

LCRO 250/2010
LCRO 242/2011

CONCERNING

An application for review pursuant to Section 193 of the Lawyers and Conveyancers Act 2006

AND

CONCERNING

a determination of the Auckland Standards Committee 5

BETWEEN

MR OV
of Auckland
Applicant

AND

MS PG
of Auckland
Respondent

The names and identifying details of the parties in this decision have been changed.

DECISION

Introduction

[1] The review applicant is Mr OV whose complaints against lawyer Ms PG (Practitioner) were not upheld by the Standards Committee. The Committee issued two decisions in respect of the various complaints raised by Mr OV. He sought a review of both decisions.

[2] An Applicant-only hearing was conducted with him on 24 April 2012, by telephone, as Mr OV is in prison following conviction of attempted rape. I was much assisted by the interpreter Mr OW.

[3] Both review applications have been considered together and are dealt with in this review decision.

[4] Mr OV (the Applicant) was convicted in May 2009 on twenty one counts, and sentenced to nine years imprisonment. The Public Defence Service assisted him in his

defence. After his conviction, the Applicant sought to appeal his conviction broadly on four grounds, none of which succeeded, and the appeal was dismissed. The Court of Appeal's decision was on the Standards Committee file and provided a helpful background to matters that occurred in the course of the trial. I also noted that several appeal grounds concerned alleged errors by the Applicant's defence counsel (the Practitioner), and were the same matters raised in the Applicant's complaints against the Practitioner (to the New Zealand Law Society).

[5] The complaints that were made by the Applicant against the Practitioner were identified by the Standards Committee as allegations that:

- The Practitioner failed to put all evidence before the jury at the trial.
- The Practitioner did not say anything about the rape charge being amended to attempted rape.
- The Practitioner failed to apply to sever the rape charge from other charges.
- The Practitioner did not provide adequate disclosure, namely a copy of the video interview and a copy of the file.
- Communications between the Applicant and the Practitioner were not good.

[6] The main areas that the Applicant sought to have reviewed related to the complaints:

(a) that the Practitioner had not obtained and placed before the Court all relevant evidence (evidence of telecom records, evidence of a social worker, and medical evidence);

(b) that the Practitioner had failed to give the Applicant any information at all about the charges prior to the trial (he denied having seen the DVD interviews of the children, and denied having seen any information from the Police files); and

(c) that the Practitioner had not investigated the allegations properly, and had not sufficiently cross examined the children on their evidence which he considered was inconsistent. The Applicant considered that the Practitioner had not obtained all the evidence that showed that the witnesses (several children) had lied.

[7] It appeared from our discussion in the course of the review that the significant aspect of the complaint was the contention that he had not received a full copy of the Police file, in particular the notes of interviews and any other material that were assembled by the Police prior to the DVD interviews with the children being arranged. The Applicant particularly believed that his daughter, PF, had changed her story, and/or that the Police had changed her story. He considered that having this information placed before the Court was pivotal to show the untruthfulness of PF as a witness.

[8] The Applicant said that if his case had been done properly he would not be in prison because he has done nothing wrong. I explained to the Applicant that it was not the role of this office to revisit a criminal conviction and it was outside of my jurisdiction to discuss whether or not the conviction was properly made. The role of the LCRO is to review decisions which concern the professional conduct of lawyers, and that was all I could do.

[9] I asked the Applicant what the Practitioner should have done that he considered would have made a difference. He stated that the Practitioner should have cross examined his daughter PF and that it would have made a difference to his trial if the telecom records had been disclosed to the jury. The Applicant stated that a particular telephone call mentioned by PF did not show up in the telecom records.

[10] The Applicant also considered that the Practitioner had not sufficiently challenged the inconsistencies in PF's evidence. (This particularly related to count 37, "assault using a hose". PF had initially stated that her visit to hospital was due to the Applicant hitting her with a hose, but under cross examination PF remembered that the reason she had gone to the hospital was because she had fallen over in the bath.) This information, and other inconsistencies in PF's evidence, was before the Court.

Applicant's appeal against conviction

[11] It was clear from the Appeal Court judgment that robust submissions were made by the Applicant's counsel in challenging the safety of the conviction. Much of this focused on evidence given by PF which, it was submitted, was insufficient for the conviction to stand.

