IN THE COURT OF APPEAL OF NEW ZEALAND

CA492/2016
[2017] NZCA 80

BETWEEN	MICHAEL JOHN DENNEY Appellant
AND	THE QUEEN Respondent

Hearing:	7 March 2017
Court:	Winkelmann, Woodhouse and Collins JJ
Counsel:	J F Pereira for Appellant A J Ewing for Respondent
Judgment:	27 March 2017 at 10.30 am

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] Mr Denney was charged with intentionally causing grievous bodily harm by using his vehicle to run over Mr Blain. He was convicted of this offence following a jury trial in the District Court at Manukau before Judge Bergseng. Mr Denney was sentenced by Judge Bergseng to four years and nine months' imprisonment.[1] He has appealed his conviction and sentence.

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1 *R v Denney* [2016] NZDC 18102 at [30].

Background

[2] On the evening of Saturday 26 July 2014 Mr Denney and Mr Blain were at a friend's party at Vetori Place in Clover Park, Auckland. An argument developed between Mr Denney, Mr Blain and their host after which Mr Denney left the address and was seen to get into his dark-blue Suzuki Samurai, which is a two-door, four-wheel-drive vehicle similar to a small jeep. As Mr Denney reversed his vehicle onto Vetori Place, Mr Blain ran alongside the vehicle banging on the driver's window with his fist. Mr Denney's vehicle was seen to drive off and turn from Vetori Place into Israel Avenue with Mr Blain still running after it.

[3] Ms Lepale, who lived in Israel Avenue, heard arguing and looked from her window where she saw a person walking down Israel Avenue. A few moments later she observed a dark-coloured, two-door vehicle similar to a jeep reverse down Israel Avenue. She said the driver of the vehicle was looking over his shoulder in the direction of where the vehicle was reversing. Ms Lepale heard a loud bang, after which she could no longer see the pedestrian. Ms Lepale then heard the driver of the vehicle say "you deserve it". The vehicle then drove away.

[4] A few minutes later, others who were at the party went to Israel Avenue looking for Mr Blain. They found him lying on the road. Mr Blain suffered multiple facial fractures, a moderate concussion, a scalp laceration, a fracture to his right collar bone and a fracture to a portion of his second cervical vertebra. Mr Blain spent eight days in hospital and he was unable to work for six months.

[5] Constable Kinniburgh was one of the police officers who examined the scene of the incident. He measured what he thought were fresh tyre marks created by mud from tyres and which led to the likely point of impact. The Constable said one muddy tyre mark was 18.5 centimetres wide. Constable Kinniburgh also measured the distance between the tyre marks and took photos of the tread marks in the mud imprint.

[6] On 30 July 2014 Detective Ralph arrested Mr Denney at his place of work. After receiving the standard caution Mr Denney said to Detective Ralph:

> Jeff [Blain] was my mate. I did not run him over. I wouldn't do that to a mate.

Detective Ralph then asked follow-up questions, the answers to which he recorded in the following way in his notebook:

> He then went on to explain to me that he'd been driving away from the party and he saw a van come flying around without its lights on, hitting Jeff [Blain]. He said that he was 40 to 50 metres away when this occurred, and he observed this in his rear view mirror. He was unable to describe the van any further to me as it was dark at this time.

[7] Detective Ralph did not give Mr Denney the opportunity to read and sign the Detective's notebook. It is accepted by the Crown that Detective Ralph's failure to allow Mr Denney to see and sign the Detective's notebook breached r 5 of the Chief Justice's practice note on police questioning: *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* (Practice Note).[2]

[8] Rule 5 of the Practice Note states:

> Any statement made by a person in custody or in respect of whom there is sufficient evidence to charge should preferably be recorded by video recording, unless that is impractical or unless the person declines to be recorded by video. Where the statement is not recorded by video, it must be recorded permanently on audio tape or in writing. The person making the statement must be given an opportunity to review the tape or written statement or to have the written statement read over, and must be given an opportunity to correct any errors or add anything further. Where the statement is recorded in writing, the person must be asked if he or she wishes to confirm the written record as correct by signing it.

