IN THE COURT OF APPEAL OF NEW ZEALAND

CA542/2016
[2017] NZCA 212

BETWEEN	JOHN SIONA MOALA Appellant
AND	THE QUEEN Respondent

Hearing: 10 May 2017

Court: Harrison, Gilbert and Katz JJ

Counsel: K S Holden for Appellant
S K Barr for Respondent

Judgment: 25 May 2017 at 10.15 am

JUDGMENT OF THE COURT

A The application for an extension of time within which to appeal is granted.

B The appeal is dismissed.

REASONS OF THE COURT

(Given by Katz J)

[1] John Moala was found guilty of one charge of aggravated robbery following a trial by jury in the Auckland District Court. He was convicted and sentenced to five years and nine months' imprisonment by Judge P I Treston on 16 September 2016.[1]

---

1 *R v Moala* [2016] NZDC 18130.

[2] Mr Moala appeals against his conviction on the grounds that the Judge was wrong to declare one of the Crown witnesses hostile and, further, that the Judge made several errors in his summing-up. These errors are said to have resulted in a miscarriage of justice.

[3] The appeal has been filed out of time. Mr Moala has filed an affidavit explaining why that is so. The Crown does not oppose an extension of time being granted under r 11 of the Court of Appeal (Criminal) Rules 2001 and we are satisfied that it is appropriate to do so.

Background

[4] On 3 July 2015 a dairy in New Lynn, Auckland, was robbed at gun point. Three men entered the dairy wearing high-visibility vests. Their faces were partially obscured by hoods or beanies. One of the men pointed a rifle at the shopkeeper while the other two took cigarettes and tobacco from behind the counter and cash from inside the register. The armed man kept the rifle trained on the shopkeeper as the other two fled the store. The armed man grabbed bars of chocolate as he left.

[5] Mr Kata was the driver of a Subaru motor vehicle that was stopped by police shortly after the robbery. Mr Kata and his three passengers — Mr Moala, Mr Pulu and Mr Fameatau — were arrested. Mr Moala is Mr Kata's cousin.

[6] After his arrest, Mr Kata provided two statements to the police. The first was recorded by hand in an officer's notebook. Mr Kata initially said that he and Mr Moala had been together on the day of the robbery. The other two men had arrived at his house about 3.30 pm and asked him to stash a bag and give them a ride to the train station. All four men then left together in his car and were subsequently stopped by the police. The interviewing officer put it to Mr Kata that he was covering for Mr Moala. Mr Kata admitted that he was, and that in fact all three of the passengers in his car had come to his door on the day of the robbery.

[7] Mr Kata then agreed to make a formal statement. His formal statement accords with and elaborates on the final position he reached in his first statement. Mr Kata said he was at home on the day of the robbery. The first time he saw

Mr Moala that day was when he arrived at his door with the other two men. He was asked to hide a backpack and give the men a ride to the train station. Mr Kata maintained that he knew nothing of a robbery until the police stopped his car, but he noted the other men "looked like they were running".

[8] Mr Kata was a Crown witness at trial. His evidence was broadly in accordance with his formal written statement — namely that three men had come together to his house including Mr Moala — but he was reluctant to accept material details. For example, he initially denied knowing who the men who came to his door were, that he was told anything about the bag that was left at his house, or that he knew anything about Mr Moala's car (despite having been in it with Mr Moala only two days before the robbery).

[9] During cross-examination Mr Kata resiled from his evidence that Mr Moala had come to his door with the other two men and said that Mr Moala had been with him that afternoon. He said that he had only implicated Mr Moala in his statements to the police because he had been scared that he himself might otherwise fall under suspicion.

[10] At the commencement of his re-examination, Mt Kata confirmed the account he had given in cross-examination, contradicting his evidence-in-chief. The prosecutor then applied to the Judge to have Mr Kata declared hostile. If a witness is declared hostile, the Judge may give leave to a party to cross-examine their own witness.[2] "Hostile", in relation to a witness, is defined in the Evidence Act 2006 as including one who "gives evidence that is inconsistent with a statement made by that witness in a manner that exhibits, or appears to exhibit, an intention to be unhelpful to the party who called the witness".[3]

[11] Judge Treston granted the application to declare Mr Kata hostile, stating:[4]

