IN THE SUPREME COURT OF NEW ZEALAND SC 47/2010

JAMES LOUIS MASON

Appellant

v

THE QUEEN

Respondent

Hearing:	19 October 2010
Coram:	Elias CJ Blanchard J Tipping J McGrath J Anderson J
Appearances:	G J King for the Appellant D B Collins QC with B L Orr for the Respondent

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CRIMINAL APPEAL

MR KING:

If it pleases the Court, I appear for the appellant.

ELIAS CJ:

Thank you, Mr King.

SOLICITOR-GENERAL:

Mr Orr appears with me this morning, Your Honours.

ELIAS CJ:

Thank you, Mr Solicitor. Yes, Mr King.

MR KING:

If it pleases the Court, I'm not really sure how to proceed in light of the concession that's been made, but my voice certainly is very grateful for the fact that hopefully I won't be on my feet for too long, although touch wood. The appeal of course involves a narrow issue of whether the combining into a single count of effectively what became two separate and quite distinct allegations - the punching of the child in the face and the pulling of the child's hair - resulted in a miscarriage of justice. The appellant's position is that for a whole raft of reasons and in a whole raft of different ways that it did in fact result in a miscarriage of justice.

The Crown have made what, I submit, is an entirely appropriate concession, which appears to be linked to the fact that the Judge did not give a unanimity direction, and the Crown's position is that, in that respect, the appeal must be allowed.

The appellant's submission is that, whilst that approach is entirely endorsed, there are further difficulties as well that arose, and it invites the Court –

ELIAS CJ:

But it wouldn't be necessary for us to get into those, Mr King, if we accept the first point.

MR KING:

It wouldn't be necessary but, in my submission, it might be helpful for future cases, and really I can't take the matter any further than that, other than to extend the invitation to the Court to consider it.

ELIAS CJ:

I think we shan't hear you on the other points, Mr King –

MR KING:

Yes.

ELIAS CJ:

– unless we find it necessary to. I meant to look before I came in to the – it's really only a sentence or two in the judgment of the Court of Appeal –

MR KING:

Yes.

ELIAS CJ:

– on this. Can you just…

MR KING:

And of course Mr Mason was self-represented in the Court of Appeal –

ELIAS CJ:

Yes.

MR KING:

– and, in fairness to all concerned, he may not have identified all of the particular issues.

ELIAS CJ:

Yes.

MR KING:

The issues which I have identified I have tended to summarise at page 5 of my written submissions, and those are the issues which, it's submitted, were visited upon the appellant in the way that the case was allowed to proceed.

The Court of Appeal's dealing of the issue had large focus on trial counsel's assertion in her affidavit that it was a pragmatic decision to make, and they

really proceeded to deal with it on that basis rather than consideration of the general consequences of the combining of the two counts.

ELIAS CJ:

Do we have the indictment?

MR KING:

Yes, it's in the casebook. Yes, tab 3, 5A.

ELIAS CJ:

Tab 3, sorry.

MR KING:

6A, sorry.

TIPPING J:

The Chief Justice's point earlier, I think, is encapsulated in paragraph 15 of the Court of Appeal's decision –

ELIAS CJ:

Yes, that's right.

TIPPING J:

– whereby the Court said that the Judge was to work out which it was –

MR KING:

Yes.

TIPPING J:

– for sentencing purposes, which is –

ELIAS CJ:

Yes.

TIPPING J:

– something that I must confess sort of rather leapt off the page at me when we were looking at it for leave purposes.

MR KING:

And indeed, and the submissions have made much of the “thirteenth juror” concept, of course. In some cases that simply cannot be avoided, of course, juries do not give reasons for their judgment and it is incumbent upon the Court to determine the facts for sentencing. This, in my submission, is not one of those cases, because the difficulties could have been so easily avoided by having the indictment split, then it wouldn't have been necessary for the Judge to assume the mantle of the so-called “thirteenth juror”.

TIPPING J:

But the Court seemed to be quite moved by the proposition that experienced defence counsel have considered that and decided against it.