[9] Mr Denney's case was that he had not told Detective Ralph that he saw a van hit Mr Blain. Mr Denney's position was that he saw a van driving in the direction of Mr Blain and that the van may have struck Mr Blain. Mr Denney maintains that he did not see Mr Blain being struck by a vehicle and hence he did not stop to render assistance to Mr Blain.

[10] Prior to trial Mr Denney challenged the admissibility of that part of Detective Ralph's evidence in which he said that Mr Denney told him he had seen a van hit Mr Blain. That application was heard by Judge Bouchier on 1 May 2015,

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2 *Practice Note – Police Questioning (s 30(6) of the Evidence Act 2006)* [2007] 3 NZLR 297.

who ruled that the statement in issue had not been obtained unfairly in terms of s 30(5)(c) of the Evidence Act 2006 and was therefore admissible.[3] We explain the relevant provisions of s 30 in paragraphs [26]–[27] below.

[11] Mr Denney gave evidence at his trial. He said he drove away from the party at Vetori Place with Mr Blain running after him. He said he drove into Israel Avenue where he saw a van driving in the direction of Mr Blain. Mr Denney said he drove straight home and did not see Mr Blain being struck by a vehicle. Mr Denney also explained that he did not change the tyres of his vehicle after that evening.

[12] The defence called Mr MacKay as a witness. He is an expert vehicle crash investigator. Mr MacKay created a mould of one of the tyres from Mr Denney's vehicle and concluded the tyres on Mr Denney's vehicle were 14.8 centimetres wide. Mr MacKay opined that his measurements "[did] not support a conclusion" the tyre tread marks examined by Constable Kinniburgh were deposited by the tyres on Mr Denney's vehicle.

[13] When Constable Kinniburgh gave his evidence he said that a number of factors may have affected the accuracy of his measurement of the muddy tyre marks at the scene. Those factors were that it had been raining that night, the chipseal surface of the road, the possibility the marks may have spread, and that the tyre pressure could have affected the tyre marks.

Grounds of appeal against conviction

[14] Four grounds have been advanced in relation to Mr Denney's appeal against his conviction:

(a) Mr Denney submits the jury's verdict was not reasonable, primarily because of Mr MacKay's evidence that the tyre mark at the scene was wider than the width of the tyres on Mr Denney's vehicle.

(b) The statement attributed to Mr Denney that he saw a vehicle strike Mr Blain was inadmissible.

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3 *R v Denney* [2015] NZDC 8062 at [74].

(c) Judge Bergseng erred by not directing the jury that Detective Ralph's evidence was unreliable when the Detective said Mr Denney had told him that he saw a van strike Mr Blain.

(d) Judge Bergseng erred in the way he directed the jury about the expert evidence.

[15] The appeal against sentence is challenged on two grounds:

(a) The starting point of five years was too high.

(b) The three-month discount given for provocation by Mr Blain was inadequate.

First ground of appeal against conviction: the verdict was unreasonable

[16] In *R v Owen* the Supreme Court explained that "a verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the requisite standard that the accused was guilty".[4]

[17] In the present case, Mr Pereira, counsel for Mr Denney, said the tyre marks measured by Constable Kinniburgh were approximately 25 per cent wider than the tyres on Mr Denney's vehicle. In these circumstances Mr Pereira submitted that Mr Denney's vehicle could not have created the tyre marks measured by Constable Kinniburgh and the jury should therefore have been left with a reasonable doubt about Mr Denney's guilt. Mr Pereira supplemented this aspect of Mr Denney's case by challenging Constable Kinniburgh's explanations as to why his measurements may not have been accurate.

[18] The difficulty with this aspect of Mr Denney's appeal is that, even if there were merit in the argument that Constable Kinniburgh's scene measurements were accurate, the evidence of the tyre marks was only part of the case against Mr Denney.

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4 *R v Owen* [2007] NZSC 102, [2008] 2 NZLR 37 at [17].

