IN THE SUPREME COURT OF NEW ZEALAND

SC 47/2010
[2010] NZSC 129

JAMES LOUIS MASON

v

THE QUEEN

Hearing: 19 October 2010

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

Counsel: G J King for Appellant
D B Collins QC Solicitor-General and B L Orr for Crown

Judgment: 3 November 2010

JUDGMENT OF THE COURT

A The appeal is allowed and the conviction quashed.

B There will be no order for retrial.

REASONS

(Given by Blanchard J)

[1] Mr Mason was tried in the District Court at Christchurch on three counts of assaulting his two young sons aged four and two, arising from an incident which took place on the Bridge of Remembrance over the Avon River in Cashel Street. On two of the charges he was acquitted and no more need be said of them. The third count was as follows:

THE SAID CROWN SOLICITOR FURTHER CHARGES

That JAMES LOUIS MASON on 19 December 2007 at Christchurch assaulted [X], a child under the age of 14 years by pulling his ear and punching him

[2] Both the boys had been riding their bikes on the bridge and, immediately before the alleged assault or assaults, the younger son had lost control on a ramp leading from the bridge to a park and had come off his bike and injured his head. Mr Mason had then seen the older boy poised to ride down the same ramp. Evidence was given that Mr Mason had yanked the boy's ear and punched him in the face. On Mr Mason's account, he had grabbed "a great hunk" of the boy's hair and pulled him towards himself. He denied doing more than that, apart from flicking his ear. In particular, he said that there had been no punching.

[3] Judge Crosbie directed the jury in relation to the third count that there was a "specific allegation" of the pulling of the child's ear and a "separate allegation" of punching him. He said that the jury did not have to find that there was both the pulling of an ear and a punch:

> You can find one or the other. It's enough to accept that there was, either, the pulling of the ear or the punching if for the intention of application of force. [sic][1]

[4] The Judge went on to say that if the jury accepted what two eyewitnesses said about a punch to the child's face, and that it was an intentional application of force, the jury might have some difficulty seeing how that in any way could be to prevent or minimise harm. That was a reference to the new s 59 of the Crimes Act 1961 which, in subs(1)(a), provides that every parent of a child and every person in the place of a parent of the child is justified in using force if the force used is reasonable in the circumstances and is for the purpose of preventing or minimising harm to the child or another person.

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[1] The Court of Appeal thought it was likely that there was an error in transcription and that the words in the final portion of this passage were actually "with the intentional application of force" – *Mason v R* [2010] NZCA 170 at [9] per William Young P, Hammond and Baragwanath JJ.

[5] We observe that the s 59(1) defence might in these circumstances have been thought by the jury to be relevant to a pulling of the child's ear but, as Mr Mason accepted, not to any punching of the child.

[6] The jury found Mr Mason guilty on the third count. In sentencing him the Judge proceeded on the basis of his view that the jury must have accepted the evidence of the eyewitnesses that Mr Mason had both punched the child and pulled his ear. The Judge imposed a sentence of supervision for nine months.

[7] Mr Mason appealed against that conviction. Unfortunately, in the Court of Appeal he represented himself and, possibly as a result, the point which immediately emerged in Mr King's submissions to this Court went unnoticed. Mr Mason did complain about the Judge's direction that it was enough for the jury to find either a pulling of the ear or a punching, but the Court of Appeal responded only with reference to what it called the "settled principle" that where a jury's verdict is ambiguous, the Judge at sentencing may act in effect as a thirteenth juror and find facts for that purpose, although only within the limits of the verdict. The Court said that the clarity sought by Mr Mason was afforded by the sentencing remarks of the Judge.[2]

[8] That was not an answer to the problem to which Mr Mason appears to have been trying to draw the Court's attention. And the Solicitor-General, who did not appear below, very responsibly acknowledged as much in a memorandum tendered to this Court in advance of the hearing, recognising that the appeal must be allowed.

[9] Section 329(6) of the Crimes Act says that:

> Every count shall in general apply only to a single transaction.