> [3] The comment I make is this and the ruling I make is that clearly his evidence and the way that he has given it, in a somewhat halting fashion, indicates in my view an intention to be unhelpful to the party who called the

---

2 Evidence Act 2006, s 94.
3 Section 4(1), definition of "hostile", para (b).
4 *R v Moala* [2016] NZDC 14954.

> witness, that is namely the prosecution, and while he gives evidence that is consistent with one statement is inconsistent with another which is not helpful to the prosecution. But in all the circumstances it seems to me that he is clearly hostile within the definition and I rule that he is declared so and that he may be cross-examined by the prosecutor. Because I determine that he is hostile I give permission to cross-examine the witness in the circumstances of this case.

[12] The prosecutor then cross-examined Mr Kata, putting key aspects of his second police statement to him. Mr Kata then agreed, in essence, that the correct version of events was the one he had given in evidence-in-chief. Mr Moala was not with him at his home, but had turned up at his address together with the other two men. He also confirmed that he had told the police in his first statement that he had initially been trying to cover for Mr Moala.

Was the Judge wrong to declare Mr Kata hostile?

[13] Ms Holden submitted that there was no proper basis for the Judge to declare Mr Kata hostile. She further submitted that it was unfair in the circumstances for the prosecutor not to have questioned Mr Kata about his conflicting statements in his evidence-in-chief, and that declaring Mr Kata hostile during the course of re-examination was unfair because defence counsel had no further opportunity to cross-examine him.

Was there a proper basis to declare Mr Kata hostile?

[14] Ms Holden submitted that there were insufficient grounds for the Judge to conclude that Mr Kata had given evidence in a manner that exhibited or appeared to exhibit an intention to be unhelpful to the Crown. Rather, Mr Kata was simply confirming in re-examination the evidence he had given in cross-examination. That evidence was consistent with the first part of his first statement. The truthfulness of his evidence was for the jury to determine.

[15] In our view there was a proper basis to declare Mr Kata hostile. Mr Kata's evidence in both of his police statements was that Mr Moala had turned up to his house together with the other two men. He explained that his initial statement to the contrary was untrue because he was covering for Mr Moala. The Judge was

therefore correct to conclude that Mr Kata in re-examination was giving evidence that was inconsistent with a statement he had previously made.

[16] The Judge was best placed to assess the manner in which Mr Kata gave evidence, and whether it exhibited an intention to be unhelpful to the prosecution. An examination of the notes of evidence, however, even without the benefit of any assistance which might be derived from seeing Mr Kata give evidence in person, supports the Judge's conclusion that Mr Kata was exhibiting a hostile attitude.

Was it unfair of the prosecutor not to ask Mr Kata during the evidence-in-chief about his original version of events?

[17] Ms Holden submitted that it was unfair of the prosecutor to have Mr Kata declared hostile during re-examination and then to proceed to cross-examine him on the conflicting accounts he had given to the police. She argued that the issue of his conflicting accounts was known to the prosecution throughout and should have been addressed in his evidence-in-chief.

[18] This submission overlooks that the evidence elicited by the prosecutor in Mr Kata's evidence-in-chief was Mr Kata's final position, which he had confirmed in his signed police statement was the truth. There was no basis for the prosecutor to also elicit from Mr Kata, in the course of his evidence-in-chief, a prior inconsistent statement that he had since recanted. That was a matter for the defence to pursue in cross-examination, which it did. Once the defence had opened up that line of inquiry, however, it was an appropriate subject for re-examination.

Did unfairness arise because the defence did not have a further opportunity to question Mr Kata following his re-examination?

[19] Ms Holden's final submission on the hostile witness issue was that declaring Mr Kata hostile during the course of re-examination had resulted in unfairness because the defence did not have the opportunity to challenge new evidence he gave. In particular, Ms Holden submitted that Mr Kata's confirmation in re-examination that he had previously told police that he had lied in order to cover for Mr Moala was new evidence that the defence should have had the opportunity to cross-examine him on. Ms Holden acknowledged, however, that she had not sought leave to further

cross-examine Mr Kata. She said that she was not aware that such a course was possible.

[20] Although relatively uncommon, there is nothing to prevent a trial judge from finding a witness hostile in re-examination, if that is when the issue of hostility arises. Section 94 of the Evidence Act imposes no limits as to when a witness can be declared hostile, and s 89 specifically provides for leading questions in both examination-in-chief and re-examination.

