PUBLICATION OF NAMES OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 139 OF THE CRIMINAL JUSTICE ACT 1985

IN THE COURT OF APPEAL OF NEW ZEALAND

CA730/2013
[2015] NZCA 558

BETWEEN	LESLIE MCGEACHIN Appellant
AND	THE QUEEN Respondent

Hearing: 10 November 2015

Court: Kós, Fogarty and Mallon JJ

Counsel: J A Dean for Appellant
S K Barr for Respondent

Judgment: 19 November 2015 at 4.00 pm

JUDGMENT OF THE COURT

A An extension of time to appeal is granted.

B Leave to adduce further evidence as set out in [12] is declined.

C The application by the appellant to file further submissions post-hearing is declined.

D The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Kós J)

[1] Mr Leslie McGeachin was convicted by a District Court jury on five counts of rape, three counts of actual (and one of attempted) sexual violation by unlawful sexual connection, four counts of other physical violence and three counts of burglary. The victims were two women who at various times had been in relationships with him.

[2] Judge Hobbs sentenced Mr McGeachin to 19 years' imprisonment, with a minimum period of nine years to be served.[1] There is no appeal against sentence.

[3] Mr McGeachin instead appeals conviction. He does so on the basis of alleged trial counsel error. The alleged errors are as follows: that counsel approved the editing of evidential interviews by the complainants without his consent, and did not give him an opportunity to see the unedited interviews; that trial counsel failed to cross-examine on a number of topics (such as a violent incident in 1996, the death (or not) of a doberman pinscher dog, the existence or otherwise of a psychiatric disorder on the part of one of the complainants, the existence of marks on the wall at the house of one of the complainants, whether Mr McGeachin lived for a period in a lock-up facility, whether injuries to one of the complainant's fingers were indeed fractures, whether Mr McGeachin had been black-balled from work sites, possible collusion between the complainants, whether one of the complainants had met Mr McGeachin's probation officer, the length of time that complainant had been in a relationship with Mr McGeachin, whether Mr McGeachin had a hearing deficit, whether that complainant was a regular cannabis user and whether the other complainant had a particular back condition); failure to obtain full disclosure of police photographs; and failure to call seven witnesses who might have given evidence useful to the defence.

[4] Drawing these strands together, Mr McGeachin's fundamental complaint is that trial counsel did not have a firm grasp on the theory of his defence. He accepts that he is violent. He says that is why he asked counsel to let the jury know about his previous assault convictions. But the complainants lied about or exaggerated the latest charges and colluded in giving evidence.

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1 *R v McGeachin* DC Wellington CRI-2012-085-2003, 23 July 2003.

[5] These allegations were supported by an affidavit sworn by Mr McGeachin. He was cross-examined by Mr Barr on it. It is unnecessary to descend into detail. We simply note that in some important respects (such as whether he had any material consultation with trial counsel before 5 May 2013, and his awareness of the evidential video interview editing process) Mr McGeachin's recollection was shown to be unreliable.

[6] None of these alleged trial counsel errors could be described as fundamental, in the sense of effectively preventing Mr McGeachin from presenting a defence. Mr Dean readily acknowledged that in his oral submissions. So the alleged errors in this case at best fall into the intermediate class identified by Gault J in the Supreme Court in *Sungsuwan v R* concerning general pre-trial or trial decisions or actions by defence counsel.[2] In that class the inquiry is two-fold: whether another competent counsel might have acted in the same way in a further trial, and (if not) whether that error in isolation or combination might have led to a miscarriage of justice. The ultimate, overriding question remains whether justice has miscarried.[3] Trials can only work by counsel exercising judgment in the circumstances as they perceive them to be. Hindsight reflection does not recapture the urgency and fluidity of a criminal trial. The fact that a hindsight reflection produces a better course of action (assuming the consequences can be predicted accurately) does not necessarily mean either that the course originally adopted was incompetent or (more importantly) that there has been a miscarriage of justice.[4]

[7] In this case trial counsel provided a sworn affirmation explaining in extensive detail those actions taken before and during trial which now have generated complaint. Amongst other points she says that she discussed the need to edit the evidential video interviews with Mr McGeachin and obtained his instructions to that effect. She also says she did provide Mr McGeachin with unedited transcripts of the evidential video interviews. She points to contemporaneous documents demonstrating discussion of the edits, and review of the unedited interviews by Mr McGeachin, had occurred. She addresses each of the instances where

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2 *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730.
3 At [70].
4 *R v Scurrah* CA159/06, 12 September 2006 at [18]. See also *Hall v R* [2015] NZCA 403 at [8]–[12].

