IN THE SUPREME COURT OF NEW ZEALAND

SC 13/2012
[2012] NZSC 39

MARK JOSEPH BENJAMIN

v

THE QUEEN

Court: Blanchard, William Young and Chambers JJ

Counsel: G M Illingworth QC and I C Bassett for Appellant
M D Downs for Crown

Judgment: 23 May 2012

JUDGMENT OF THE COURT

The application for leave to appeal is dismissed.

REASONS

[1] Between January and August 2006 Mark Benjamin, the applicant, worked for Kerry (NZ) Ltd. His responsibilities included arranging monthly payments to Kerry's salaried employees. Mr Benjamin's initial salary was $165,000 pa. But from March that year, he paid himself as if his annual salary was $175,000. When this was discovered, after he had left Kerry's employment, he eventually proffered by way of explanation that on 6 March 2006 Hugh Spence, Kerry's managing director, had agreed to Mr Benjamin's salary being increased by $10,000 pa. Hugh Spence denied ever having so agreed.

[2] Mr Benjamin eventually faced seven charges of accessing a computer system and thereby dishonestly and without claim of right obtaining a pecuniary advantage,

contrary to s 249(1)(a) of the Crimes Act 1961. Four of the charges related to overpayment of salary.[1] The other three related to overpayment of holiday pay. Mr Benjamin's defences to those charges were mistake on his part (with respect to two of the counts) and mistake on someone else's part with respect to the other.

[3] The trial took place in the District Court before Judge Wilson QC. He found him guilty on all counts.[2] Mr Benjamin appealed, essentially on the grounds of what is loosely called trial counsel incompetence and new evidence. The Court of Appeal dismissed the appeal.[3] Mr Benjamin now seeks leave to appeal, principally on the basis that a substantial miscarriage of justice has occurred.

[4] Complaint is made concerning the truncated nature of the hearing in the Court of Appeal. Mr Rogers, Mr Benjamin's counsel in the Court of Appeal, had asked for a two day hearing but effectively was given a one day hearing. He complained that, as a consequence, he had to rush his cross-examination of Crown witnesses whose evidence responded to evidence given in support of the appeal. All courts can ration time available for oral submissions, especially in circumstances where (as in the Court of Appeal) detailed written submissions are filed in advance of the hearing. We accept that counsel should not be rushed with respect to the taking of evidence in the Court of Appeal, where the grounds of appeal by their nature require evidence. In this case, however, we are satisfied no miscarriage of justice arose from the procedure adopted. First, Mr Rogers did not indicate to the panel that a fair appeal would not be possible if the programme advised by the presiding judge was followed. In fact, to accommodate Mr Rogers's cross-examination, the Court ended up giving him more time than initially indicated. Secondly, Mr Rogers in his affidavit filed in this Court has not pointed to any specific topics he wanted to cover in cross-examination which the time constraints prevented.

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1 These related to the months of March, April, May and June 2006. No charge was laid in respect of over payment of salary in July 2006, although it is common ground Mr Benjamin paid himself as if his annual salary was $175,000 that month too. There was a charge relating to overpayment of holiday pay in July 2006.

2 *R v Benjamin* DC Auckland CRI-2008-004-18032, 24 November 2010.

3 *Benjamin v R* [2012] NZCA 9.

[5] The nub of the appeal in the Court of Appeal and as now proposed in this Court is new evidence. It does not matter for present purposes why that evidence was not called at trial. Even if it is taken into account, it does not cause us to question the safety of Judge Wilson's verdicts. A key plank of the Crown's case remains unanswered. Mr Benjamin has confirmed that his final payment from Kerry, paid on 11 August 2006, was $48,365.50. That is the exact amount shown on Crown Exhibit Booklet page 34, purporting to be a copy of Mr Benjamin's final payslip.[4] Although the new evidence, in particular of Brett Mills and Michael Spence, now casts some doubt on the accuracy of much of the Crown's forensic evidence at trial, it is simply inconceivable that the sum of $48,365.50 was arrived at other than by the calculation set out on page 34. One of the figures in the calculation was salary at $13,750. That is one-twelfth of $165,000 — the salary as originally agreed. From March to July, however, Mr Benjamin had been paying himself a monthly salary of $14,583.33, being one-twelfth of $175,000, the figure Mr Benjamin asserted Hugh Spence had increased his salary to. Someone must have accessed the Comacc computer system between the July payment date and 11 August to reduce Mr Benjamin's salary from an annualised $175,000 to $165,000. It has always been the Crown case that Mr Benjamin made that reduction as a means of covering his tracks once he knew he was leaving Kerry and that Matthew Spence, Hugh's son, would be taking over Mr Benjamin's payroll duties.