MR KING:

Yes, although of course, as the point is made in this case, and this is not criticism of trial counsel in that regard, we all do things that may not, in hindsight, have been the best approach. But what counsel did fairly concede was that she had not consulted with her client over that issue, and of course the basis upon which she considered it was appropriate was that it avoided the risk of multiple convictions. But the benefit, if it was that before trial, was certainly lost in sentencing, where His Honour took the worst possible interpretation of the verdict and, one suspects, had there been two separate convictions, one for ear pulling and one for punching, firstly, the ear pulling would not have added anything to sentencing; secondly, the Judge may well have been, in those circumstances, persuaded to at least discharge him without conviction on that count, and so that Mr Mason would not be any worse off. So, although trial counsel, one can perhaps have a lot of sympathy for her position, what she does candidly acknowledge, she didn’t consult with her client. The basis, the rationale for her deciding on that, was really related to how the case could progress. The reality was that the case progressed in a

way that was largely favourable to Mr Mason in that he was acquitted of two counts but, unfortunately, when it came to sentencing he was sentenced on the worst possible interpretation available.

ELIAS CJ:

The Court didn't deal with the unanimity point at all.

MR KING:

No.

ELIAS CJ:

The argument, I suppose, against you, is that the charge was of assault, with two particulars, if you like, and that takes you into those cases, *R v Brown* (1983) 79 Cr.App R 115 and one that I think Justice Anderson and I disagreed on, so I'm not unsympathetic to the view that these things have to be separated out –

MR KING:

Yes.

ELIAS CJ:

– but the problem is that in a mêlée or something like that, are we getting to the point where we'd have to say that the jury has to be directed, it has to be unanimous as to each particular blow, and is the charge of assault sufficiently conclusionary to encompass these two different particulars, if you like?

ELIAS CJ:

In my submission, Ma'am, the answer to that is that there are obviously many different forms of assault. When someone is charged with an intentional, assault with intention to injure or so on, then a combination of separate blows obviously is an essential part of that, and in that scenario one can easily deal with multiple-type striking assault. But in this particular case, where they really were two quite separate allegations, that carried with them separate defences, both factually and, I submit, legally, because the application of the

section 59 defence, the "reasonable force to protect harm," is very different when one is dealing with a punch to when one is dealing with the flicking of the ear, so, but the position of the appellant, Ma'am, is not to try and use this case to lay down some blanket laws that whenever an assault is charged every single individual blow and strike must be separately charged, must be separately directed, it must be unanimously held. The argument is really limited to the factual scenario here. These were assaults that were alleged without particular intents. In other words, it was just the intentional application of force would suffice and so we don't have to have that combining of incidents or individual blows to establish an intention. These were, each act was complete upon the specific allegation, and in the context of this case it is my submission the section 59 defence does loom large, because a jury would simply not deal with it, in my submission, if it was a punch to the face, but may well have if it was simply a flicking of the ear. And that carries through on the facts of this case, because when a discharge without conviction was sought in sentencing, the trial Judge, and it seems all parties, drew a very sharp line if His Honour found that there was a punch that wasn't on the cards, whereas conversely if it was simply an ear pulling –

ELIAS CJ:

What do you mean, "It wasn't on the cards"?

MR KING:

His Honour had made it clear that he would not entertain, and the concession by trial counsel is made, that His Honour would not entertain a discharge without conviction if he found that there was a punch to the face, but would entertain it if it was simply an ear flicking or yanking or whatever, however one terms it. So in all of those respects, it is my submission the combining of the two charges on the facts of this particular case, really did result in some significant difficulties, which may not arise in a normal type of scenario.

TIPPING J:

I would have thought that this was a case that did require severance, because even if one says that you can have an overriding assault with different

particulars, you're still then into difficulties downstream of those particulars. How are you going to instruct the jury as to unanimity or otherwise as between particulars? And when it is likely to be important for sentencing purposes, I would've thought as a matter of policy –

MR KING:

Yes.

TIPPING J:

– one ought, if one reasonably can, and that's the control, if one reasonably can, have severance of individual incidents.

MR KING:

That's right. And in my submission that's absolutely correct. In this case there was one incident, the Crown had laid three separate charges, they should've laid four, and that was the simple easy answer which would've avoided "thirteenth juror" issues, that would've made life simpler for the jury in applying the section 59 defence which they were directed to apply, would have given some certainty as to outcome for the Masons. And in that, and I do, and I hope it's, and I say an unfair tugging of the heart strings, but these are real people and they have to live with this, the family, and a young boy now aged seven, he was four at the time, potentially has to live with his father being convicted of punching him in the face, and that's something, in my submission, which is a difficult burden for a family to carry, and it could have so easily been avoided, and I refer I think –

TIPPING J:

Well, of course, it may not have been avoided, they may have then got two discrete verdicts of guilty, but at least we'd have known.

MR KING:

Absolutely. And I agree with that entirely, Sir.

