NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS, OCCUPATION OR IDENTIFYING PARTICULARS OF WITNESSES/VICTIMS/CONNECTED PERSONS PURSUANT TO S 202 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF COMPLAINANTS PROHIBITED BY S 203 OF THE CRIMINAL PROCEDURE ACT 2011.

NOTE: PUBLICATION OF NAMES, ADDRESSES, OCCUPATIONS OR IDENTIFYING PARTICULARS OF ANY COMPLAINANTS/PERSONS UNDER THE AGE OF 18 YEARS WHO APPEARED AS A WITNESS PROHIBITED BY S 204 OF THE CRIMINAL PROCEDURE ACT 2011.

IN THE COURT OF APPEAL OF NEW ZEALAND

CA369/2017
[2018] NZCA 74

	BETWEEN	THOMAS JAMES LUKE OLLIVER Appellant
	AND	THE QUEEN Respondent

Hearing: 26 February 2018

Court: Brown, Brewer and Collins JJ

Counsel: A J Bailey and E Huda for Appellant
M H Cooke for Respondent

Judgment: 28 March 2018 at 12.30 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Brewer J)

Introduction

[1] Mr Olliver appeals his convictions on three charges of indecent assault relating to two child complainants. He submits he did not get a fair trial because the jury was aware that, originally, he faced a further five charges in respect of a third complainant (F), including a charge of rape. This knowledge, which the jury should not have had, raises in his submission a real risk that the jury was prejudiced against him.

Background

[2] On Monday, 19 September 2016, Mr Olliver appeared for trial in the High Court facing 11 charges relating to three complainants. The usual procedure for empanelling a jury was followed. The charges were read out and then jurors were selected from the jury panel by ballot. Once the jury foreperson was selected, the jury panel was excused from the courtroom and the trial proper commenced.

[3] The following day, the complainant F became distressed and did not want to give evidence. Eventually, the Judge discharged Mr Olliver on the five charges he faced in respect of F, declared a mistrial and discharged the jury.

[4] On Wednesday, 21 September 2016, the same jury panel as had attended on the Monday (less the discharged jurors) returned to the courtroom and a new jury was selected from their number. The trial then proceeded on the charges relating to the remaining two complainants.

[5] In his introductory remarks, Nation J gave the standard direction that the jury's verdicts must be reached on the evidence, and only on the evidence, heard during the trial. He also said:

> I do need to say that on Monday you were in Court when the charges were read out and there was a list of witnesses read out. It was anticipated at that stage that a trial would proceed and that it would take up all of this week. In fact, for reasons that can quite often occur and sometimes do occur, that

> hasn't been possible and that trial is completely at an end. What happened during that time, those first two days, is totally irrelevant to the matters which you now have to consider and you must put them out of your mind. If you don't do that, there won't be a fair trial for the Crown or for Mr Olliver.

[6] At the end of the trial, the jury found Mr Olliver guilty of one of the two charges relating to one complainant and two of the four charges relating to the other complainant. The jury found Mr Olliver not guilty of the remaining three charges.

Discussion

[7] We must decide this appeal in accordance with s 232 of the Criminal Procedure Act 2011:

> (1) A first appeal court must determine a first appeal under this subpart in accordance with this section.
>
> (2) The first appeal court must allow a first appeal under this subpart if satisfied that,—
>
> (a) in the case of a jury trial, having regard to the evidence, the jury's verdict was unreasonable; or
>
> (b) in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred; or
>
> (c) in any case, a miscarriage of justice has occurred for any reason.
>
> (3) The first appeal court must dismiss a first appeal under this subpart in any other case.
>
> (4) In subsection (2), **miscarriage of justice** means any error, irregularity, or occurrence in or in relation to or affecting the trial that—
>
> (a) has created a real risk that the outcome of the trial was affected; or
>
> (b) has resulted in an unfair trial or a trial that was a nullity.
>
> (5) In subsection (4), **trial** includes a proceeding in which the appellant pleaded guilty.

[8] Mr Olliver's position is that because the jury knew of F and the charges he faced in relation to her, there is a real risk that the outcome of his trial was affected and thus a miscarriage of justice has occurred.

[9] Mr Bailey for Mr Olliver addressed us on the factors he submits go to creating the real risk that the outcome of the trial was affected:

(a) The charges in relation to the two complainants were significantly less serious than the charges relating to F. One of those charges was rape, a word which has a particularly prejudicial resonance.

(b) The jury was not told that the charges in relation to F had been dismissed because she did not want to give evidence. So, the jury did not know that, in effect, Mr Olliver had been acquitted on those charges. Instead, the jury might have thought he had pleaded guilty to the charges.

(c) It is unrealistic to suggest that the jury would have complied with the direction of the Judge that they put out of their minds the events of the Monday when the first jury was empanelled.