[6] That Crown submission, which found favour with Judge Wilson and the Court of Appeal, remains unanswered. The new experts provide no answer to that. They have shown problems with the Crown's reconstruction of the computer records, but they do not deal with the fact that Mr Benjamin did receive on 11 August 2006 $48,365.50, the very sum calculated on page 34. Mr Illingworth QC, for Mr Benjamin, refers to new evidence from another employee, Colin Lowe, who says he accessed the Comacc computer system and looked at the information it held relating to Mr Benjamin. Mr Lowe says he did this while Mr Benjamin was on leave in mid-2006. (We know from Mr Benjamin exactly when he was on leave:

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[4] The actual payslip was not produced. At interview, Mr Benjamin did not deny receiving the payslip. His evidence at trial was that he may have been given the payslip but could not recall it being given to him. In his evidence to the Court of Appeal he said that he believed that he did not receive it. The trial Judge concluded that Mr Benjamin had prevaricated on this issue and found that the payslip had been given to him.

26 June to 7 July 2006.) Mr Illingworth submitted Mr Lowe might have inadvertently altered the information relating to Mr Benjamin's salary. We know, however, that that cannot be right. We know that Mr Benjamin received his July salary payment on 13 July (that is, after he had returned from leave) and that the July payment was calculated on the basis of his annual salary being $175,000. So nothing Mr Lowe did could have affected the salary information in the Comacc computer system. Mr Lowe in his affidavit does not assert he did anything to the salary figure recorded in the system. In any event, it would be an odd coincidence that any inadvertent tampering brought back the figure to the originally agreed salary.

[7] The alternative submission is that Matthew Spence might have altered the figure prior to the making of the 11 August payment. Mr Benjamin's trial counsel explored that possibility at trial. Judge Wilson did not accept it. Nor did the Court of Appeal, even after taking into account the additional evidence available to it. For the reasons those Courts gave, we agree that the suggestion Matthew Spence altered the figure is highly improbable. The theory that Hugh and Matthew Spence conspired to set Mr Benjamin up is riddled with holes, as the Court of Appeal demonstrated. That leaves Mr Benjamin as the only person who could have altered the figure in the period leading up to 11 August. The only inference to be drawn from that is the inference the Crown draws and the Courts below have accepted.

[8] None of the new evidence provides anything like a telling answer to many of the other points the Crown relied on. In particular, we note Hugh Spence's letter to Mr Benjamin dated 17 October 2006 following the internal audit at Kerry. Hugh Spence set out in some detail the alleged overpayments the audit had revealed. He said that Mr Benjamin's salary was $165,000 per annum, or $13,750 a month, whereas in March through to July Mr Benjamin had paid himself $14,583.33 a month. Mr Benjamin's response to that letter, dated 24 October 2006, while in a sense non-committal, is not consistent with his defence. Hugh Spence's letter would have revealed to him that he had *not* been paid $14,583.33 for August.[5] There is no

[5] Assuming for the moment either that Judge Wilson's finding that Mr Benjamin received the payslip is wrong, or alternatively that Mr Benjamin had not digested its contents.

explanation as to why he did not complain about that underpayment if, as he now asserts, Hugh Spence had agreed to increase his salary.

[9] We have not been persuaded that the Court of Appeal's detailed analysis of the new evidence is wrong or incomplete. We are not satisfied that it is arguable that a substantial miscarriage of justice may have occurred. Nor does the appeal involve a matter of general or public importance.

Solicitors:
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