[21] In our view no miscarriage of justice arises from the fact that the defence did not have a further opportunity to question Mr Kata following his re-examination. The defence had already questioned him on the reason he changed his story. He said that it was because he was scared that he would otherwise fall under suspicion. In re-examination he confirmed that he had given the police a different reason for changing his story, namely that initially he was covering for Mr Moala. Two conflicting accounts were therefore before the jury. It was for them to determine which one was the truth.

[22] The Judge did not err in declaring Mr Kata a hostile witness. No miscarriage of justice resulted.

Was the Judge's summing-up unfair to Mr Moala?

[23] Mr Moala's second ground of appeal is that the Judge's summing-up was unfair to the defence case, resulting in a miscarriage of justice.

[24] In *R v Keremete* this Court provided the following guidance as to allegations of an inadequate summing-up:[5]

> [18] … A judge's summing up must identify the fundamental facts in issue, be balanced in its treatment of opposing contentions with respect to those facts, and leave the jury in no doubt that the facts are for them and not for the judge. Rival contentions with respect to the factual issues will normally be summarised (*R v Miratana,* 4 December 2002 CA 102/02) but there is a wide discretion as to the level of detail to which the judge descends in carrying out that task. Treatment of matters affecting the cogency of

[5] *R v Keremete* CA247/03, 23 October 2003 affirmed in *Preston v R* [2016] NZCA 568, [2017] 2 NZLR 358 at [98].

> evidence is not required as a matter of law: *R v Foss* (1996) 14 CRNZ 1 (CA) at p 4.
>
> [19] The judge need not, and should not, strive for an artificial balance between the rival cases if the evidence clearly favours one side or the other: *R v Hall* [1987] 1 NZLR 616 (CA). A judge is entitled to express his or her own views on issues of fact, so long as it is made clear that the jury remains the sole arbiter of fact *(R v Hall,* supra, at p 625). Any comment on the facts should be made in suitable terms without use of emotive terms or phrases which could lead to a perception of injustice. But provided the issues are fairly presented, the comment may be in strong terms: *R v Daly* (1989) 4 CRNZ 628 (CA). Inevitably these are ultimately matters of degree and judgment.

[25] Ms Holden submitted that the summing-up was unfair because the Judge on five occasions made unnecessary references to things that the prosecutor had said in his closing address to the jury. For example, the Judge said: "[A]s the Crown urged, don't leave your common sense at the door".[6] Later when directing the jury on circumstantial evidence the Judge recited the prosecutor's common analogy of a rope, which is set out below. Ms Holden submitted that it was unnecessary for the Judge to refer with approval to what the prosecutor had said regarding matters of a general nature relating to all jury trials. Such a course implicitly enhanced the overall value of the Crown submissions and may have resulted in the jury giving them undue weight.

[26] A judge obviously has to be careful when summing up for a jury not to give the impression that he or she is endorsing one party's closing submissions to the detriment of the other. Here, in relation to a couple of fairly routine jury directions, the Judge noted that the relevant matter had also been mentioned by the prosecutor. In relation to circumstantial evidence, this is what the Judge told the jury:

> [26] … As both parties have said but particularly the prosecutor, this is a case which relies on circumstantial evidence. Circumstantial evidence relies on reasoning by inference and I've talked to you about inferences just a moment ago and derives its force from the involvement of a number of factors that independently point to the guilt of the defendant.
>
> [27] The prosecutor made some small comment about it being an analogy, that of a rope. Any one strand of the rope may not be strong enough to support the burden of proof but the combined strands can be sufficient to do so. The weight it must support is beyond reasonable doubt and the logic that underpins a circumstantial case is that the defendant is

---

6 *R v Moala* DC Auckland CRI-2015-090-3652, 11 August 2016 at [9].

> either guilty or is the victim of an implausible, unlikely series of coincidences and I think that was the phrase that the prosecutor used to you when he was making his closing address. He said, "He must be the most unfortunate man in South Auckland," because of all the evidence the Crown points to by way of circumstantial facts.

