IN THE SUPREME COURT OF NEW ZEALAND

SC 77/2007
[2008] NZSC 11

CAREY DEAN TURNER

v

THE QUEEN

Court: Elias CJ, Anderson and Wilson JJ

Counsel: C J Tennet for Applicant
M D Downs for Crown

Judgment: 5 March 2008

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Following trial by jury, the applicant was convicted of sexual violation. Having appealed unsuccessfully to the Court of Appeal against his conviction, he now seeks leave to appeal to this Court on the ground that there has been a substantial miscarriage of justice in either or both of two respects.

[2] First, the applicant contends, evidence of the conduct of the complainant following the offending was incorrectly admitted as "recent complaint" evidence. Secondly, the trial Judge misdirected the jury about a statement by the applicant to

the Police which was recorded on a video and which the applicant adopted when giving evidence.

[3] The first point rests on a misconception of what occurred at trial. Although the complainant gave evidence of what she did in the hours between the incident with the applicant and her going to the Police, including contacting a friend and her mother, she was not asked to and did not give evidence of anything she had said to any person during that time. The friend and the mother were not called as witnesses. The Crown relied on the evidence which the complainant did give as evidence of conduct which was consistent with the offending having occurred.

[4] The Court of Appeal saw no difficulty with the evidence being given for this purpose. As it said, it was the complainant's conduct which was used to support her credibility, not a prior consistent statement. We agree that the evidence was not in law "recent complaint" evidence, was unobjectionable and did not require any special direction.

[5] We do however differ from the Court of Appeal on one minor and immaterial point in relation to the first proposed ground. That Court expressed the view that it would have been preferable for the trial Judge not to have referred to the evidence as a complaint. The Judge however used the word "complaint" in the ordinary sense of that word and the jury would have understood it as such, rather than attributing to it the technical legal meaning of "recent complaint".

[6] On the second point, it is important to understand what occurred at trial. The video on which the applicant's statement to the Police had been recorded was played to the jury as part of the prosecution case. It did not include any admission of the offending. When he gave evidence, the applicant was after some formal introductory questions asked by his counsel "Is what you said in the video true" and answered "yes". (We interpolate that that question was objectionably leading, but no objection appears to have been taken to it). The applicant then gave some brief supplementary evidence, including an assertion that any sexual involvement with the complainant was consensual, before being comprehensively cross-examined on what he had said to the Police.

[7] In his directions to the jury, the trial Judge said:

> [22] The accused has made a statement out of Court. You will recall it was showed to us by Detective Moore in the form of a long video statement. That is not sworn evidence in the case but it is part of the factual material for you to consider and to attach as much weight to as you see fit. You can accept that statement in whole or in part. Obviously it is another one of the features of the case where large chunks of the scenario are not in dispute. It is for you to decide what weight you put on parts of that statement.

[8] The Judge went on to give a conventional "tripartite" direction in the following terms:

> [24] Now, remember first of all that the accused did not have to give evidence and he does not have to prove anything in the case. It is often said that where an accused gives evidence it can have three possible effects.
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> [25] The first is that a jury accepts entirely the important parts of his evidence and where that happens and if it happens here then obviously you are going to find this accused not guilty without hesitation. If you accept that this young lady initiated the sexual activity, became angry about some extraneous matter afterwards and has made up these allegations then of course he is not guilty.
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> [26] The second possibility is that the accused's evidence might cause you reasonable doubts about the things the Crown has to prove. Again, if you are in reasonable doubts about what the Crown has to prove after hearing from the accused, then he is entitled to be found not guilty.
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> [27] There is a third possibility about which you have to be careful. If you do not accept the evidence of the accused about the material parts of these events, that does not automatically mean he is guilty. Put the unacceptable evidence to one side. Remind yourself who has got to do the proving. Go back to the evidence of the complainant and ask yourself whether it satisfies you beyond reasonable doubt that her allegations are true.
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> [28] The fact that an accused says something which a jury does not believe, does not automatically mean that he is guilty. What it can do, of course, is open a door for the jury then to go through and accept the evidence of a complainant. So bear in mind, if you find the accused's evidence unacceptable, put it to one side, go back to the other evidence in the case, essentially that of the complainant, and ask whether on the basis of what she says, you are sure of the truth of the allegations which she makes.

[9] The Court of Appeal dealt briefly as follows with the appeal over the direction on the use of the videotaped statement:

> [37] There is no basis on which it can be contended that the proper direction on the use of the videotaped statement could, in any way, have undermined the tripartite direction which dealt, quite separately, with the

> jury's approach to the evidence given by Mr Turner before them. The Judge was dealing with different issues. There is nothing in this point.

[10] We have some difficulty with this conclusion. First, the direction was not in our view a "proper" one because the videoed statement became the sworn evidence of the applicant upon being adopted by him. Secondly, in a situation where the applicant was permitted to confirm his videotaped statement and was then cross-examined on it, it would be artificial and unrealistic to expect the jury to treat the evidence given by way of the video as in a different category from the evidence which the applicant gave from the witness box.

[11] The procedure adopted without objection here was unconventional for the evidence in chief of an accused. The conventional direction given about out of court statements of the accused was therefore inappropriate. It was, however, overtaken in our view by the "tripartite" direction set out in para [8]. The jury could only have understood that direction as applying to all of the evidence of the applicant, including the videoed statement adopted by him. In a situation where the adoption of the videoed statement was preceded and followed by evidence-in-chief, and there was extensive cross-examination on the statement, realistically the jury would not have excluded the substance of the statement from the operation of the "tripartite" direction.

[12] Accordingly, while the Judge erred in directing that the videoed statement was not "sworn evidence", there is no appearance of any miscarriage of justice having resulted from that error.

[13] We note that the way in which evidence is to be given is now governed by the provisions of the Evidence Act 2006, particularly s 83.

[14] The application is dismissed.

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