

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

CONCERNING a determination of the Standards Committee

BETWEEN **COMPLAINANT E** of Reefton,

Applicant

AND **Prosecutor B** and **Prosecutor C** of Christchurch

Respondent

DECISION

Application for review

[1] The applicant is Complainant E who sought a review of a decision by the Standards Committee in respect of his complaint against Prosecutor B and Prosecutor C. Complainant E's complaint arises from a criminal conviction. He considers that he was unjustly convicted and he holds Prosecutor C and Prosecutor B responsible for failing to correct an injustice that occurred. The Standards Committee was of the view that the allegations against Prosecutor C and Prosecutor B could not give rise to a finding of unsatisfactory conduct which breaches the Lawyers and Conveyancers Act 2006. Pursuant to section 138(2) of the Act, the Standards Committee determined that no further action in relation to the complaint was necessary. Complainant E applied for a review of that decision.

Background

[2] Complainant E was charged with committing an offence 7 July 2006 as recorded in the information. The Police later prepared a summary of facts which referred to the offence having occurred on 7 June 2006. At the trial Complainant E was informed by the Judge that where a not guilty plea was entered the summary of facts was not provided to the court. Complainant E, who had cross-examined the police sergeant, claimed that the sergeant gave sworn evidence was that the offence had occurred on 7 June. Complainant E was convicted of an offence that had occurred on 7 July 2006. Complainant E appealed the conviction. One ground of his appeal related to the evidence of the sergeant, which in his view rendered the conviction unsafe. This was rejected by the High Court, which upheld the original decision of the trial judge. Prosecutor C presented the Crown at that hearing. Complainant E was also unsuccessful in his application for leave to appeal to the Court of Appeal.

[3] Complainant E then lodged a complaint with the New Zealand Law Society against Crown Solicitors Prosecutor C and Prosecutor B as her supervisor.

The complaint

[4] Complainant E's complaint against Prosecutor C and Prosecutor B was that as officers of the Crown they had an obligation to correct the error made by the trial judge.

[5] Complainant E considered that a police sergeant's sworn evidence that the offence had occurred on 7 June could not support the conviction of an offence on 7 July. He considered that the job of lawyers, particularly those working in the Crown Law office, was to examine the 'facts of the case'. In his view Prosecutor C, acting for the Crown at the appeal, had not done her job properly as she had not presented the facts, in particular the fact that the police officer had given evidence of an offence occurring on 7 June. He considered that she had failed in her professional obligation to correct this error.

[6] The above complaint needs to be distinguished from a similar error made by Prosecutor C when she referred, in her written submissions, to the date of the offence as 7 June 2006. This was subsequently corrected in her oral submissions. This error is not the subject of Complainant E's complaint.

Review of the evidence

[7] At the review hearing Complainant E produced extracts from the Notes of Evidence taken before Judge McMeeken at the District Court trial. They were pages 10 and 11 of a larger document that includes a record of Complainant E's cross examination of the police sergeant. Both pages include mention of both 7 June and 7 July 2006. The two mentions of 6 June are by Complainant E, the first in relation to the 'summary of facts' which the judge reminded him was not part of the proceedings, and the second arising in a question that Complainant E put to the sergeant. From this material Complainant E advances an argument that the sergeant's evidence was that the offence occurred on 7 June 2006, making his conviction of an offence on 7 July unsustainable.

[8] Prosecutor B challenged Complainant E's interpretation of the cross examination material, contending that it was far from clear that the information about the sergeant's evidence supported Complainant E's claims. Both he and Prosecutor C also challenged Complainant E's submissions concerning the role of Crown lawyers, and in any event refuted an obligation to correct a trial judge's error concerning a conviction .

[9] I considered the extracts produced by Complainant E, which clearly form only a part of the evidence in relation to the court proceedings. In addition to the parties' information and submissions, other pertinent evidence that I considered were the judgement of Mr Justice Fogarty following Complainant E's unsuccessful High Court Appeal, and also the comments of the Court of Appeal which declined leave to appeal.

[10] In considering the above material in relation to the complaint against the lawyers, I make the following observations. First, it by no means clear that the small extract from the cross examination record produced by Complainant E supports the claim he makes for it. Both dates are mentioned in the two pages, and there must some doubt that the sergeant's evidence (on page 11) about having made enquiries about a phone call "*on the morning of that day*" is unequivocally a reference to 7 June rather than to 7 July. While no copy of the District Court decision was made available, it appears from the decision of other courts I have referred to that there was sufficient evidence relating to the offence having occurred on 7 July to have supported the conviction.

[11] Second, the role of Crown solicitors is to evaluate the evidence relating to the indictment for the purpose of bringing a prosecution, and then to advance the Crown's case. A mistake made by a witness during cross examination in the course of a trial is not part of the evidence relating to a charge. While it may be relevant to a conviction, that is a matter for the judge who is in charge of court proceedings, including evaluating the evidence that is presented at the trial. In the absence of a jury, it is for a trial judge to decide if the evidence is sufficient to support a conviction. Furthermore, if a convicted person considers there is an evidential basis for challenging a conviction, the proper course is to seek an appeal, as indeed Complainant E has done.

[12] Notwithstanding the above observations, a third could be added, that the significance of the sergeant's error in his evidence was considered as part of the appeal that Complainant E pursued in the High Court. There, Mr Justice Fogarty stated "... *in my view, Complainant E has not adequately distinguished between the making of mistakes in the course of a trial, and whether or not the mistakes matter. It is quite often that there are slips of one sort or another in a trial which like all other human activity is prone to error. The task of the judge conducting the trial is to continue the trial when the error is minor and does not cause an injustice, and I am quite satisfied in this case that the District Court Judge when identifying the error of opening was correct to say that it was not fatal to the police case,....*". The Judge concluded that there was no material mistake in the conduct of the trial and that the conviction was sound.

[13] The Court of Appeal approved the approach of the High Court, with Venning, J adding, "*Whether the evidence was sufficient to enable the trial judge to be sure Complainant E was the person who made the call on 7 July 2006 was an issue of fact for the trial Judge.*" Neither Court considered that the error in the police evidence was material, nor that it had lead to an injustice.

[14] Essentially this is a complaint alleging that lawyers failed to correct a judge's error that lead to the applicant's conviction, where the complaint is based upon a possible error in the evidence of a witness during court proceedings that the judicial authority of both the High Court and the Court of Appeal have considered was of no material consequence to the safety of the conviction. It would be difficult to see any basis for concluding that failing to correct an immaterial matter could amount to a failure of a Crown Solicitor to perform their professional duty.

[15] In the circumstances I am unable to find any omission or wrongdoing of any kind whatsoever on the part of Prosecutor C or Prosecutor B. This makes it unnecessary to consider whether the alleged conduct reaches the threshold that is required by section 351 of the Lawyers and Conveyancers Act, which applies to conduct occurring prior to the commencement of the Lawyers and Conveyancers Act. Such complaints can be pursued only if conduct could have justified disciplinary intervention under the Law Practitioners Act.

Conclusion

[16] For the above reasons I am unable to find any error or wrongdoing by Prosecutor C in relation to this matter, and the complaint against her is not upheld. The complaint against Prosecutor B likewise cannot stand.

Decision

[17] Pursuant to section 211 of the Lawyers and Conveyancers Act 2006 I hereby confirm the decision of the Standard Committee.

DATED this 19th day of May 2009

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:

Complainant E as Applicant
Prosecutor B as Respondent
Prosecutor C as Respondent
The Canterbury - Westland Standards Committee 2
The New Zealand Law Society