[27] As Mr Barr noted, however, the prosecutor had addressed circumstantial evidence and coincidence reasoning during his closing address, including discussing the unlikelihood of a series of unfortunate coincidences and making brief reference to the common rope example. The defence had made a minor reference to coincidences in her opening statement. The Judge's opening comments therefore reflect that these issues had been covered by both counsel, but were a feature of the prosecution closing. The Judge picked up on the prosecutor's brief reference to rope analogy, but went on to give a fuller explanation. Importantly, the Judge stressed the need for the jury to be satisfied beyond reasonable doubt of guilt.

[28] Viewed in their overall context, the Judge's references to comments made by the prosecutor would not have caused the jury to understand that the Judge was endorsing the prosecutor's closing to the detriment of the defence.

[29] Ms Holden's second argument under this head relates to Mr Kata's evidence. She submitted that the Judge had misstated Mr Kata's evidence as positively stating that he covered up for the defendant when in fact Mr Kata had only agreed with the prosecutor that he had said in his statement to the police that he was covering for Mr Moala. The relevant passage in the summing-up is as follows:

> [55] Put all the pieces of the jigsaw together, the Crown urged you, there was more than enough evidence just with those but then there is the overlaying evidence or Mr Kata's evidence where reluctantly you could see, and tearfully as I recall it, he said, *"Yes I was in fact covering up for the defendant."* You've heard what the defence has got to say about that aspect and I'll refer to that in just a moment but look at the thing over all. Don't focus on things that were not found. Look at the fingerprint evidence. Look at the DNA evidence. Look at the fact that there was no money found doesn't mean much.
>
> (Our emphasis.)

[30] The Judge did err in paraphrasing the evidence of Mr Kata, as opposed to saying that Mr Kata had confirmed in re-examination that he had previously told the police that he was covering up for Mr Moala. However, the jury saw and heard Mr

Kata giving evidence. They also had the benefit of both parties' closing submissions and the summing-up (as a whole) to help them identify the key issues. Mr Kata's evidence was not critical to the Crown case. On the contrary, the Crown submitted that there was ample other evidence identifying Mr Moala as one of the robbers even without referring to Mr Kata's evidence. To the extent that it did rely on Mr Kata's evidence, however, the Crown submitted that his account that Mr Moala was not with him on the afternoon of the robbery should be preferred.

[31] The jury would have been quite clear, based on seeing Mr Kata give evidence and also hearing the closing addresses and the summing-up, that the two competing contentions were that:

(a) Mr Moala was *not* with Mr Kata on the afternoon of the robbery, but Mr Kata had initially told police that he was to cover for Mr Moala (the Crown position); or

(b) Mr Moala *was* with Mr Kata on the afternoon of the robbery and Mr Kata subsequently changed his story to avoid suspicion falling on him (the defence position).

[32] We are not persuaded that, viewed in its overall context, the Judge's relatively minor misstatement would have given rise to any miscarriage of justice.

[33] Third, Ms Holden submitted that the Judge "did not state the reasons why the defence urged the jury to accept Mr Kata's evidence that Mr Moala with him when the other two men came to the door". The Judge was not required in summing up to repeat this level of detail from the defence closing address. He was required fairly to put to the jury the defence case that Mr Moala was already with Mr Kata when the other two arrived, and therefore he was not one of the robbers. He complied with that obligation.

[34] Ms Holden's final submission was that the Judge "did not put the defence submission about the third robber being a person who could have got out of the car before when it was abandoned, taking the stolen cash with him".

[35] We reject this submission. As Mr Barr noted, the Judge did fairly signpost this aspect of the defence case when he noted that the defence position that "the man in the creamy white hoodie could be the link", that the defence queried where that man was going, that the creamy white hoodie was never found, and that the explanation for the cash never being found was that it was with the man with the creamy white hoodie.[7]

[36] Ms Holden also took issue with the Judge's observation that the creamy white hoodie could not been seen in the CCTV footage. That observation, however, was neither inaccurate nor prejudicial. Significantly, the Judge noted that one of the robbers seen leaving the scene was, by then at least, wearing a creamy white hoodie. Overall, the defence case would have been clear to the jury: that the third robber was not Mr Moala but might have been the man wearing a creamy white hoodie.

[37] In conclusion, the Judge's summing-up did not breach the principles set out in *R v Keremete* and cannot be considered unfair. No miscarriage of justice arises.

Result

[38] The application for an extension of time within which to appeal is granted.

[39] The appeal is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent

---

7 At [58]–[59].