IN THE SUPREME COURT OF NEW ZEALAND

SC 81/2008
[2009] NZSC 53

ERIC BARRY STEWART

v

THE QUEEN

Hearing: 7 May 2009

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

Counsel: S J Shamy for Appellant
J C Pike and S B Edwards for Crown

Judgment: 28 May 2009

JUDGMENT OF THE COURT

A. The appeal is allowed.

B. The convictions of the appellant are set aside.

REASONS

(Given by Wilson J)

Introduction

[1] Mr Stewart appeals against his conviction on charges of defrauding the Accident Compensation Corporation. He alleges that prosecuting counsel, in his

closing address, attacked a defence expert witness in intemperate and unjustified language and claimed that the appellant and other defence witnesses were motivated to lie by their wish to avoid the conviction of the appellant. As a consequence of either or both of these matters, it is claimed, the trial was not fair and a miscarriage of justice resulted.

[2] Upon conviction, the appellant was sentenced to three years' imprisonment. On appeal, the Court of Appeal reduced the term of imprisonment to 18 months, which was effectively the time Mr Stewart had already served.[1] The Crown therefore accepts that there should not be an order for a new trial if the present appeal succeeds.

The trial

[3] At trial in the District Court at Timaru before Judge Abbott and a jury the appellant faced 59 counts of using a document dishonestly to obtain a pecuniary advantage. Each count was founded on a certificate which was completed by Mr Stewart's general practitioner, Dr Small, based in part on what Mr Stewart told him. The certificates specified certain activities which Mr Stewart was said to be unable to perform as a consequence of accidental injury. The form of the certificates required the appellant to sign them and in doing so to certify that the document stated accurately the activities which he was unable to perform. Mr Stewart did so and gave the certificates to the Corporation. In reliance on them, the Corporation continued to pay weekly compensation to Mr Stewart in the belief that he was unfit to return to his former employment as a butcher.

[4] The certificates related to dates between April 1992 and February 2004, for most of which time the appellant was not in paid employment and was receiving weekly compensation. Mr Stewart was acquitted on the first 25 counts, which related to periods up to August 1995, but was found guilty and convicted of

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[1] *R v Stewart* [2009] NZCA 89 (CA 802/2008, 25 March 2009, William Young P, Chisholm and Heath JJ).

the subsequent 34 counts. Mr Stewart was also charged with, but acquitted on, a further count of attempting to pervert the course of justice by applying improper pressure on a witness.

[5] The prosecution called extensive evidence from witnesses who claimed to have seen the appellant carrying out activities of a nature which, according to the certificates, he was incapable of performing. Accordingly, the Crown claimed that Mr Stewart had acted dishonestly in obtaining the medical certificates and providing them to the Corporation. In his defence, the appellant disputed some of the prosecution evidence about what he had allegedly been doing. He also emphasised that his ability to perform an activity occasionally and for a limited time was characteristic of the condition of fibromyalgia from which he suffered and was therefore not inconsistent with an inability to perform that activity repetitively in employment. Dr Small confirmed that Mr Stewart had explained to him that he experienced pain for approximately 70 per cent of the time and was free from pain for the other 30 per cent. Dr Small also told the Court that, in completing the certificates, he thought it relevant that Mr Stewart might not be able to undertake the specified activities whenever required to do so as a butcher. The contention that the appellant suffered from a chronic pain disorder was also part of his defence. The consequence of that condition was said to be that the appellant exaggerated his level of pain because otherwise he thought that he would not be believed.

The evidence of Dr Davis

[6] The defence of a chronic pain disorder rested in large part on the evidence of Dr Davis, a consultant psychiatrist. His evidence in chief was provided in the form of a written report, apparently modified by agreement of counsel to address matters to which the prosecutor had objected. For reasons he set out in his report, Dr Davis concluded that:

> … Mr Stewart has a very clearly defined clinical diagnosis of **chronic pain disorder** [bolding and underlining in original].
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> … Mr Stewart's pain behaviour has features of the variability and inconsistency that still falls within the accepted range and understanding of pain disorder.

> … it is best to understand such a range of behaviour through the context and view point of the established diagnosis (in his case chronic pain disorder) before assuming that the behaviours being exhibited are indicative of malingering.
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> As noted, Mr Stewart has, in my opinion, the diagnosis of chronic pain disorder. He has original diagnoses related to his wrists problems and he has also developed a Fibromyalgia Syndrome involving trigger points in his buttocks and his back and shoulders. The psychological aspects of his pain experience (factors thought to [be] related to the perpetuation of his pain experience) have been identified.

