Kula v R

Court of Appeal
Burchett, Tompkins, Neaves JJ
App.2/96

23 & 27 May 1996

Appeal - criminal trial - incompetence of counsel
Criminal law - incompetence of counsel

This is the appeal (against conviction and sentence of 5 years imprisonment) from the matter reported immediately above. The appeal against sentence was withdrawn and dismissed. Against conviction complaint was made as to the manner in which counsel at trial, conducted the trial.

Held:

1. Appellate courts will normally view allegations of counsel incompetence sceptically. The Court of Appeal has to be on guard against any tendency by accused persons, who have been properly and deservedly convicted, to put the result down, not to the crime committed, but to the incompetence of counsel.
2. But rare cases do arise in which it becomes necessary to hold that, in the conduct of the defence, there have been mistakes so radical that the ground has been made out. It is not a question whether or not counsel has been negligent. Mis calculations can occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised.
3. A new trial will be ordered only if the court is satisfied that the incompetence of counsel (in the conduct of trial) has been so serious that there is a real likelihood that a miscarriage of justice has occurred. But cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional.
4. Where incompetence of counsel is relied upon it is essential that the appellant provide to the Crown a waiver of privilege. This will enable the Crown to interview the counsel against whom the allegations are made, and obtain and put before the appellate court counsel's version of the events that have occurred. Only in this way can an appellate court judge whether the manner in which counsel conducted the defence has been explained, if indeed an explanation was called for.
5. That course was not adopted in this case; nor did the appellant file an affidavit describing the instructions he gave his counsel.
6. The court was satisfied that there were no valid grounds for criticising the conduct of counsel at trial. It followed that there was no basis on which it could

find that there had been a miscarriage of justice.

7 The appeal was dismissed.

Cases considered : R v Pointon [1985] 1 NZLR 109
R v Clifton [1993] 2 All ER 998

Counsel for appellant : Mr W. Edwards
Counsel for respondent : Mrs Taumoepeau

Judgment

The appellant was charged with rape, indecent assault, detention with the intention of carnally knowing the complainant, and common assault. He was tried before Hampton CJ, sitting without a jury, on 8, 9, 10 and 11 January 1996. In the course of the trial, the Crown elected not to seek a verdict on the assault charge. Also during the hearing, counsel then appearing for the appearing for the appellant acknowledged that there was no defence to the indecent assault charge.

By verdicts delivered on 15 January 1996 the appellant was found guilty of rape, indecent assault and detention. He was found not guilty of common assault.

On that day he was sentenced to 5 years imprisonment on the rape count, 2 years imprisonment on the abduction count, and 1 year imprisonment on the indecent assault count, all these sentences to be concurrent.

He appealed against his conviction on the rape and detention counts, and against sentence. He has, through his present counsel, applied for leave to amend that notice of appeal as it relates to the appeal against conviction. That application is granted. Counsel for the Crown submitted that, in accordance with s 16(a) of the Court of Appeal Act (Cap.9), this being an appeal where the grounds of appeal involve questions of fact, or mixed questions of law and fact, any appeal must be with the leave of the court. Accordingly, the application is further amended to be an application for leave to appeal.

At the hearing in this court, counsel for the appellant withdrew the appeal against sentence. It is dismissed.

Facts as found by the Chief Justice

The events to which the charges relate occurred on the night of 9 and 10 June 1995. The then 14 year old complainant and her then 13 year old friend, Mele Tu'ivai came to the centre of Nuku'alofa on the evening of Friday 9 June, in a van with a young man they knew. They were drinking alcohol. They visited a night club. The appellant, who was then aged 31, and 4 and 5 others in two vans came in to Nuku'alofa that same evening. They too, had been consuming alcohol.

In the early hours of the morning of Saturday 10 June 1995, the two girls and the appellant met. Sometime later, the two girls entered the van being driven by the appellant. They were joined by an old friend of the appellant, Faolui Taulanga. Taulanga said that he and the appellant were drunk. Further beer was drunk in the van by all four. The appellant drove the van to a beach. It became stuck in the mud. Their attempt to extricate the van failed. Faolui Taulanga and Mele Tu'ivai left to see if they could find another vehicle to tow the van out. By that time dawn was breaking. As those two were leaving, the complainant went to join them. The Chief Justice found that the appellant forcibly restrained her. The Chief Justice accepted the complainant's evidence that the appellant

asked her twice to get in the van. She refused. The appellant said he would force her, she tried to break clear, a struggle ensued, she was screaming, he threatened her with violence, she broke away, slipped and fell, he fell on top of her. The complainant said, and the appellant accepted, that he removed her clothes, and licked her vagina. She said, and the Chief Justice found, that it was then that the appellant had sexual intercourse with her without her consent. The appellant in his statement to the police officer acknowledged that he "put my penis inside and we had intercourse and I ejaculated inside ...".

