IN THE SUPREME COURT OF NEW ZEALAND

SC 41/2006
[2007] NZSC 51

QIU JIANG

v

THE QUEEN

Hearing: 15 February 2007

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

Counsel: W G C Templeton and K M Muller for Appellant
J C Pike and A Markham for Crown

Judgment: 5 July 2007

JUDGMENT OF THE COURT

A The appeal is allowed and the conviction is quashed.

B A new trial is ordered.

REASONS

(Given by Anderson J)

[1] The appellant was convicted on one count of blackmail pursuant to s 237 of the Crimes Act 1961. On this appeal from the Court of Appeal she says that a miscarriage of justice has occurred because of the way the indictment was framed. She also says that the trial Judge misdirected the jury in several respects.

The allegations

[2] The complainant Mr Shibing Wang and his wife gave evidence about a number of threats they said were made by the appellant, who was known as Linda, and by unknown people on her behalf. The threats related to money claimed by the appellant to be owed to her family by Mr Wang and his wife for arranging their marriage.

[3] The alleged threats began with statements made by the appellant at and in the vicinity of a Burger King restaurant on one day about the end of August 2004. According to Mr Wang, the accused said "if you don't pay the money I will break your leg" and then, later, "if you don't pay the money I will get someone to break your leg". At this time the appellant herself had suffered broken legs in a car accident and walked with the aid of crutches.

[4] Within a month of the Burger King incident subsequent threats were made by telephone, according to the evidence of Mr and Mrs Wang. The callers threatened to "deal with" them and more specifically, to break Mr Wang's leg if the debt was not paid. The telephone calls were made by two unknown men and one unknown woman. On several occasions they included comments to the effect that those people were acting on instructions from Linda. Some of the calls were recorded by Mr and Mrs Wang. Although the recordings indicate that the appellant claimed a debt, which Mr Wang denied, they do not contain threats by the appellant personally or through others.

[5] There was an occasion when windows of Mr Wang's house and car were broken. The next day, the accused called Mr Wang. When he asked the accused why she had broken his windows, she replied "what can you do about it?".

[6] On another occasion Mr Wang was called out to do some maintenance work at an address in Howick. While he and his wife were waiting in their van at the address, they noticed a suspicious vehicle. Their van was then followed in a sinister way by that vehicle, which had two occupants, a male and a female. As he was being followed, Mr Wang received threatening calls on his mobile telephone from an

unknown man. During two of those calls, the unknown man claimed Linda had paid him $10,000 to break the complainant's leg.

The indictment

[7] The case could conveniently have been analysed and presented in terms of the Burger King threats by the appellant and in terms of the telephone threats by unknown people allegedly acting at the appellant's direction. They had the character of separate transactions. The other generally intimidating or contextually relevant incidents could not properly be regarded as discrete threats. However, the Crown chose to present an indictment containing only one count, notwithstanding that it conflated conceptually different types of offending in terms of primary and accessory culpability. The indictment alleged that the appellant had "together with others, threatened expressly to endanger the safety of Shibing Wang with intent to obtain a benefit, namely a cash payment".

[8] Section 329(b) of the Crimes Act 1961 provides that every count shall in general apply only to a single transaction. However, it is not uncommon for a pattern of offending to be charged by one or more representative counts, particularly when criminal acts of a similar character are alleged to have happened frequently and, for understandable reasons, a complainant is unable to distinguish between them in terms of their dates or details.[1] Further, it is appropriate and not unusual to charge as a single count a continuing course of conduct which it would be artificial to characterise as separate offences. But it is another thing to charge as a single count repetitive acts which can be distinguished from each other in a meaningful way. In such cases, it is appropriate to have distinguishing counts even if they relate to more than one act of a certain class or character. Separate counts facilitate fairness in the conduct of the trial by focussing attention on matters of fact and law which can and need to be distinguished for the purposes of different counts. In the event of

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[1] The practice of representative counts is discussed in *R v Accused (CA 160/92)* [1993] 1 NZLR 385. In view of the common use of indictments containing representative counts over the past two decades, the restrictive view of what is now s 330, taken by Myers CJ and Callan J in *R v Crossan* [1943] NZLR 454 (CA), is no longer authoritative.