The qualification "in general" and the relatively indefinite word "transaction", which can encompass both a single event or a course of conduct, recognise the

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2 *Mason v R* [2010] NZCA 170 at [15].

difficulty of application of any precise rule to the charging of the many different fact situations in which acts of offending may occur. They indicate the need for some flexibility. The essential requirement emerging from case law is that, if particular acts of alleged offending can sensibly be charged separately without undesirably lengthening the indictment (overcharging), then that should be done. It is necessary that distinctly identifiable acts of alleged offending be the subject of separate charges where the accused may be prejudiced either at trial or on sentencing if they are combined in a single count. On the one hand, the use of a multiplicity of counts is to be avoided where fewer would suffice for the interests of justice. On the other, overly complex counts may prejudice the defence or make it difficult to frame fair and accurate directions to the jury. If necessary trial Judges should intervene if either problem arises.

[10] We repeat what Anderson J said for this Court in *R v Qiu*.[3] The Court endorsed the practice of not charging as separate offences a continuing course of conduct which it would be artificial to characterise as separate offences. But the Court said that it was another thing to charge as a single count repetitive acts which can be distinguished from each other in a meaningful way, even if they relate to more than one act of a certain class or character. The Court added something which the present case vividly illustrates:

> Separate counts facilitate fairness in the conduct of the trial by focusing attention on matters of fact and law which can and need to be distinguished for the purposes of different counts. In the event of conviction, they assist the sentencing Judge by indicating the extent of culpability.

[11] The third count in the indictment in this case alleged two acts of assault. It was therefore entirely possible that some members of the jury might find Mr Mason guilty on the basis of the ear-pulling only, while the other members might find him guilty on the basis of punching only, so that there would not be unanimity on either basis.[4] As the Chief Justice said in *R v Mead*:[5]

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3 *R v Qiu* [2007] NZSC 51, [2008] 1 NZLR 1 at [8].

4 The trial was held before the commencement of the provision in s 29C of the Juries Act 1981 permitting majority verdicts, but obviously the same problem would exist on the facts of this case if the permitted majority were not all agreed on the basis of guilt.

5 *R v Mead* [2002] 1 NZLR 594 (CA) at [20].

> Where a number of specific incidents or transactions or courses of conduct are included in the same count, there is a risk that all jurors will be satisfied of the proof of one, but not necessarily the same one.

[12] If that was the extent of the difficulty at trial likely to be created by the composite formulation of the count, it might have been curable by a direction that all jurors must agree on Mr Mason's guilt of the same act (or acts) of assault. But, even then, the Judge would still be left at sentencing having to determine the basis on which the jury found Mr Mason guilty and might in fact sentence on a basis not contemplated by the jury. That unsatisfactory consequence should in itself have led to division.

[13] The problem was even greater. Division into two counts was the *only* proper course because the two acts of assault were of a different character and seriousness. Moreover, the inclusion of both in the one charge could deny Mr Mason in relation to the ear-pulling the defence provided by s 59(1)(a), where it may have been open. It was a jury question whether that action (if proved) was a use of reasonable force to prevent or minimise harm to the child by stopping him from riding his bike down the ramp and suffering an accident like that which befell his brother. But it was exceedingly unlikely that the jury would be of that view if it concluded that the child's face had been punched. This required such a complex direction on the composite count that, if the Judge had turned his mind to the nature of the assaults and the availability of the defence to each, he could only have ordered division.

[14] Because count 3 was not divided into two separate charges of assault by amendment of the indictment, Mr Mason's defence was always likely to be prejudiced. It was further prejudiced by the way in which the Judge's direction was given. It is true that Mr Mason's defence counsel at trial did not seek division and in fact expressed a preference for the composite count (apparently out of concern that conviction on two counts of assault rather than one might result in a heavier penalty). But now that the problem has been identified it can be seen that the composite nature of the count has led to a substantial miscarriage of justice.

[15] Before leaving this matter we should emphasise, as the Solicitor-General did, that the outcome of this case should not be taken to be a signal to prosecutors that separate counts should routinely be included in an indictment where, for example, a series of blows has been struck in a fight, or preceding a more serious assault such as a wounding. It may be neither practical nor desirable to prove separate charges of assault in such circumstances. The special feature of the present case is the distinctly different nature and seriousness of the two alleged assaults and the practical possibility of a particular defence for one of them only.

[16] For these reasons the conviction on count 3 must be quashed. The Crown did not seek an order for re-trial.

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