IN THE SUPREME COURT OF NEW ZEALAND

SC 53/2007
[2008] NZSC 29

ALEX KWONG WONG

v

THE QUEEN

Hearing: 14 April 2008

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

Counsel: F C Deliu and E Orlov for Appellant
A Markham for Crown

Judgment: 18 April 2008

JUDGMENT OF THE COURT

A The appeal is allowed and the convictions are quashed.

B A re-trial is ordered.

REASONS

(Given by Blanchard)

[1] At the end of the hearing the Court announced that the appeal would be allowed and a re-trial ordered, with reasons to follow. These are the reasons of the Court.

[2] The single issue on the appeal is whether at the trial of Mr Wong, who has been found guilty by a jury on charges of drug dealing and money laundering, "exceptional circumstances" existed in terms of s 374(4A) of the Crimes Act 1961 entitling the Court to proceed with 10 jurors when the defence did not consent to that course.

[3] Mr Wong's appeal against his convictions was determined by the Court of Appeal before this Court's decision in *Rajamani v R*[1] was delivered. We held that whether exceptional circumstances exist is not a matter of discretion. It is, we said, a matter of fact requiring judicial assessment. The discretionary power vested in the trial Court to proceed with 10 jurors exists only if there are exceptional circumstances.[2] This Court observed that subs (4A) was inserted into the Act in 1997 prompted by the expectation of a trial which was going to involve 40 mainly sexual counts with 27 complainants and which was likely to last five months. We noted that the explanatory note to the Bill spoke of the need to ensure that "lengthy or difficult trials" could be completed with 10 jurors and spoke of an ability to do so "in certain limited circumstances". The phrase "exceptional circumstances" was to be construed against that background.

[4] The reduction to 10 jurors in *Rajamani* occurred in the second week of a murder trial where there were 37 witnesses for the Crown, one being from Australia. Most of the witnesses had already been heard.

[5] This Court said that at two weeks, the length of the trial, and hence of the potential re-trial, could not possibly be regarded as exceptional. Nor could the number of witnesses. Finding those circumstances exceptional would set the standard significantly too low.[3] There had been a miscarriage of justice because Mr Rajamani had been deprived of his right to be tried by not less than 11 jurors. That was a substantial miscarriage and the proviso to s 385 could not be invoked to save the murder conviction.

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1 [2007] NZSC 68.
2 At para [4].
3 At para [9].

[6] Turning to the present case, the trial of Mr Wong and two others[4] was scheduled for two weeks but ran substantially over time, in large part because of a number of applications to the Judge by trial counsel for the accused. Juror difficulties arose in the fourth week. A juror was discharged on the Tuesday of that week because she had to sit examinations that day and again on the Saturday. No objection was taken by the parties. While Crown counsel was part way through a closing address which had been interrupted overnight, a second juror was verbally abused, intimidated and spat at by a man near the Court. That incident had no connection with Mr Wong's trial and seems to have been a random action by someone who had a connection with an unrelated trial in the same building. The juror was very upset and the Judge took the compassionate step of discharging her.

[7] Defence counsel then applied for the whole jury to be discharged because it was contended that there was a risk that its members had somehow been contaminated by this incident and its effect on the discharged juror. Unsurprisingly, the Judge saw no such risk and, over the objections of the defence, ruled that the trial should continue with 10 jurors. The verdicts were returned on the Friday of the fourth week of trial.

[8] What was in contemplation when subs (4A) was introduced into the Crimes Act was a few very long trials with some special complicating factors. The right to a jury trial has long been a fundamental right. It is now confirmed in s 24(e) of the New Zealand Bill of Rights Act 1990. It is a right of such importance that Parliament should not be taken to have intended to abridge it more than is necessary to prevent confidence in the system being undermined by the need to abort very long trials when jurors are unable to continue. However, the exact number of jurors who must participate in the unanimous decision of a jury has been altered by Parliament from the traditional 12. Section 374 permits a reduction to 11 members and, under subs (4A), in certain circumstances to 10. The legislature chose not to specify any particular length of trial which could be continued with only 10 members. The subsection, instead, empowers the Judge to exercise a discretion to continue with 10 members if that is considered by the Judge to be in the interests of justice. But it has restricted the exercise of that discretion to circumstances which are "exceptional" – a

[4] Both were acquitted. A fourth accused was tried separately and acquitted.

term which is frequently encountered in different statutory contexts but here must be read bearing in mind the importance of the right being affected. It is, as Lord Bingham of Cornhill said in *R v Kelly*,[5] a phrase which describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special or uncommon:

> To be exceptional, a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

[9] For subs (4A) to apply, the circumstances need not be rare but in combination they must be distinctly out of the ordinary, although they need not approach those envisaged in the case which was the genesis of the legislative amendment in 1997, which was indeed a very rare situation. Administrative inconvenience is not the touchstone. There will always be significant inconvenience whenever a trial is terminated because jurors have to be discharged. The better approach is to ask, adapting a suggestion made by Mr Deliu in argument, whether there really is an exceptional reason for completing the particular trial, rather than beginning again before another jury.

[10] In endeavouring to support the trial Judge's decision, counsel for the Crown, Ms Markham, submitted that this was a lengthy and complex trial (four weeks with several accused, interpreters and 41 witnesses, of whom 30 were heard orally). There was a considerable quantity of technical information including telephone and accounting records and financial information. The accuracy of casino records was also in dispute. Because of its complexity, the trial was held in the largest of the courtrooms in the Auckland High Court. Ms Markham suggested that rescheduling would have appeared more likely to cause difficulties than in most cases. The trial ran substantially over time. It was said that a two week trial running two weeks over time is exceptional in itself. The juror difficulties occurred only at the very end of the trial, in the fourth week. At least one Crown witness was overseas, although it was accepted that there was no risk of non-attendance at any re-trial. No concerns were ever raised about the representativeness or impartiality of the jury, other than the unsubstantiated suggestion of contamination.

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5 [1999] 2 All ER 13 at p 20 (CA).

[11] We find ourselves, however, in agreement with counsel for the appellant that the circumstances in this case were not exceptional. The four week length of Mr Wong's trial was not out of the ordinary. It is not uncommon for trials to be of at least that length. A re-trial will not be of particular difficulty for the court system to accommodate. The trial Judge of course did not know at the time of her ruling that the other accused would be acquitted, but even if it had been necessary to re-try all of them, it could have been anticipated that the second trial would not be as long as the first trial, since the defence applications which were a cause of substantial delay had been resolved. It was not a case in which the interests of complainants had to be given any weight. There was no real likelihood of witnesses becoming unavailable. The overseas witness was a former police officer and there could be no reason to think that he would be unwilling to testify again. The trial had required the use of interpreters but it could not be suggested that the need to resort to interpretation at a re-trial would cause especial difficulty. The language concerned is now quite commonly spoken in urban New Zealand. It was not, and could not be, suggested that the reasons why each juror was discharged could be regarded as exceptional circumstances. The substantial overrun in the length of the trial was in part the cause of the loss of the jurors but did not lead to a trial of unusual length.

[12] Weighing up the various factors which have been mentioned, we are of the view that there cannot properly be said to have been exceptional circumstances relating to Mr Wong's trial, and that accordingly it was not open to the trial Judge to exercise her discretion to continue the trial with 10 jurors. A substantial miscarriage of justice has therefore occurred.

Solicitors:
Crown Law Office, Wellington