conviction, they assist the sentencing judge by indicating the extent of culpability. Did the charging of a single count in this case result in a miscarriage of justice? The appellant argues that it did, particularly having regard to the Judge's directions in relation to the rule of evidence which is sometimes called the co-conspirators rule.[2]

[9] The threats on different occasions could each have been the subject of separate charges. But on the view on which the indictment was framed, the evidence of Mr and Mrs Wang disclosed a continuing threat by the appellant expressed by her both personally and by the agency of others. The preferment of a single count in this way made it necessary that the jury be given careful and clear directions to ensure unanimity for the basis of their verdict.

The Judge's directions

[10] The Judge gave the jury a written list of issues, the first of which was:

> Did the accused either alone or in concert with others threaten Shibing Wang?

Her directions to the jury included the following:

> [28] If you are satisfied that the accused did make the threat that was described at Burger King then this element of the charge will be proven regardless of what you decide in relation to the other unidentified callers who are said to have made threats.
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> [29] So if you got to the point where you believed the threat was made by the accused at Burger King this part of the charge would be proved. In relation to the other threats made by unidentified people, you would have to be satisfied that both the threats were actually made and also that they were made at the direction or the behest of the accused, that she organised for them to be made. But this really depends on whether you believe the complainants' evidence. Mr Wang said that the callers made the same threat of breaking his legs and told him that he had to pay the accused. You may accept that the callers did say that and that you can infer from those threats that they were made in concert with the accused.
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> [30] However, I need to say something to you about this evidence. You might recall hearing counsel mention hearsay evidence during the trial. The evidence of what these unidentified callers said is hearsay evidence because the callers themselves did not give the evidence of what they said. Usually

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[2] A very useful discussion of the rule appears in *Ahern v R* (1988) 165 CLR 87 at pp 92 – 95.

> hearsay evidence is not allowed because the person who is said to have made these statements is not there to be cross-examined and so the evidence cannot be tested in the usual way. So to put it simply, no-one has been able to ask the people who made these calls under oath what they said and so we are hearing it second hand.
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> [31] However, hearsay evidence is allowed sometimes and one of the exceptions to the rule is where there has been a conspiracy between the accused and some other person. In that situation, the evidence of what the other members of the conspiracy said is allowed. However, because the evidence of those other people has not been tested by cross-examination you have to be careful when you are considering it. It is for you to decide how reliable it is. Remember that before you accept the evidence you need to be satisfied beyond reasonable doubt that these callers were acting in concert with the accused and that they did make the threats that Mr Wang gave evidence about.

[11] Those directions were inadequate to deal with the different concepts of principal and accessory liability in respect of the alternatives. In addition, because the evidence of the threats said to have been made personally and the threats said to have been made by others rested effectively on the evidence of Mr and Mrs Wang, inviting the jury to bring in verdicts on the alternative bases that the appellant was acting alone or with others was dangerous without explaining how the evidence of the telephone threats from others could be used and without a warning that the evidence of Mr and Mrs Wang required particular care. This was a case where it was necessary to give careful directions on the evidence because of the alternative bases for liability suggested by the Judge in the summing up, the lack of independent evidence of the offending,[3] and the fact that some of the evidence was contextual rather than probative of guilt. The need for clear directions on use of the evidence was particularly important given that the crucial evidence had to be translated.

[12] There are other problems with the Judge's directions. First, the explanation given to the jury as to why the hearsay evidence could be considered suggested that conspiracy was relevant to the case, and implied that the Judge had concluded that there was in fact a conspiracy. Next, the directions treated Mr and Mrs Wang's evidence of what others had allegedly said as if it were the evidence of those others. Third, it was not just because the alleged other persons had not been tested by

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[3] There was independent evidence of the breaking of the windows, but no evidence, other than that given by the complainant and his wife, linking that incident to the appellant.

cross-examination that the jury had to be careful, but also because of the absence of independent evidence.