[7] The report of Dr Davis was provided to Dr Alchin, a consultant occupational physician called by the Crown, before he gave evidence. When asked in cross-examination whether he disagreed with, or wished to comment on, any "major areas" of the report, Dr Alchin replied:

> On the reading that I went through out there before I came in, no, nothing jumped out at me as – I'm not saying that there's nothing I disagreed in there, off-hand I can't think of any now, but nothing really jumped out at me. As I said, I think it was a pretty good sound report.

[8] When giving evidence, Dr Davis confirmed and explained the contents of his written report and did not resile from those views in any significant way when cross-examined at length on them. He told the Court, in answer to a question from the prosecutor, that in his experience malingering was "extremely rare", whereas chronic pain disorder and "inconsistent and unusual behaviours" were "extremely common". Dr Davis went on to say, again in answer to questions in cross-examination, that "my experience with Mr Stewart is I think he's had a Chronic Pain Disorder that has lingered, lingered on for years untreated" and that "with people with Chronic Pain Disorder who get into that sort of mind-set at times they can do things to make sure that others see them as the ill person they perceive themselves to be". In answering a subsequent question, Dr Davis told the Court that the Corporation and its advisers had warned doctors to be "very cautious about making pre-emptive assumptions of malingering" of those with a chronic pain disorder.

The closing address of the prosecutor

[9] In closing for the Crown, the prosecutor Mr Murray made the following submissions in relation to the evidence of Dr Davis:

> What did you make of the psychiatrist that the accused hired just before the trial and paid to try and get a defence to these charges? What did you make of Dr Davis' psycho babble? At the end of the day the doctor agreed that it was ultimately for you to make the decision about deceit or fraud, that's not for a doctor to make. You may well think that Dr Davis was a malingerer's dream who seemed to be able to come up with an explanation for everything the accused did as being consistent with Chronic Pain Disorder. Do you think he came across as an independent and impartial expert or was he someone who was firmly in the accused's camp bending things around to suit the accused.
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> …
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> You may well think at the end of the day Dr Davis' evidence seemed to say that everything was explainable by Chronic Pain Disorder. Is this just another one of those myriad of modern disorders let loose on the world by the medical profession which means that no one's responsible for any of their own actions anymore?

[10] In his directions to the jury, the only reference which the trial Judge made to these assertions, having said that the "crucial expert evidence in the trial was that which was given by Dr Davis", was to include in his summary of the Crown case the proposition that "the suggestion, on the basis of Dr Davis' evidence, that chronic pain disorder in some way negates a dishonest intention on Mr Stewart's part can be dismissed as patently ridiculous".

[11] In his closing address, the prosecutor also submitted to the jury:

> Who's got the motive to lie? Burt White has got no reason to lie. I suggest to you, the neighbours have got no reason to lie. It's the accused who's got the reason to lie, he's got motive to lie, he's got the motive to go along and hire a psychiatrist and try to get himself off his … out of this trouble. He's the one on trial, he's the one with the most to lose, him and his family. That's why they've got the motive to lie at this trial, those witnesses have got no motive to lie.

Mr White was the appellant's brother-in-law and was an important witness for the Crown.

[12] The trial Judge made no specific reference to this submission in his directions to the jury but gave a "tripartite" direction that it should acquit Mr Stewart on the fraud charges either if it accepted his evidence that he had acted honestly or if it was not prepared to accept or reject that evidence. As a third possibility, it could reject

his evidence, in which event it would have to decide whether the charges were proved by other evidence.

[13] The Judge also instructed the jury that it was entitled to take into account that a witness "could have any motive to lie or to give a false account of events". By doing so, the Judge may well have been understood by the jury to be endorsing the prosecutor's submission that the appellant had a motive to lie.

The judgment of the Court of Appeal

[14] Mr Stewart appealed separately against his conviction.[2] Among his grounds of appeal were the two complaints he advances in this Court, namely the comments of the prosecutor on the evidence of Dr Davis and on the motive of the appellant and his witnesses to lie.

[15] The Court of Appeal accepted that the prosecutor should not have made his comments about Dr Davis.[3] The Court said:[4]

> [62] Counsel went distinctly too far in this part of his address. The suggestion that Dr Davis was paid to provide a defence was insulting and completely inappropriate. So too were the references to "psychobabble" and "myriad of modern disorders let loose on the world by the medical profession which means that no-one's responsible for any of their own actions any more". On the other hand, the reluctance of Dr Davis to provide direct answers to straight-forward (if perhaps loaded) questions provided some context for the complaint about his apparent lack of impartiality. More importantly, the reality was that the evidence of Dr Davis did not provide an innocent explanation for the conduct of the appellant and, on this point, counsel's contention was correct.