Mr McGeachin complains that she failed to cross-examine on particular issues. In her explanation she sets out countervailing considerations justifying limiting cross-examination. For instance, in several of the instances the line of cross-examination now suggested would have elicited evidence of further violence by Mr McGeachin towards the complainants. Other points not pursued are described, cogently, as merely peripheral. Collusion between the complainants was indeed addressed in cross-examination. So was the mental health disorder of one complainant (the diagnosis being admitted, although its accuracy was contested). As to the seven witnesses not called, counsel denies that she was given instructions to call five of them. The sixth was in fact called by the Crown and cross-examined. Trial counsel denies that she was instructed to apply for this witness (who had returned to Australia) to be recalled. The last suggested witness was uncooperative and could not be located. In any event there was a real possibility his evidence would be unhelpful overall, as the Crown case was that he too had been assaulted by Mr McGeachin.

[8] As to Mr McGeachin's overall complaint that she lacked a grasp of the theory of his defence in not leading evidence of earlier violence convictions, she notes that, consistent with the instructed defence, Mr McGeachin pleaded guilty to certain violence charges at the start of the trial (demonstrating a willingness to accept responsibility for admitted actions). Secondly, however, Mr McGeachin's instructions were to oppose the Crown's application to adduce evidence of prior convictions for violence against one of the complainants as propensity evidence. This was the subject of a pre-trial ruling by Judge Hobbs, admitting one prior conviction as propensity evidence, but declining or adjourning others (the adjourned ones being dropped by the Crown at trial). Thirdly, that position was adhered to at trial. In giving evidence Mr McGeachin accepted responsibility for the now-admitted charges and the admitted propensity conviction, but did not seek to give evidence of other violent acts. Fourthly, the foundation for the defence was laid: tempestuous but loving relationships; where violence occurred, admitted; but all sexual activity consensual. That defence was clearly outlined in counsel's opening statement to the jury and in her closing address. Fifthly, the complaints now made were difficult to square with a note signed by Mr McGeachin at the end of the trial (but before convictions were entered):

> I, Les McGeachin, have now heard the closings by both the Crown and the defence. In terms of [counsel]'s closing I believe it covered everything it should have and I am content my case has been well represented. Whilst I thought the prosecutor was rambling a bit, I felt [counsel] was more detailed and clear. I really appreciate what she has done for me in this trial.

[9] The explanations given by counsel in her affirmation are cogent. The tactical choices made are explained and were available to notional competent counsel. We are satisfied that taken both individually and collectively, no miscarriage of justice has been demonstrated by the appellant. Furthermore, trial counsel was not cross-examined on her affirmation. Where the affirmation responded to matters of fact in contest (e.g. the provision of the video interviews to Mr McGeachin or the scope of his instructions), it was effectively uncontested.[5]

[10] Faced with this difficulty, Mr Dean attempted to argue that Mr McGeachin's allegations "spoke for themselves". We cannot accept that submission. The alleged errors were not fundamental, in the sense referred to at [6]. As we have said, a cogent explanation for each point of complaint has been given by trial counsel. In these circumstances, it would be wrong for this Court to reject that explanation without challenge by cross-examination.

Three further matters

[11] Mr McGeachin's notice of appeal was filed two months out of time. An extension of time to appeal was sought. It was not opposed by the Crown. An extension is therefore granted.

[12] Mr McGeachin sought leave to adduce further evidence from four of the seven potential witnesses referred to at [3]. In the circumstances that evidence is not relevant and leave is declined.

[13] After completion of the hearing the Court received unexpectedly an application for leave to file further submissions from the appellant. Attached were handwritten comments by Mr McGeachin on the evidence, and on other documents. We have considered that material. To the extent it raises points of factual conflict

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5 See for example *T (CA433/2010) v R* [2011] NZCA 89 at [25].

(e.g. as to alleged untruths deposed by trial counsel) it should have been put in cross-examination. Nor do we consider this material demonstrates a miscarriage of justice. The application is therefore declined.

Result

[14] An extension of time to appeal is granted.

[15] Leave to adduce further evidence as set out in [12] is declined.

[16] The application by the appellant to file further submissions post-hearing is declined.

[17] The appeal against conviction is dismissed.

Solicitors:
John Dean Law Office, Wellington for Appellant
Crown Law Office, Wellington for Respondent