The appellant at all stages acknowledged that intercourse had taken place. The central issue at the trial was whether the Crown had proved beyond reasonable doubt that the appellant knew the complainant was not consenting to that intercourse, or was reckless whether she consented to it.

The Chief Justice held that the appellant knew that he had held the complainant back, struggled with her, partly unclothed and licked her against her will and that he had sexual intercourse with her also against her will. He found proved beyond reasonable doubt that the appellant knew that she was not consenting. The charge of rape in count 1 was therefore proved.

He found also that the appellant had detained the complainant against her will for the purpose or with the intent of carnally knowing her. Count 3, the charge of detention, was also therefore proved.

The grounds of the appeal:

The grounds of appeal in the application for leave to appeal are all based on the manner in which counsel for the appellant at the trial (who was not counsel for the appellant on the appeal) conducted the trial. Before we refer to the specific aspects relied upon, we make two comments on this ground of appeal.

First, appellate courts will normally view allegations of counsel incompetence sceptically. This court has to be on guard against any tendency by accused persons, who have been properly and deservedly convicted, to put the result down, not to the crime committed, but to the incompetence of counsel: *R v Pointon* [1985] 1 NZLR 109, Cooke P. at 114. But rare cases do arise in which it becomes necessary to hold that, in the conduct of the defence, there have been mistakes so radical that the ground has been made out. It is not a question whether or not counsel has been negligent. Miscalculations can occur for which counsel, perhaps making tactical decisions under pressure, is not necessarily to be criticised ; R v Pointon (supra at 114). A new trial will be ordered if, but only if, the court is satisfied that the incompetence of counsel, in the manner in which he or she conducted the trial, has been so serious that there is a real likelihood that a miscarriage of justice has occurred. But we emphasise that cases where the conduct of counsel can afford a basis for appeal must be regarded as wholly exceptional: R v Clifton [1993] 2 All ER 998, 1004. That will be all the more so where, as here, the accused was represented by counsel with a deserved reputation as an experienced and competent criminal counsel.

Secondly, where incompetence of counsel is relied upon as a ground for appealing, it is essential that the appellant provide to the Crown a waiver of privilege. This will enable the Crown to interview the counsel against whom the allegations are made, and obtain and put before the appellate court his or her version of the events that have occurred. Only in this way can an appellate court judge whether the allegations made by the appellant are justified, or whether the manner in which counsel conducted the defence has been explained, if indeed an explanation is called for. That course was not adopted in this

case. Nor was there filed an affidavit by the appellant describing the instructions he gave to his counsel.

We now consider the three respects in which Mr Edwards submitted that counsel at the trial failed adequately or properly to represent the appellant.

Cross-Examination of the Police Officer

Mr Edwards submitted that counsel failed effectively to cross-examine the police officer concerning the written and signed statement made by the appellant to Police Corporal Latu.

The Chief Justice said that the police officer was not challenged concerning that interview, the manner in which he conducted it, his record of it, or any claimed divergence between the accused's answers as recorded and the accused's evidence at the trial. He concluded, for reasons he set out in detail, that he could rely more on the record of interview than on the account of the events as given by the accused in evidence.

In his evidence the appellant claimed that the police officer had not accurately recorded his answers, and that because of a lack of sufficient food and sleep before the interview, he felt he was not quite thinking right at the time of the interview. Mr Edwards submitted that counsel at the trial should have challenged the admissibility of the statement of these grounds. No such challenge was made. There are no sufficient grounds to support this submission. The claim by the appellant that answers were not accurately recorded had no prospect of success for two principal reasons.

First, as the Chief Justice noted in his reasons for verdict, the appellant's signature appears at the end of every answer recorded in the statement. The appellant made a material change to one of those answers. He must have had the document in front of him for a significant time to sign after each answer. He is experienced and educated. This cautious approach adopted by the police officer has resulted in the appellant individually acknowledging by his signature the correctness of each answer as recorded. Unsurprisingly, the Chief Justice concluded that the appellant's claim that his answers were not accurately recorded itself reflected on the appellant's credibility.

Secondly, there is nothing before the court to show the nature of the appellant's instructions to his counsel before trial. As any experienced criminal counsel is only too well aware, it is by no means unusual for an accused to give evidence significantly at variance to the account given to counsel before trial. Had there been evidence that the accused told his counsel, before the police officer gave his evidence, that the statement had not recorded his answers correctly in material respects, and had counsel confirmed that he had received these instructions, that may have provided some basis for the criticism. But even if that were so, counsel may well have taken the justified tactical decision that a challenge to the accuracy of the answers, when the appellant had acknowledged the correctness of each answer by signing his name beside it, could only be counterproductive.