[19] In assessing the reasonableness of the jury's verdict we are required to look at *all* of the evidence that was before the jury. That evidence included:

(a) The fact that Mr Denney and Mr Blain had been involved in an acrimonious argument and Mr Blain was seen hitting Mr Denney's vehicle in Vetori Place.

(b) Ms Lepale's evidence that she heard an argument and saw a vehicle very similar to Mr Denney's reverse in the direction of a pedestrian before hearing a loud bang and the words "you deserve it".

(c) The evidence of other party-goers who found Mr Blain in Israel Avenue, just minutes after Mr Denney had left the party.

[20] In addition, the evidence about the width of the tyre mark was only part of the Crown case concerning the tyre marks. The Crown also relied in closing on the following points concerning the tyre marks:

(a) The marks were created by mud from the tyres of the offending vehicle. Mr Denney's vehicle had been parked on grass at the Vetori Place address and it was raining that evening.

(b) When photographed a few days later there were remnants of mud on the tyres of Mr Denney's vehicle.

(c) The distance between the two sets of tyre marks at the scene was consistent with the distance between the wheels (the axles) of Mr Denney's vehicle.

(d) The tyre pattern in the marks was consistent with the tyre pattern on Mr Denney's vehicle.

[21] Having assessed all this relevant evidence we are satisfied the jury's verdict was reasonable.

Second ground of appeal against conviction: admissibility of the statement to Detective Ralph

[22] This ground of appeal raises three issues:

(a) Was the statement unfairly obtained for the purposes of s 30(5)(c) of the Evidence Act?

(b) If it was, was it nonetheless admissible pursuant to s 30(2)?

(c) If it was not admissible, has its admission occasioned a miscarriage of justice?

Was the statement unfairly obtained?

[23] Detective Ralph should have complied with r 5 of the Practice Note. That rule exists to ensure that suspects have a fair and reasonable opportunity to accept or challenge records of statements at the time they are made by an interviewing officer. Had Detective Ralph complied with the Practice Note, the dispute which has developed about the admissibility of the challenged aspect of the statement made by Mr Denney to Detective Ralph would have been avoided.

[24] When assessing whether or not the disputed portion was admissible, we start from the proposition that the Practice Note was designed to ensure the police adhere to the rights of a suspect when being interviewed. Rule 5 of the Practice Note puts in place a positive obligation on the police to avoid statements made by a defendant being inadvertently misinterpreted or deliberately misstated by the police. The requirement in r 5 of the Practice Note that a defendant have the opportunity to read and challenge what an interviewing officer has written during an interview is an important safeguard against police errors and abuses.

[25] When the issue was raised before Judge Bouchier, the Judge first needed to apply s 30(5)(c) and (6) of the Evidence Act which state:

> (5) For the purposes of this section, evidence is **improperly obtained** if it is obtained—

…

(c) unfairly.

(6) Without limiting subsection (5)(c), in deciding whether a statement obtained by a member of the Police has been obtained unfairly for the purposes of that provision, the Judge must take into account guidelines set out in practice notes on that subject issued by the Chief Justice.

[26] As we come to, even if evidence is obtained unfairly and is therefore improperly obtained, the evidence may still be admitted by following the balancing exercise prescribed in s 30(2)(b) of the Evidence Act after having regard to relevant matters set out in s 30(3). Those subsections state:

(2) The Judge must—

(a) find, on the balance of probabilities, whether or not the evidence was improperly obtained; and

(b) if the Judge finds that the evidence has been improperly obtained, determine whether or not the exclusion of the evidence is proportionate to the impropriety by means of a balancing process that gives appropriate weight to the impropriety and takes proper account of the need for an effective and credible system of justice.

(3) For the purposes of subsection (2), the court may, among any other matters, have regard to the following:

(a) the importance of any right breached by the impropriety and the seriousness of the intrusion on it:

(b) the nature of the impropriety, in particular, whether it was deliberate, reckless, or done in bad faith:

(c) the nature and quality of the improperly obtained evidence:

(d) the seriousness of the offence with which the defendant is charged:

(e) whether there were any other investigatory techniques not involving any breach of the rights that were known to be available but were not used:

(f) whether there are alternative remedies to exclusion of the evidence that can adequately provide redress to the defendant:

(g) whether the impropriety was necessary to avoid apprehended physical danger to the Police or others:

(h) whether there was any urgency in obtaining the improperly obtained evidence.