[13] Although it is not generally necessary or desirable for a judge to explain the legal basis for the admission of evidence, it is sometimes unavoidable. Here, counsel had made references to hearsay and they may well have called for a comment by the Judge. What she ought to have said, however, is that not all hearsay is inadmissible and in this case it was available for the jury to consider, but only with care because of its nature. Instead, she directed the jury in terms suggesting that the evidence given by Mr and Mrs Wang about threats by people other than the appellant was essentially in the nature of hearsay, whereas the only hearsay elements were the references to "Linda". Furthermore, although favourable to the appellant, the last sentence in paragraph [31] of the summing-up is wrong. Once the hearsay evidence is ruled admissible by the Judge, it may be considered by the jury on the ultimate issue of guilt. The direction in this case confuses the judicial test for admission with the jury's function of assessment. The directions do not properly reflect the nature of the co-conspirators rule.

[14] There is often an inference of complicity in a joint enterprise because of a connection or relationship between the conduct of an accused and the conduct of another or others, which cannot reasonably be explained by mere coincidence. The paradigm is the disguised driver of a car, parked with its engine running outside a bank in which an armed robbery is occurring. Evidence may be led against the driver of what the offenders inside the bank said and did, in order to prove the fact that a robbery occurred. The purpose for which such statements are admitted is not to prove the truth of what was said, but the fact that it was said. They therefore have the quality of verbal acts,[4] not hearsay. In the present case the complainant gave evidence of coincidences supporting an inference that the appellant and the unknown callers were acting in a joint enterprise. These included the fact that there were threats, their nature, their timing and their monetary objective. For the purpose of drawing the inference the evidence was not hearsay. It was evidence of verbal acts.

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[4] See *Ahern* at p 94.

[15] But the callers' alleged statements also included assertions to the effect that they were making the threats at the bidding of the appellant. If the purpose of such evidence was to prove the truth of those assertions, it would be hearsay. However, in some circumstances involving an alleged criminal combination, including but not limited to criminal conspiracies, statements made by one or more alleged offenders in the absence of another, implicating that other, are admissible as evidence of their truth, notwithstanding their hearsay nature. If the qualifying circumstances exist in the present case, evidence of the statements allegedly made by the unknown callers to the effect that they were acting on instructions from Linda would be admissible as to their truth. Whether such hearsay statements are admissible for that purpose is a question of law for the trial judge, and if properly admissible, they become evidence which the jury is entitled to consider.

[16] There are differing views about the degree of cogency of the other evidence relating to an accused's involvement in the enterprise about which a judge must be satisfied before allowing the hearsay evidence to go to the jury. They are discussed later in this judgment. But even when such evidence is properly let in, it has the potential for unfairness to an accused unless accompanied by cautionary directions to the jury. The nature of appropriate directions is indicated in *Ahern*:[5]

> It will be proper for [the judge] to tell the jury of any shortcomings in the evidence of the acts and declarations of the others including, if it is the fact, the absence of any opportunity to cross-examine the actor or maker of the statement in question and the absence of corroborative evidence. Where it is appropriate, it will not be difficult to instruct a jury that they should not conclude that an accused is guilty merely upon the say so of another nor will that be an instruction which it is difficult to follow.

[17] Counsel for the appellant also took issue with the directions on jury unanimity. The Judge had directed that each juror, individually, must be of the opinion that the appellant was either guilty or not guilty, but that this did not mean they had to be unanimous in their reasons for reaching a verdict. They could all come to their conclusion for different reasons. The Judge went on to direct the jury in the terms reproduced at paragraph [10] of this judgment. Counsel for the

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5 At p 104.

appellant submitted that, given the composite factual bases for the single count in the indictment, and in light of the Judge's directions on unanimity, the appellant may have been convicted without unanimity in relation to any one specific incident or transaction.

[18] There is some weight to that argument. The case against the appellant in respect of every incident or transaction depended upon the credit of the complainant and his wife. Although it would have been illogical for members of the jury to be unsure about one category of threats and not the other there was nevertheless a danger of confusion in the absence of appropriate directions, as we have indicated in paragraph [11].

