IN THE SUPREME COURT OF NEW ZEALAND

SC 28/2011
[2011] NZSC 62

LYNETTE KAYE STEWART

v

THE QUEEN

Hearing: 2 June 2011

Court: Elias CJ, Blanchard, Tipping, McGrath and William Young JJ

Counsel: J K W Blathwayt for Appellant
R J Collins for Crown

Judgment: 2 June 2011

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] Ms Stewart and a Ms Oliver were jointly charged with sexual violation of a third woman by unlawful sexual connection. The Crown case was that Ms Oliver was the principal offender who had actually violated the complainant. Ms Stewart was alleged to have been a party to that offence by the encouragement she gave to Ms Oliver. Both the accused were found guilty at trial in the District Court at Wellington in late 2005.

[2] The Crown case at trial was that Ms Oliver had physically and sexually assaulted the complainant over the course of an evening in December 2003 after Ms Oliver and Ms Stewart had invited the complainant to the house they shared in Masterton for a meal. The Crown alleged that Ms Oliver had assaulted the complainant by manual penetration of her vagina while Ms Stewart had encouraged Ms Oliver's behaviour. The jury found Ms Oliver guilty on two counts of assault and one of sexual violation, and Ms Stewart guilty as a party to the count of sexual violation.

[3] Ms Stewart appealed unsuccessfully to Court of Appeal against her conviction on grounds unrelated to those presently before the Court.[1] At a later time the Court of Appeal heard an appeal against conviction by Ms Oliver. On that appeal counsel for Ms Oliver led fresh medical evidence from Dr Wilde, an obstetrician and gynaecologist, which suggested that the complainant's injuries were inconsistent with her account of the assault. Ms Oliver's conviction appeal was allowed and a retrial ordered.[2] At her retrial the Crown offered no evidence and Ms Oliver was discharged pursuant to s 347 of the Crimes Act 1961, thus being deemed to be acquitted.[3]

[4] Ms Stewart now appeals out of time to this Court against her conviction on the ground that, in circumstances where her co-accused at trial has subsequently been acquitted after a successful appeal, it is unsafe for Ms Stewart's conviction as a secondary party to the offence to stand and it ought to be quashed. The Crown concedes that a substantial miscarriage of justice has occurred and seeks no order for retrial, but it is necessary for this Court to explain why this must be so.

[5] It will not always be the case that a secondary party must also be acquitted in the absence of the conviction of a principal offender. There will be circumstances in which a jury can safely convict a person of secondary liability for an offence notwithstanding that the evidence, or fresh evidence, leaves reasonable doubt as to guilt on the part of the principal offender. This may be the case where, for instance, it is certain that the offence took place but the identity of the principal offender is

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1 *R v Stewart* CA515/05, 15 August 2006.
2 *R v Oliver* [2007] NZCA 326.
3 Crimes Act 1961, s 347(4).

unknown or in doubt, yet the identity of the secondary party is clear.[4] It may be the case where the principal offender cannot be found guilty by reason of infancy, insanity or death, or is otherwise not amenable to prosecution.[5] And it may also be the case where the criminal liability of the parties is separately established, especially on the basis of different evidence – if, for example, evidence against the secondary offender is inadmissible against the principal offender.[6]

[6] However in circumstances where, as here, the successful appeal and subsequent s 347 discharge of the principal offender indicates reasonable doubt about whether the alleged primary offending took place at all, the conviction of a secondary party for encouraging that offending must be considered unsustainable.[7] In such circumstances the acquittal of the principal implies that the elements of the offence cannot be proved, so that the primary offence cannot be said to have been committed, especially where the acquitted person was the only possible principal.[8] If no crime occurred, the secondary party cannot be said to have helped the principal offender to commit it.

[7] Ms Oliver and Ms Stewart were jointly charged and tried together in the District Court on the same evidence, and Ms Oliver was the only possible principal offender. The doubt cast by the medical evidence led during Ms Oliver's appeal must therefore have a direct bearing also on whether Ms Stewart could be found to have committed an offence. Where Ms Oliver has been discharged at retrial for a want of evidence that she had committed any offence, it would amount to an "unjust inconsistency" and a substantial miscarriage of justice to allow Ms Stewart's conviction to stand.[9]

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4 See, for example, *R v Kimura* (1992) 9 CRNZ 115 (CA); *Fielding v Police* [2008] DCR 23 (HC).

5 Crimes Act 1961, ss 21(2), 22(2) and 23(4); and see *R v Darwish* [2006] 1 NZLR 688 (HC); *van Niewkoop v Registrar of Companies* [2005] 1 NZLR 796 (HC).

6 Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA66.08]; and see *R v Humphreys and Turner* [1965] 3 All ER 689 (Liverpool Crown Ct).

7 *R v Paterson* [1976] 2 NZLR 394 (CA); *The King v Harrison* [1941] NZLR 354 (CA); and *Morris v Tolman* [1923] 1 KB 166 (KB).

8 AP Simester and WJ Brookbanks *Principles of Criminal Law* (3rd ed, Brookers, Wellington, 2007) at [6.2.2(3)]; see also *Adams* at [CA66.08].

9 *Sweetman v Industries and Commerce Department* [1970] NZLR 139 (SC) at 148; *Surujpaul v The Queen* [1958] 1 WLR 1050 (PC).

[8] Accordingly Ms Stewart's conviction is quashed. No order for retrial is made.

Solicitors:
WCM Legal, Carterton for Appellant
Crown Law Office, Wellington for Crown