[16] We do not agree with the Court's criticism of Dr Davis. From the record of his cross-examination, which runs to 32 pages of transcript, Dr Davis did on a few occasions initially dispute, but subsequently accept, a proposition put to him. That is far from uncommon in cross-examination, and did not reflect on the impartiality of Dr Davis as an independent expert. On many other occasions, he readily accepted

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2 [2008] NZCA 341 (CA 231/07, 2 September 2008, William Young P, Randerson and Harrison JJ).

3 Set out at para [9] above.

4 Per William Young P.

what was put to him. Dr Davis refused to give his unqualified assent to propositions which misrepresented his evidence and over-simplified complex psychological concepts, and was fully entitled to do so.

[17] As to motive to lie, the Court of Appeal accepted that there is "ample authority" that Judges and prosecutors should not comment on the obvious reasons why a defendant would wish to give exculpatory evidence.[5] It was however difficult, the Court went on to say, to see what the Judge could have done once the comment had been made by the prosecutor.[6] It would in any event have been obvious to the jury that the appellant had a motive to lie[7] and, in this case, the burden of proof had not been inverted "in any real sense".[8]

[18] The Court concluded that:[9]

> The adverse comments of the prosecutor about Dr Davis, while inappropriate, can hardly have been material to the jury because his evidence did not provide the appellant with a defence. And the prosecutor's comment that the appellant had a motive to lie, while inappropriate, was no more than a statement of the obvious. So we have not been persuaded that there was an appreciable risk of a miscarriage of justice.

The appeal against conviction was therefore dismissed.

The duties of a prosecutor

[19] The duties of a prosecutor are well-established and should be well-known to all who undertake that role in this country. Among these duties, as the Court of Appeal said in *R v Roulston*[10] in a dictum equally applicable to an attack on defence witnesses, is that:[11]

> … it has always been recognised that prosecuting counsel must never strain for a conviction, still less adopt tactics that involve an appeal to prejudice or amount to an intemperate or emotional attack on the accused. Such conduct is entirely inappropriate and a basic misconception of the function of any

5 At para [64].
6 At para [65].
7 At para [65].
8 At para [66].
9 At para [71].
10 [1976] 2 NZLR 644.
11 At p 654 per Woodhouse J.

> barrister who assumes the responsibility of speaking for the community at the trial of an accused person.

[20] To like effect, Tipping J observed when delivering the more recent judgment of the Court of Appeal in *R v Hodges*:[12]

> [20] [Counsel representing the Crown in a criminal trial] is entitled, indeed expected, to be firm, even forceful. Counsel is not entitled to be emotive or inflammatory. The Crown should lay the facts dispassionately before the jury and present the case for the guilty of the accused clearly and analytically … [Crown counsel] are entitled to contend forcefully but fairly for a verdict of guilty; but they must not strive for such a verdict at all costs.

[21] The words of the Supreme Court of Canada in *R v Cook*[13] apply with equal force to New Zealand prosecutors:[14]

> … while it is without question that the Crown performs a special function in ensuring that justice is served and cannot adopt a purely adversarial role towards the defence, it is well recognized that the adversarial process is an important part of our judicial system and an accepted tool in our search for the truth Nor should it be assumed that the Crown cannot act as a strong advocate within this adversarial process. In that regard, it is both permissible and desirable that it vigorously pursue a legitimate result to the best of its ability. Indeed, this is a critical element of this country's criminal law mechanism. In this sense, within the boundaries outlined above, the Crown must be allowed to perform the function with which it has been entrusted; discretion in pursuing justice remains an important part of that function. [Underlining in original].

[22] After referring in *R v Mallory*[15] to this passage from *Cook*, the Ontario Court of Appeal helpfully analysed the obligations of prosecutors in opening and closing their case:

> [338] It is well established that the opening address is not the appropriate forum for argument, invective, or opinion. The Crown should use the opening address to introduce the parties, explain the process, and provide a general overview of the evidence that the Crown anticipates calling in support of its case. Simply put, "the Crown's opening address should be impartial and fair, a brief outline of the evidence that the Crown intends to call". At the opening of the trial the rules constraining the Crown "should apply with even more vigour" than at the closing when by then the jurors have heard and seen all about the case.

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12 (CA 535/02, 19 August 2003, Tipping, Hammond and Paterson JJ); followed in *R v O* [2007] NZCA 87 (CA 342/06, 21 March 2007, Hammond, Chambers and Arnold JJ) and *R v Henderson* [2007] NZCA 524 (CA 153/07, 20 November 2007, Wilson, Panckhurst and Venning JJ).

