought to be raised on further appeal were fully addressed in the judgment of the Court of Appeal, delivered by O'Regan J. The Court applied the principles summarised in *R v Mokaraka*.[2] It is not suggested on the present application that the principles there discussed about the application of s 339(1) are wrong. It is a matter for the trial Judge whether an included charge should be left to the jury. The mere fact that an included charge is available does not make that course appropriate.

[4] The Crown case was that the applicant had kicked the complainant in the face while in a bedroom in her family home. The applicant, who did not give evidence at trial, had acknowledged in his statement, which was produced in evidence, that while in the lounge he had punched the complainant, in retaliation for her punching or kicking him. It was argued that the jury might have accepted the applicant's version of a punch and that the distinct charge of assault or male assaults female might well have been thought by the jury to be more appropriate than the charge of wounding with intent to injure. The suggestion by the applicant referred to an assault in the lounge. The Crown case was that the applicant had kicked the complainant when in

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2 [2002] 1 NZLR 793 (CA).

a bedroom. The jury were instructed in terms of the bedroom assault and could not have been in any doubt that it was the incident relied upon by the Crown. Even if the blow which caused the injury suffered by the complainant was as a result of a punch in the bedroom rather than a kick, counsel for the respondent rightly points out that the element of wounding with intent to injure would still have been present. There was evidence of all such elements. The jury can have been in no doubt that it had to find all elements proved.

[5] In those circumstances, there was no basis upon which the Judge would have been obliged to leave the included offence to the jury. There was, as the Court of Appeal noted, no live issue as to whether no more than the elements of the lesser charge were proved. There is no basis upon which it could be said that the Judge exercised the power he had under s 339(1) incorrectly. No matter of general or public importance is raised by the application. There is no basis upon which it could be concluded that a substantial miscarriage of justice may have occurred.

[6] The Court of Appeal also dismissed the appeal on the second ground advanced, that references by the complainant and her father to previous assaults and hearsay evidence given by the father as to what others present had said occurred caused a miscarriage of justice. The hearsay evidence that younger children present had said "Palmiro beat her up" was held by the Court of Appeal to add no additional prejudice. The Judge directed the jury to ignore it and in any event it added little to the case against the applicant. Indeed, as counsel for the respondent on the present application points out, the substance of the hearsay went no further than the admissions made by the applicant.

[7] The references to previous assaults emerged for the most part indirectly as the complainant explained her normal practice of taking up defensive positions when the applicant had previously "threatened", "hit" and "manhandled" her. The complainant's father's evidence was that he had commented "not again" when the applicant acknowledged pushing the complainant.

[8] With respect to the references to previous assaults, the Court of Appeal relied upon the decision of this Court in *R v Thompson*[3] where it was emphasised that whether a jury should be discharged after illegitimate prejudicial material has been heard by the jury depends on all the circumstances of the case. An appellate court will not lightly interfere with the exercise of that discretion. The Court of Appeal was satisfied that any potential prejudice was overcome by the firm direction given by the Judge in his summing-up. It was relevant that no details of the past abuse were given and the remarks were general. They were also consistent with the applicant's statement to the police where similar indirect references to previous violence were made. The Court of Appeal was satisfied, in the light of these factors and the Judge's "emphatic" direction, that no miscarriage of justice occurred.

[9] No point of general or public importance arises in this application of settled principle to the circumstances of the case. In context, the remarks are unlikely to have been significantly prejudicial and the strong direction given by the Judge leads us to agree with the Court of Appeal that there was no risk of miscarriage of justice.

[10] Neither ground advanced having met the criteria for leave to appeal under s 13 of the Supreme Court Act 2003, the application is declined.

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3 [2006] 2 NZLR 577 (SC) at p 594.