[12] Several of the appeal grounds raised by the Applicant were the same as, or similar to, those matters he raised in his complaints to the New Zealand Law Society. Among them was the contention that defence counsel (the Practitioner) "*had erred in not making a greater play of these inconsistencies, including in her closing address to*

the jury". This particularly related to inconsistencies in PF's evidence and her unreliability as a witness.

[13] The Court of Appeal analysed the evidence given by PF (to the social worker and her later account in the recorded interview which was seen by the jury), questioning whether there was any real inconsistency, but noting that to have highlighted inconsistencies in PF's evidence also risked allowing PF to clarify points. The Court further noted that the inconsistencies in PF's evidence had been exploited by defence counsel (the Practitioner).

[14] The Court of Appeal considered the closing addresses to the jury, and stated that it did not accept that the closing address of defence counsel (the Practitioner) was deficient in the way it dealt with PF's evidence. After considering all of the grounds advanced for the Applicant's appeal, the Court concluded that no issue before it (including evidence not put before the jury) would have led to a different outcome.

Considerations

[15] I have considered all of the evidence on the files and the claims made by the Applicant, and his complaints. It is my view that no part of the Practitioner's actions, whether alleged as acts or omissions, led to the Applicant's conviction.

[16] The complaint that the Applicant did not have all the information relevant to the charges and evidence against him is inconsistent with the evidence. The Court of Appeal traversed in some detail the steps taken when the charges were laid against him, and included information about the evidence of social workers who had provided information to the Police.

[17] The Practitioner became involved in the defence of the Applicant some months after the charges had been laid, the earlier counsel having left the PDS. She explained that by the time she became involved with the file it had already been through a 'standby' trial and that the matter had been with the PDS for some time.

[18] The Practitioner said that at no time had the Applicant indicated that he did not understand the charges or that he had not been given information, or sufficient information, adding that if there had been such a suggestion, assistance would have been provided. The Practitioner added that the Applicant's instructions were consistent with someone who was fully aware of the case against him and how he wished to conduct his defence.

[19] The Practitioner's letter outlined the various steps that had been taken in regard to preparing his defence. This letter was sent to the Applicant for his response. He replied that the Practitioner was lying to cover up her deficiencies.

[20] There is an abundance of evidence that all of the information that was pertinent to the Applicant's trial was before the Court, and that he could not have remained unaware of that evidence. Much of that evidence formed the basis of his appeal.

[21] It is also clear from the information that the original charge of rape was amended to one of attempted rape for reasons related to inconsistencies in PF's evidence. Although the Applicant claimed that he was unaware of the amended charge, on questioning him at the review hearing it was plain that he knew that the charge was amended because PF's evidence had shown to be unreliable. I do not accept that he was either unaware of, or unaware of the reasons for, the reduced charge against him.

[22] Having carefully considered all of the information relating to the complaint my clear impression is that the Applicant was given all of the information that was relevant to the charges he confronted, and that he was fully aware of the case against him. There is nothing to indicate that he did not understand the charges against him, and this is also made clear from the instructions he was able to give to his counsel and the defence that was advanced which, as noted, led to a reduction in one of the most significant charges.

[23] Insofar as the Court of Appeal addressed the same issues raised by the Applicant in this review, my own review of these matters supports the conclusions of the Court of Appeal. There is no evidence that supports the various complaints against the Practitioner. Rather, the evidence indicates that the Applicant was fully informed of the charges and the nature of the evidence that would be presented by the Crown.

[24] The Applicant's grievance is based on having been convicted when in his view he did nothing wrong. He maintains that the information that was withheld from the jury would have made a difference, and that the defence lawyers did not cross examine PF properly. However, it is not enough for the Applicant to make allegations without any supporting evidence. I have been unable to find a basis for the contention that information that was relevant to the charges, and eventually the conviction, was withheld from the Applicant. Nor have I found any evidence of failure on the part of the Practitioner in conducting the defence.

[25] The Applicant went further to say that they (defence counsel) were helping the Crown's case. There is no evidence whatsoever to support such an allegation, and I have given no consideration to it.

Decision

Pursuant to section 211(1)(a) of the Lawyers and Conveyancers Act 2006 the Standards Committee is confirmed.

DATED this 7th day of August 2012

Hanneke Bouchier
Legal Complaints Review Officer

In accordance with s 213 of the Lawyers and Conveyancers Act 2006 copies of this decision are to be provided to:

Mr OV as the Applicant
Ms PG as the Respondent
The Auckland Standards Committee 5
The New Zealand Law Society
Secretary for Justice (redacted)