[19] A further submission on behalf of the appellant was that the Judge failed to direct on the question whether the alleged threats were a reasonable and proper means of effecting recovery of the debt. This point alludes to s 237(2) which provides that everyone who acts in the manner described in s 237(1) is guilty of blackmail "… unless the making of the threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose". It cannot sensibly be suggested, however, that a reasonable jury might contemplate the possibility that threatening to break a debtor's leg and to "deal to him" is a reasonable and proper way of getting someone to pay a debt. This submission must be rejected.

[20] Counsel for the appellant also argued that the Judge did not give adequate directions in relation to the credibility of Mr and Mrs Wang because she did not make it clear to the jury that its task was not to choose on credibility but rather to be satisfied that the prosecution had proven all elements of the offence. The appellant did not testify at trial but she had made a videotaped statement which was put in evidence. The Judge, when directing that the appellant had no onus of proving innocence, pointed out that because the appellant had not given evidence that meant the jury had not had the opportunity of hearing her account in the witness box or tested under cross-examination. In these circumstances, it was argued, there was a chance that the jury approached the question of proof in terms of a preference for the in-court testimony of Mr and Mrs Wang over the videotaped statement of the

appellant. The risk was said to have been exacerbated by the Judge's comments on hearsay evidence in cases of conspiracy, because those comments suggested that the Judge had formed a view that there was in fact a conspiracy. She could have been perceived as endorsing the complainant's credit to that extent.

[21] We do not see anything in the Judge's directions, taken as a whole, which suggested to the jury that they could convict on the basis of a mere preference for the evidence of Mr and Mrs Wang over the statement of the appellant. She did not compare this evidence or deal with it in a way inviting the jury to choose. The Judge gave a conventional direction in respect of onus of proof, identifying it as most important and explaining that the onus related to the essential ingredients of the offence of blackmail. She discretely identified and addressed those ingredients both orally and in a written set of issues.

[22] Overall, however, we are satisfied that the Judge's directions on conspiracy and the other shortcomings in the summing up make the verdict unsafe.

[23] That conclusion is sufficient for the appeal to succeed, but it is appropriate to discuss further matters raised by counsel's submissions. Those submissions put in issue whether evidence of threats by persons other than the appellant ought to have been admitted at all. They do so by challenging the legal and factual basis relied on by the Judge in relation to the co-conspirators rule of evidence. Of course the only aspect of that evidence relevant to the rule is the evidence which could indicate the appellant's involvement.

The co-conspirators rule of evidence

[24] The juristic rationale for the admission of what would otherwise be hearsay is that statements made by one member of a joint criminal enterprise in furtherance of the common criminal purpose are attributed to all members on the basis that there is implied authority in each to speak on behalf of the others.[6] Logically, the existence of the enterprise, and the complicity of anyone whose statement in furtherance of the

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6 *R v Humphries* [1982] 1 NZLR 353 at p 356 (CA); *Tripodi v R* (1961) 104 CLR 1 at p 7; *Ahern* at p 95.

common intention is sought to be admitted, must be proved before the attribution can be made. But proving it for the purpose of admission must be distinguished from proving it for the purpose of establishing guilt. So the question arises as to the quality of the evidence for admission. Different views have been expressed on that issue. In *R v Buckton* Somers J said:[7]

> In the formulation of the test of a sufficiency of evidence the cases exhibit a variety of expression all having the same general purpose – prima facie evidence, probability, real possibility, some evidence, and the one favoured in *Humphries* namely reasonable evidence. This last phrase I consider to be most appropriate. It connotes evidence which of itself would not sustain a verdict of guilt but is of such a nature that the Judge considers it safe to admit the evidence of a co-conspirator.

[25] In the same case, McMullin J favoured a test of probability. He said:[8]

> To require the prosecution to make out a case for the receipt of the otherwise inadmissible evidence on a balance of probabilities would be to adopt a test which is simple and certain in expression. And it has the additional advantage of being a test which is well known to the law. On this approach the hearsay evidence of one conspirator in furtherance of the conspiracy would be admissible if the prosecution established that it was more probable than not that a common intention or preconcert existed.