[27] Section 30(4) provides:

> The Judge must exclude any improperly obtained evidence if, in accordance with subsection (2), the Judge determines that its exclusion is proportionate to the impropriety.

[28] In the present case, Judge Bouchier concluded that the statement made by Mr Denney had not been obtained unfairly and that it was therefore not necessary to engage in the decision-making exercise set out in s 30(2)(b) of the Evidence Act.[5]

[29] In this Court Ms Ewing, for the Crown, endeavoured to support Judge Bouchier's conclusions by referring to the following factors:

(a) Mr Denney had been cautioned that what he said could be used in evidence.

(b) Mr Denney, rather than Detective Ralph, had initiated the conversation. There was no suggestion of oppression.

(c) Detective Ralph's notes were made contemporaneously.

(d) The statement was brief.

(e) Mr Denney was offered but declined the opportunity of a video interview.

(f) Mr Denney agreed that Detective Ralph had recorded most of their conversation accurately. The only part he disagreed with was the suggestion he had seen another vehicle strike Mr Blain.

[30] In his submissions before us, Mr Pereira argued that the circumstances of this case constituted unfairness because it required Mr Denney to give evidence in order to challenge the accuracy of Detective Ralph's record of what Mr Denney said.

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5 *R v Denney*, above n 3, at [74].

Mr Pereira said this created an unfair burden for Mr Denney and resulted in him appearing to be a liar when he disputed the accuracy of Detective Ralph's notes.

[31] In considering whether or not Judge Bouchier was correct when she concluded that the statement had been obtained fairly, we acknowledge that the Supreme Court said in *R v Chetty* that "there must almost always be a causative link between the unfairness and the impugned evidence".[6] But the Supreme Court conceded that cases might exist where this analysis is not appropriate.[7] We consider that the usual causation analysis is not applicable in the circumstances of this case where the breach of the Practice Note occurred after Detective Ralph obtained the statement in issue from Mr Denney. In these circumstances we think it preferable to focus on the true nature of the consequences of Detective Ralph's breach of r 5 of the Practice Note. That consequence was that Mr Denney was denied the opportunity at the time he was speaking to Detective Ralph to correct what Mr Denney says was a misunderstanding on the part of Detective Ralph, and was left to challenge the accuracy of Detective Ralph's record within the context of the proceedings. This detrimental consequence aligns exactly with the interest r 5 of the Practice Note was designed to protect — avoiding dispute as to what was said in an interview.

[32] We do not consider the six factors advanced by Ms Ewing in support of her argument that the statement was obtained fairly are particularly persuasive. While we acknowledge Mr Denney had been cautioned, and that it was he who initiated the conversation with Detective Ralph, these factors do not address the unfairness that occurred in this case. The fact the statement was brief underscores the reason why it could easily have been shown to Mr Denney. That Mr Denney was offered but declined the opportunity to make a video interview is of no assistance when addressing the issue of fairness because at the time Mr Denney declined the opportunity for a video interview, he did not know what Detective Ralph had recorded in his notebook.

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6 *R v Chetty* [2016] NZSC 68 at [47].
7 At [47].

[33] Unlike Judge Bouchier, we consider the disputed portion of Mr Denney's statement was obtained unfairly because Mr Denney was not provided the opportunity to check and, if necessary, correct his statement.

Was the statement nonetheless admissible under the Evidence Act?

[34] Having concluded the statement was obtained unfairly in terms of s 30(5)(c) of the Evidence Act and therefore obtained improperly, we proceed to assess whether or not the evidence should have been excluded by applying the test in s 30(2)(b) of the Evidence Act and referring to the relevant criteria in s 30(3).