Mr Edwards raised another respect in which he submitted that counsel at the trial had failed adequately to cross-examine the police officer. The complainant and the appellant each said in evidence that the appellant ejaculated after, not during, penetration. The doctor who examined the complainant following her complaint to the police, produced as his evidence in chief the report that he made at the time of his examination. This recorded that two vaginal swabs did not reveal the presence of spermatozoa. In the record of interview in the passage we have cited above, the appellant is recorded as saying

that he "ejaculated inside". Mr Edwards submitted that the police officer should have been cross-examined on this apparent inconsistency with a view to demonstrating that the police officer must have recorded the appellant's answers inaccurately.

We do not accept his submission. Again, counsel was faced with the obvious difficulty that the appellant had signed his name beside the answer. But apart from this, we do not know whether the instructions given to counsel accorded with the evidence he gave at trial, or with his statement as recorded.

There was a further difficulty that counsel would have faced had he attempted to challenge the accuracy of the answers in the written record of the interview. After the interview was completed, the appellant signed a further short statement, a part of which reads,

> "My statements to all the charges against me are that in the answers to your questions and nothing else that I want to add to my answers and I am aware of its contents"

For the reasons we have expressed, we are satisfied that there are no grounds for criticising the conduct of counsel in relation to the cross-examination of the police officer.

Cross-Examination of Other Witnesses

Fatui Taulanga was one of the persons in the van when it became stuck in the mud near the beach. He said in his evidence in chief that, when he and Mele Tu'ivai left to look for a vehicle to tow the van out, the appellant and the complainant "were standing". Mr Edwards submitted that this witness should have been cross-examined on whether he saw any pulling or pushing, to confirm the appellant's claim that there was no struggle. This submission is misconceived. The witness had given an answer favourable to the accused. To cross-examine on a favourable answer is to invite a qualification or alteration to that answer which could only be adverse to the accused. Far from criticising counsel, it is our view that counsel demonstrated sound judgment in leaving that evidence alone.

Mr Edwards further submitted that this witness should have been cross-examined about whether the complainant had made any adverse comment about the appellant when they were in the taxi before they reported the incident to the police. This submission is also misconceived. Any conversation between witnesses in the absence of the accused would be inadmissible hearsay. The only basis on which it could be admitted would be if in some respect it could be shown that any statement she made then was inconsistent with what she had said in the witness box, such an inconsistency going to credibility. But there is no evidence that there was any such inconsistency.

Mr Edwards' submission that Mr Taulanga should have been cross-examined about whether Mele Tu'ivai had complained to Mr Taulanga about the appellant is also unsound. If there had been any such complaint, it would clearly have been inadmissible hearsay.

Next, Mr Edwards criticised the cross-examination of Mele Tu'ivai. First, he pointed to an inconsistency between Miss Tu'ivai's evidence and the complainant's, Miss Tu'ivai stating that the liquor they were drinking was mixed with fanta, where the complainant had said that it was mixed with coke. Quite apart from the trivial nature of this discrepancy, the inconsistency was there. Further cross-examination on it was unnecessary, and may have lessened the inconsistency.

Miss Tu'ivai in her evidence said nothing about a struggle. On the contrary, she said that when she saw the complainant the last time, the appellant was holding her hand. She said nothing about the complainant screaming or shouting. This evidence was favourable to the accused. In this case also, any experienced counsel would know that where

favourable evidence had been given, it could be dangerous to question the witness further about it, because of the real risk that the witness may qualify or alter her evidence in a way that would make it less favourable. In our view, counsel at the trial was correct to leave this evidence unchallenged.

The medical evidence

Mr Edwards submitted that counsel failed to have the evidence of the medical officer admitted. That is factually incorrect. The doctor gave evidence, during which he produced the report he had prepared at the time. As we have already pointed out, the evidence in the report was favourable to the appellant, to the extent that it was consistent with the absence of ejaculation within the complainant. Mr Edwards' submission that the doctor should have been cross-examined on this evidence is unsound. As with the other instances, counsel was wise to leave this favourable evidence as it was.

Counclusion

We are satisfied that there are no valid grounds for criticising the conduct of counsel at the trial. It follows that there is no basis on which we can find that there has been a miscarriage of justice.

The appellant was entitled to have his apppeal considered by this court. The application for leave to appeal is granted. The appeal is dismissed.