[26] Woodhouse P[9] and Richardson J[10] also favoured the balance of probabilities. Cooke J, however, preferred the "reasonable" standard suggested by Somers J. He said:[11]

> Supporting evidence is required to satisfy the trial Judge, whose decision will of course always be subject to appeal if there is a conviction, that it is safe to admit the evidence of the acts or declarations of alleged fellow conspirators. In agreement with Somers J, whose judgment I have had the benefit of reading in advance, I think that the word "reasonable" remains the most appropriate to describe the standard.
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> The circumstances of criminal conspiracies vary widely. There is a danger that trying to evolve a more exact formula to cover all cases will create more difficulties than it solves. For example, if a balance of probabilities formula is adopted it becomes necessary to define what the other evidence must point to as being more probable than not. Although the broad concept of a common purpose of the kind alleged in the indictment can be used as one factor to consider in applying a broad test of reasonableness, it becomes difficult when the test is made more rigid.

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7 [1985] 2 NZLR 257 at p 263 (CA).
8 At p 262.
9 At p 258.
10 At p 259.
11 At p 258.

[27] In *R v Uea*[12] the Court of Appeal's judgment makes reference to *Humphries* as well as the decisions of the High Court of Australia in *Tripodi* and *Ahern*, all of which are consonant with the views of Cooke and Somers JJ. But the Court did not attempt to choose which line of authority to follow, noting that in the case before it, and more often than not, the result will be the same whichever test is adopted. In *R v Morris (Lee)*[13] the Court of Appeal followed the majority view in *R v Buckton* on the same basis.

[28] In the present case the Judge was bound to and did accept the test endorsed by *Buckton* and *Morris (Lee)*. Whether she applied it correctly is a matter we shall return to. When this case went to the Court of Appeal that Court remarked upon what it termed "[t]he rather confused state of the law in this country [which] stems from the divided court in *R v Buckton*",[14] and it indicated a preference for the "reasonable" rather than the "probability" standard. We think it was right to do so. The reasoning of Cooke and Somers JJ in *Buckton*, and of the High Court of Australia in *Ahern*, is more persuasive than the authority for a test of probability.

[29] It also happens to be in harmony with the general test of admissibility of hearsay evidence provided by the Evidence Act 2006, which is concerned with an assurance of reliability. The relevant provisions of that Act have not yet come into force.

Should the disputed evidence have been admitted?

[30] Courtney J was satisfied on the balance of probabilities that there was a conspiracy amongst the unknown persons to extract money from Mr and Mrs Wang through threat of harm to the former. In relation to the appellant's involvement, the similarity in the nature of the threats and their timing in relation to the Burger King incident (which included, allegedly, a threat to get someone else to harm the

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12 (1989) 4 CRNZ 703.

13 [2001] 3 NZLR 759.

14 *Jiang v R* (Court of Appeal, CA 495/05, 3 May 2006) at para [24] per Chambers J for the Court.

complainant), as well as the evidence of the appellant's reaction to the complainant about the broken windows, all satisfied the Judge on the balance of probabilities that the appellant was party to the conspiracy. We think the Judge's decision to admit the evidence was justified, both on the test of probabilities and on the test we now favour.

[31] Courtney J's assessment in terms of probability was necessarily based, at the time it was made, on the depositions. She had to assume, not unreasonably, that the evidence would come up to brief and would be credible. Trial judges will often be in that position. They should bear in mind, however, when a ruling on admissibility has been made on the basis of provisional or incomplete evidence, that the position may need to be reviewed before a case goes to the jury. That is because in the course of a trial the indications for admission may have weakened. One can speculate what the outcome of such a review may have been in this case but as the appeal is to be allowed we mention that only as a consideration to be borne in mind in the event of a retrial.

Conclusion

[32] For these reasons we allow the appeal and quash the conviction. A new trial is ordered. Whether a new trial should be undertaken will be a matter for the Crown to consider, mindful no doubt that the appellant has already served the sentence imposed on her.

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