ELIAS CJ:

Well then the submission really is that there should have been separate counts.

MR KING:

Indeed. That's exactly right, Your Honour, and that – so, I hope –

TIPPING J:

Well, isn't that what the statute prima facie requires?

MR KING:

It does, it should normally relate to a single transaction.

TIPPING J:

Now, what is a transaction?

MR KING:

Yes.

TIPPING J:

There's some issues around that, but I've understood –

MR KING:

Well, the transaction, I think –

TIPPING J:

– the practice always to be that if you can sensibly sever, you do.

MR KING:

Yes, you should, yes. And it's as simple as that, in my submission. But within that, and I've identified again, I refer just to page 5 of the written submissions of all of the consequences which, of course, I start with the KISS principle to keep it simple, divide, and let the jury determine it on a unanimous basis, on a proper, discrete, factual basis, and of course in this case Mr Mason had made

an admission to grabbing the hair in front of the child's ear and flicking the ear, but denied absolutely the punch, so a jury confronted with this count had quite separate defences and factual issues to resolve in their determination. It's not as if he denied that anything had occurred, he at least gave some basis for a jury to say, "Well he's admitted flicking his ear and grabbing the hair in front of him, we don't think that's very much different to a yanking of the ear". Some may have thought that, others may have thought that there was a punch, we just don't know, and that's at the heart of the difficulties in this case.

ELIAS CJ:

Yes, it seems to me that there are issues which, on another occasion, might require consideration relating to directions where different particulars are given.

MR KING:

Yes.

ELIAS CJ:

But this case is a much more narrow one and we wouldn't want to go more widely.

MR KING:

Yes. Well, I'm of course in the Court's hands in that. I mean, I'm trying to be Oliver Twist holding the bowl out and asking for more than is being very graciously offered to me by the Crown. But unless the Court has particular questions, I don't think I can realistically improve on what's set out in the written submissions, Ma'am.

ELIAS CJ:

Yes, thank you Mr King.

MR KING:

As the Court please.

ELIAS CJ:

Yes, Mr Solicitor, thank you for your very helpful and proper, if I might say, memorandum. The area of concern is this demarcation between the wider question which, as I indicated, may need consideration at some stage, and really what was the problem in this particular case. And you accept, do you, that this is one where the indictment really was defective?

SOLICITOR-GENERAL:

Your Honour, I think the major problem was the failure to give a unanimity direction, and that with a property unanimity direction the unsatisfactory features of the indictment might have been able to be salvaged.

ANDERSON J:

You'd still never know the basis upon which they convicted though, would you?

SOLICITOR-GENERAL:

And that would only be an issue at sentencing and under section 24 of the Sentencing Act and under the common law provisions which relate to the ability of a Judge to be able to make an assessment of the evidence for himself or herself when sentencing. That problem would have been able to be resolved.

ANDERSON J:

It sometimes used to happen when manslaughter was advanced as a defence on both a provocation basis and on an intent basis, a Judge would have to decide what it was.

SOLICITOR-GENERAL:

Yes, I agree. And can I come back to the most important point that Your Honour the Chief Justice has raised? I think that the Court can, and I would urge the Court to, deal with this on a very narrow basis. I accept that one day there may there may be a case that comes before the Court which raises the wider issues –

TIPPING J:

Well, the issue is one in which there was a disagreement in the Court of Appeal and that, that's the name of which escapes me.

ELIAS CJ:

I can't remember it either.

SOLICITOR-GENERAL:

That was *R v Mead* [2002] 1 NZLR 594 (CA), Mr Mead and Mrs Molloy.

ELIAS CJ:

But that was a transactional offence, although assault can be a transaction too.

SOLICITOR-GENERAL:

Yes, but in this particular case I think it's very, very clear, and I do firmly believe that if there had been the unanimity direction, which was the first thing I went looking for when I received the file, it would've been salvageable, but absent that it was not salvageable.

ELIAS CJ:

Well, the – a unanimity direction you say would have corrected the fact that these two rather, well, very different assaults –

SOLICITOR-GENERAL:

Different types of assaults, yes.

ELIAS CJ:

– were combined, unfortunately.

SOLICITOR-GENERAL:

Yes.

TIPPING J:

I think one would be better to reserve, whether a unanimity direction would have cured it Mr Solicitor, because I'm not wholly persuaded that the Judge would then have appropriately used those powers to decide which of two very discrete events it was, and you denying the ability to say it was both, it's a very unsatisfactory state of affairs.