[35] We are satisfied that excluding the evidence would not be proportionate to the impropriety, having regard to the need for an effective and credible system of justice. In reaching this conclusion we have considered the following matters:

(a) The right breached was an important right.

(b) Detective Ralph's error was an inadvertent breach of r 5 of the Practice Note. Mr Pereira acknowledged Detective Ralph made an innocent mistake. The detective was not acting dishonestly or trying to trick Mr Denney.

(c) Although the right breached was important, we consider that the evidence obtained is likely to be reliable. The statement was short. Mr Denney agreed that Detective Ralph had accurately recorded most of what he said. In the pre-trial hearing Detective Ralph was cross-examined about the accuracy of the disputed record in his notebook. Detective Ralph said he would not have made an error in "recording basic information".[8]

(d) In contrast, at the pre-trial hearing Mr Denney's evidence was more equivocal. Judge Bouchier summarised it as follows:[9]

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8 *R v Denney*, above n 3, at [10].
9 At [14].

> [Mr Denney] agreed with the words that were in quotes, and he then said in answer to a question, "Do you recall saying the van came flying around without its lights on?" He said, "It was a very long time ago, I honestly don't recall saying 'I saw the van hit Jeff.'" He said, "Jeff was chasing me up the road 40 to 50 metres away behind me. I was looking in the rear vision mirror." The van, he said, "He was driving along, the van was coming the other way, it was just a flash."

The Judge did not make a finding as to whether the Detective's record was accurate. We consider the chance it was inaccurate to be slight because of the pithy nature of the statement, its internal coherence and Mr Denney's concession that the rest of the statement accurately captured his own words.

(e) The offence was a serious offence that carried a maximum penalty of 14 years' imprisonment.

(f) It would have been very easy for Detective Ralph to have shown his notebook to Mr Denney and asked him to confirm its contents.

(g) There was no urgency involved in this case and there was no risk of danger to others at the time Detective Ralph breached r 5 of the Practice Note.

[36] We consider that against this background it was appropriate that the statement be admitted leaving Mr Denney with an opportunity to challenge its accuracy, if he wished to do so, at trial.

Miscarriage of justice

[37] Even if we are incorrect in our view as to the admissibility of the evidence, we are satisfied that its admission did not cause a miscarriage of justice. First, we are not satisfied that Mr Denney could, in any event, have entirely avoided giving evidence in this case. This is because, as Mr Pereira properly acknowledged, the Crown evidence concerning Mr Denney's motive and opportunity to offend in the way alleged, combined with the need to address Ms Lepale's evidence, created some challenges for Mr Denney. Second, as we come to, the judicial direction given by

Judge Bergseng was, we consider, sufficient to address any unfairness to Mr Denney. Judge Bergseng explained to the jury that Detective Ralph had breached required procedures.

Third ground of appeal against conviction: direction on reliability

[38] In his summing-up to the jury, Judge Bergseng said that Detective Ralph had not followed the correct procedure when recording Mr Denney's disputed statement. Judge Bergseng said:

> The statement made by the Defendant to Detective Ralph, that he saw a van drive into Mr Blain, is part of the evidentiary material in the case you must consider both for and against the Defendant. However, there is a procedure regarding the taking of statements that is required to be followed by the police. It requires the police officer undertaking the questioning to allow the suspect to read and correct any errors or add anything further. When Mr Denney spoke with Detective Ralph, he was not given the opportunity to review the detective's notes of their discussion. This is a breach of the procedure Detective Ralph should have followed. In this case, Mr Denney says that Detective Ralph got it wrong when he recorded that Mr Denney said he saw the van hit Mr Blain. Mr Denney said, in his evidence, had he been able to read the notebook entry he would have corrected what he says is an error on the part of the detective. You should also take into account the cross-examination, when you consider this issue, of Mr Denney by Mr Dobbs [counsel for the Crown] on this point.

[39] In this Court, Mr Pereira argued that Judge Bergseng's direction did not go far enough and that he should have given the jury a very firm direction for the jury to be cautious about accepting the accuracy of Detective Ralph's notes.