13 [1997] 1 SCR 1113 (footnotes deleted).

14 At para [21] per L'Heureux-Dubé J.

15 (2007) 217 CCC (3d) 266 (footnotes deleted).

> [339] With respect to closing addresses, the Crown is afforded greater latitude. While Crown counsel must at all times conduct themselves with dignity and fairness, they are entitled to advance their position forcefully when making closing submissions. In *R v Daly*[16] this court observed:
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> > A closing address is an exercise in advocacy. It is the culmination of a hard fought adversarial proceeding. Crown counsel, like any other advocate, is entitled to advance his or her position forcefully and effectively. Juries expect that both counsel will present their positions in that manner and no doubt expect and accept a degree of rhetorical passion in that presentation.
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> [340] The closing address is the proper forum for argument and the Crown is certainly entitled to argue its case forcefully. The Crown should not, however, engage in inflammatory rhetoric, demeaning commentary or sarcasm, or legally impermissible submissions that effectively undermine a requisite degree of fairness.
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> [341] In a protracted and hard fought trial such as this, one with months of pre-trial proceedings and allegations of abuse of process, it may be difficult for the Crown to resist rhetorical excess. But resist it must, even when provoked by what Crown counsel perceives to be obstructive and truculent behaviour by the defence.

The conduct of the prosecutor

[23] On the present facts, it would be difficult to imagine a more obvious breach of a prosecutor's obligations than the statements of counsel about the evidence of Dr Davis. By accusing Dr Davis of accepting payment in an attempt to establish a defence, of speaking "psychobabble" and of "bending things around to suit the accused" counsel was attacking the integrity of a senior medical practitioner and was plainly appealing to prejudice through the use of emotive and inflammatory language. The prosecutor's language would have been inexcusable even if the views of Dr Davis had been in conflict with those of other expert witnesses; the breach of the prosecutor's obligation was all the more serious when the Crown's own medical expert was in general agreement with Dr Davis.

[24] The prejudice to the appellant from the prosecutor's language may have been irremediable by the trial Judge. In fact the prejudice was increased when the Judge subsequently characterised the evidence of Dr Davis as "crucial" and then referred, without any indication of disapproval, to the contention of the Crown that the

[16] (1992) 57 OAC 70 at 76 (CA).

suggestion, made on the basis of Dr Davis' evidence, that chronic pain disorder could negate dishonest intention was "patently ridiculous".

[25] Contrary to the view of the Court of Appeal, the evidence of Dr Davis cannot, in our opinion, be dismissed as irrelevant. In a trial where the crucial issue was whether Mr Stewart was a malingerer, in that he dishonestly claimed to be unable to undertake various activities which he would have been required to perform as a butcher, it was open to the jury to have regard to the evidence of the psychiatrist in assessing the accused's perception of his own limitations. Indeed, the jury may well have thought that, unless it was relevant, the evidence of Dr Davis would not have been given, without apparent objection, and would not have been the subject of prolonged cross-examination. And, importantly, having been told by the Judge that this was the "crucial expert evidence", the jury could not responsibly have disregarded it.

Motive to lie

[26] A witness should not be accused of having a motive to lie without there being an appropriate evidential foundation for the accusation. A generalised allegation that an accused person has a motive to lie simply to avoid conviction is particularly serious because it subverts the presumption of innocence. Only if the accused were presumed guilty could there be any basis for the suggested motive.

[27] The Court of Appeal rightly said in *R v E*,[17] in commenting on a submission of the prosecutor that the accused "has every reason to tell untruths about what occurred because he has the reason for avoiding a finding of guilt in this case":[18]

> It has been held that it is never legitimate for a judge to make such a suggestion and it is just as unacceptable (if not more so) for a prosecutor to do so. Making such a submission has the effect of suggesting that the evidence of an accused should be scrutinised more carefully than that of a complainant or other Crown witness simply because he or she is the accused. This is wrong and unfair – see *Robinson v R (No 2)*,[19] *R v Bentley*[20] and *R v*

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17 (CA 308/06, 11 September 2007, Glazebrook, John Hansen and Harrison JJ).
18 At para [96] per Glazebrook J.
19 (1991) 180 CLR 531 at p 535.
20 [2001] 1 Cr App R 307 at p 326 (CA).

> *Leef.*[21] The situation may have been saved by a very strong direction by the Judge but none was given.