SOLICITOR-GENERAL:

Yes. Yes, he did say either/or, rather than both.

TIPPING J:

For myself, I wouldn't regard it as so clear that the unanimity direction would've solved it. We don't need to develop that.

SOLICITOR-GENERAL:

I really don't urge Your Honours to develop that because, as I say, I do think that it is appropriate for me to concede there has been a miscarriage of justice because one simply does not know on what basis the jury convicted the appellant on count 3.

TIPPING J:

Well, there could have been six for punch and six for hair, couldn't there?

SOLICITOR-GENERAL:

Absolutely, yes.

ELIAS CJ:

The aspect that bothers me is a general fight in which there may well be hair pulling and eye gouging and knifing or something. It would have to be very fact specific as to whether in the particular case this really should have been severed, because only two discrete forms of assault were being alleged.

SOLICITOR-GENERAL:

Indeed, and in fact Lord Ackner, in a case called *More,* which is reported in 1987, '86 Criminal Appeal Reports at 234 ((1988) 86 Cr App R 234) made it very clear that whether a specific direction in relation to unanimity should be given will all be dependent on the extent of the facts and the degree of the proximity of the various components of the offending that is alleged.

ANDERSON J:

That citation again?

SOLICITOR-GENERAL:

1987, '86 Criminal Appeal reports at 234, and the relevant section that I was going to refer to is at 252.

TIPPING J:

Is that Lord Ackner in the House of Lords?

SOLICITOR-GENERAL:

Yes, indeed.

ELIAS CJ:

We haven't, I think, been given any authority on severance in this sort of context which I think we might need to look at, Mr Solicitor.

SOLICITOR-GENERAL:

And I have not gone down that route because, as I have said, I have taken a particular view that it was the absence of the unanimity direction or, as we would now call it, requisite majority direction that was the fatal element.

ELIAS CJ:

Why would we now call it that? Is that –

SOLICITOR-GENERAL:

Because of majority verdicts.

ELIAS CJ:

I see, yes, requisite majority.

SOLICITOR-GENERAL:

Just pre-dated that change in the Juries Act.

ELIAS CJ:

Yes, yes, of course. Requisite, I'd better make a note of that.

SOLICITOR-GENERAL:

I don't know if other people are calling it that, but that seemed to me to be the appropriate label.

ELIAS CJ:

Well, it may become so.

TIPPING J:

We could return the law to what it was by a casual reference to unanimity.

SOLICITOR-GENERAL:

I really do emphasise that I do believe this case can be disposed of on a very, very narrow basis and –

ELIAS CJ:

Narrow basis, yes.

SOLICITOR-GENERAL:

– I'd urge the Court to do so, and if I can assist Your Honours in any way I am happy to do so. I have researched quite extensively the area of the law relating to unanimity directions and specificity directions but unless the Court wishes me to go through it all, I'm quite happy to resume my seat.

ELIAS CJ:

I think it may be that we should ask you that if you uncover anything relating to the areas that we have been discussing with you, any authorities you wish to refer us to, you can put in a memorandum on that.

SOLICITOR-GENERAL:

All right. I'm happy to do that, Your Honour. If I think of something within, say five days, working days, if that's convenient.

ELIAS CJ:

That would be very helpful. It would be helpful. Shall we confer? We'll just take a few minutes.

TIPPING J:

Could we confer and counsel just wait. There's a point that I'd like to confer about and not put directly to counsel at this stage.

COURT ADJOURNS: 10.23 AM

COURT RESUMES: 10.37 AM

ELIAS CJ:

Yes, counsel, we're going to reserve our decision in this. The area in which it seems to us there may be particular vice is during the course of the trial when it became clear that the defence may have been embarrassed in the defences being run. If there's any assistance counsel can give us on that point within the next five days, we'd be grateful for memoranda on it. It may be that there is nothing and this an intensely fact-specific case. But if there is any, we're just conscious of the fact that we haven't had any assistance really on the question of severance more generally, and we want to be careful in that area, and also, at the other end, that on the directions point it trespasses into the difficulty with particulars and requiring unanimity there. But we think that there may be an issue in relation to the defence that was being run, or the defences that were realistically available.

So, if there's anything further you wish to put before us, particularly by way of authority, we'd be very pleased to receive it. But it may be that the matter in the end is so fact specific that there's nothing that will be of assistance. So thank you, counsel, for your assistance. We'll take time to consider our decision.

COURT ADJOURNS: 10.39 PM