[40] We consider that Judge Bergseng's direction was adequate. Judge Bergseng pointed out that Detective Ralph had failed to follow the correct procedure and that it was for the jury to make their own assessment of the disputed evidence after considering all relevant aspects of the dispute including Mr Denney's account of events. He linked that direction to the Crown's case as it related to the inconsistency between Mr Denney's evidence and the notebook. Nothing further was required.

Fourth ground of appeal against conviction: directions concerning expert evidence

[41] The fourth ground of appeal challenges the appropriateness of Judge Bergseng's directions concerning Constable Kinniburgh's and Mr MacKay's

evidence about the width of the muddy tyre mark. Judge Bergseng said in his summing-up:

> [38] The significance of the expert evidence of Mr MacKay is that it relates to the issue of whether the marks left at the scene exclude the Defendant's vehicle as being able to leave those marks. The Crown submission regarding the expert evidence is that you should look carefully at what Mr MacKay is saying. Look at the language he is using when he gives his conclusion. The Crown submission is that there are factors identified by Constable Kinniburgh which affect the accuracy of the measurement of the tyre track he took from the scene. If that measurement is not accurate, then that has an impact on the conclusions drawn by Mr MacKay. Mr Dobbs reminds you that the evidence from the scene is only part of the Crown case, and he reminds you to look at all of the evidence in total.
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> [39] Mr Pereira, when he was discussing the issue of the tyre width measurement from the scene, used the analogy of it being like a fingerprint. Because it does not fit Mr MacKay's conclusion, then he submits that you can reject the Crown case as it excludes Mr Denney's vehicle.
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> [40] You may consider that the analogy of a fingerprint is useful, but only in a very general sense. At the end of the day, what is required, be it for a fingerprint or a tyre width measurement, is that the source of the measurement needs to be such as to provide an accurate reference point. If a clear fingerprint or a clear tyre print does not allow for an accurate measurement, that impacts on the reliability of the conclusions that may subsequently be drawn.

[42] In this Court, Mr Pereira said Judge Bergseng should have directed the jury on Mr MacKay's criticisms of Constable Kinniburgh's evidence and that the Judge's directions unfairly endorsed this aspect of the Crown's case.

[43] We disagree with Mr Pereira's submissions because Judge Bergseng was not required to reiterate every point that Mr MacKay had made and which had been fully traversed by Mr Pereira in his closing submissions. Furthermore, the summing-up did not constitute an endorsement of the Crown's case. All Judge Bergseng said was that the defence case relied upon Constable Kinniburgh's measurements being accurate whereas the Crown said there were sound reasons to reject that assumption. Ultimately this was an issue for the jury to assess by considering all relevant evidence. We do not see any miscarriage of justice in the fourth ground of appeal against conviction.

Appeal against sentence

[44] In sentencing Mr Denney, Judge Bergseng concluded his offending sat within the lower end of band 2 of *R v Taueki*.[10] This assessment was made on the basis of two factors, namely Mr Denney's use of a vehicle as a weapon and the injuries to Mr Blain.[11] We agree with the starting point adopted by Judge Bergseng. This case was clearly within the lower part of band 2 of the *Taueki* categories.

[45] Judge Bergseng considered Mr Blain was the initial aggressor who had chased after Mr Denney and banged on his car window. Judge Bergseng categorised Mr Blain's conduct as being "relatively low level provocation" that justified a discount of three months from the starting point of five years' imprisonment.[12]

[46] In our assessment, the discount for the so-called provocation was more than adequate — Mr Denney's response was disproportionate to Mr Blain's behaviour. Judge Bergseng could not have been criticised for concluding Mr Denney overreacted to Mr Blain's conduct and that no discount was required for the provocation.

[47] We conclude the end sentence of four years and nine months' imprisonment was well within the range that was reasonably available in this case. The appeal against sentence is therefore dismissed.

Conclusion

[48] The appeals against conviction and sentence are dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

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10 *R v Denney*, above n 1, at [19] citing *R v Taueki* [2005] 3 NZLR 372 (CA) at [38]–[39].
11 At [16]–[17].
12 At [25].