[28] There was no evidential foundation for the submission of the prosecutor that Mr Stewart and his witnesses were motivated to lie in an attempt to secure his acquittal. The submission should therefore not have been made.

[29] Counsel for the Crown contended that the submission was justified because the appellant had claimed that his brother-in-law Mr White and some neighbours, who were prosecution witnesses, had lied. But their situation was distinguishable from that of the appellant because the presumption of innocence had no application to those witnesses and Mr Stewart had claimed in evidence that they lied because they were "obsessive" about him and that Mr White was also "manipulative".

[30] On analysis, the reasons of the Court of Appeal for holding that the submission of a motive to lie was of no consequence cannot be correct. The fact that a direction from the Judge could not have overcome the difficulty caused by the submission reinforces the conclusion that prejudice resulted to the appellant, rather than negating it. There would be no reason to prohibit any such submission if, as the Court said, it is obvious to juries that an accused has a motive to lie. In any event, any such reasoning would be improper and should not be invited. And, although the burden of proof may not have been inverted, the presumption of innocence was subverted.

Fairness of trial

[31] Section 25(a) of the New Zealand Bill of Rights Act 1990 guarantees a fair hearing to everyone who is charged with an offence. A trial before a judge and jury will not be fair if a prosecutor acts in a way which creates substantial prejudice and the judge cannot or does not counteract that prejudice by directions to the jury. The

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21 (CA 14/06, 24 August 2006, William Young P, Williams and Venning JJ) at paras [18] – [32] per Williams J and [57] – [62] per William Young P.

attack of the prosecutor on Dr Davis and the alleged motivation to lie unfairly resulted in substantial prejudice to the defence. The Judge did not attempt to redress that prejudice. To the contrary, his directions compounded the prejudice by appearing to endorse the inappropriate submissions.

[32] Lord Bingham of Cornhill said when delivering the judgment of the Privy Council in *Randall v R*:[22]

> … it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.

[33] Applying this approach to the trial of Mr Stewart, the prosecutor's conduct was so blatant a departure from good practice and so prejudicial that the trial was unfair and the convictions cannot stand. Whatever the strength of the evidence against the appellant, his statutory entitlement to a fair trial was breached. The attack on Dr Davis made the trial unfair. Alleging a motive to lie to avoid conviction made it even more unfair.

Miscarriage of justice

[34] Even if the conduct of the prosecutor had not made the trial unfair, his submissions and the resultant prejudice gave rise to a miscarriage of justice. Section 385(1)(c) of the Crimes Act 1961 requires an appeal against conviction to be allowed if the appellate Court is of the opinion that there was on any ground a miscarriage of

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22 [2002] 1 WLR 2237 at para [28].

justice, provided that the Court may dismiss the appeal "if it considers that no substantial miscarriage of justice has actually occurred".

[35] This Court said recently in *R v Matenga*:[23]

> Following conviction, after a fair trial by jury, Parliament has given the appeal courts an ability to uphold the conviction despite there being a miscarriage of justice in some respects. While the jury is in general terms the arbiter of guilt in our system of criminal justice, the very existence of the proviso demonstrates that Parliament intended the Judges sitting on the appeal to be the ultimate arbiters of guilt in circumstances in which the proviso applies. The general rule that guilt is determined by a jury rather than by Judges does, however, mean that the proviso should be applied only if there is no room for doubt about the guilt of the appellant; … considerable caution is necessary before resorting to the proviso when the ultimate issues depend, as they frequently will, on the assessment of witnesses.

[36] It cannot be said that there is no doubt about the guilt of the appellant. Assessment of his credibility was crucial. The fact that the jury found Mr Stewart not guilty of a number of charges similar to those on which he was found guilty supports the inference that the outcome on the latter charges may have been different but for the attack on Dr Davis and the suggestion of a motive to lie. So does the subsequent decision of a Corporation reviewer that it had not been shown that Mr Stewart could return to work as a butcher, and there was therefore no proper basis for the suspension of his weekly compensation.[24] Quite apart from the unfairness of the trial, the proviso could not be applied.

Result

[37] The appellant has established that his trial was unfair and that a substantial miscarriage of justice resulted.

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23 [2009] NZSC 18 (SC 50/2008, 13 March 2009, Elias CJ, Blanchard, Tipping, McGrath and Wilson JJ) at para [29] per Blanchard J.

24 Discussed by the Court of Appeal at paras [11] to [13] of its judgment on the appeal against sentence.

[38] The convictions of the appellant must therefore be set aside. As we have mentioned,[25] the Crown does not seek an order for a new trial.

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25 At para [2] above.