[10] We accept it was undesirable for the second jury to be drawn from the same jury panel as the first. The knowledge that Mr Olliver had, on the Monday, faced charges in respect of F was not knowledge that was relevant to the jury's consideration of the charges involving the other two complainants. Further, it was knowledge that had the potential to cause prejudice to Mr Olliver because it was unfavourable to him.

[11] However, it is not the case that every time a jury acquires knowledge of material with the potential to arouse illegitimate prejudice against a defendant that there is created a real risk that the outcome of the trial will be affected such that a miscarriage of justice will occur if verdicts of guilty are given. It is a matter of degree.

[12] In this case, the jury was directed from the outset by Nation J that the earlier trial was at an end and was not relevant to the charges before them. Juries are

presumed to follow the directions of trial judges.[1] The Judge's direction was adequate and readily understandable.

[13] It is not uncommon for there to be media publicity about a case, or about a defendant, prior to trial. It is not uncommon, for example, for a defendant in a high-profile case to be convicted of offences and then secure a retrial of the same offences. Juries are commonly directed to decide the case only on the evidence put forward in the trial and to ignore anything they have learned outside the evidence presented at trial. That is what was done here. As the Privy Council commented in *Taylor (Bonnett) v The Queen*:[2]

> The assumption must be that the jury understood and followed the direction that they were given… [T]he experience of trial judges is that juries perform their duty according to law… [T]he law proceeds on the footing that the jury, acting in accordance with the instructions given to them by the trial judge, will render a true verdict in accordance with the evidence. To conclude otherwise would be to underrate the integrity of the system of trial by jury and the effect on the jury of the instructions by the trial judge.

[14] There is little direct authority relevant to the fact situation in this case. However, in 1960, this Court dismissed an appeal based on the prejudice arising from a jury panel providing juries to hear two indictments against the appellant:[3]

> The arraignment on the first indictment of assault with intent to commit rape took place on February 23, 1960, and the trial continued during that day and into the afternoon of the following day, February 24. On the retirement of the jury the appellant was arraigned on the second indictment containing four charges of breaking and entering, and one of unlawful conversion of a motor-vehicle. After the second trial commenced, the jury in the first trial returned with their verdict of guilty, but the jury for the second trial retired from the Court room while this verdict was given. The second trial continued into the afternoon of the following day, February 25, when the jury retired and later returned with their verdicts of guilty. It was argued that a fair trial on the second indictment was prejudiced by the cumulative effect of the arraignment of the appellant on the first indictment in the presence of the waiting jurors, the likelihood that waiting jurors heard at least some of the evidence tendered in the first trial, and the likelihood also that the jury in the second trial learnt the result of the first trial from reading the newspapers before they returned their verdicts. It was pointed out that in the first trial three members of the appellant's family were called to give evidence suggesting an alibi, and that on the second trial the same persons were called for the same purpose.

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1 *Mussa v R* [2010] NZCA 123 at [41]; *Weatherston v R* [2011] NZCA 276 at [24]; and *Green v R* [2016] NZCA 196 at [23]–[25].

2 *Taylor (Bonnett) v The Queen* [2013] UKPC 8, [2013] 1 WLR 1144 at [25].

3 *R v Matich* [1960] NZLR 1004 at 1005.

[15] The Court reviewed and distinguished cases which had led to convictions being overturned because of prejudicial information about the defendant being disclosed to juries. It approved English dicta "that it was impossible to lay down the general proposition that in no case must a jury who have tried a man on one charge proceed to try him on another charge, because each case must be considered with reference to its particular circumstances".[4]

[16] Accordingly, the Court held that it cannot be said generally that "the arraignment of an accused person in the presence of waiting jurors on one charge precludes his trial by them on another charge".[5] The Court found the events described at [14] did not give real grounds for fearing prejudice and observed that the trial Judge had directed the jury appropriately to dismiss from their minds anything they might have learned about the appellant outside the trial.

[17] 1960 was, perhaps, a more robust time than the present in terms of judicial assessment of potential prejudice to a defendant. But, we agree that each case must be considered with reference to its particular circumstances and we agree there can be no general proposition that if a jury is aware a defendant faces or faced other charges it is disqualified from deciding the charges before it.

[18] We acknowledge there are situations which arise in trials where knowledge acquired by the jury in error or through an unforeseen occurrence will require the jury to be discharged because the risk of prejudice that such knowledge brings is too great to be banished by judicial direction. At the first trial, the Judge discharged the jury because it had seen F's distress and it had heard about her allegations in the Crown's opening address. It was obviously inappropriate for the trial to proceed once the charges in relation to F had been dismissed.

[19] Similarly, where particularly prejudicial knowledge is acquired by the jury — for example, that the defendant is a sentenced prisoner on related charges — the trial Judge should normally discharge the jury and, if this is not done, an appellate Court might well find there was a miscarriage of justice in allowing the trial to proceed.

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4 At 1005–1006.
5 At 1006.

[20] However, the fact the jury that tried Mr Olliver was aware that at the beginning of the week there were charges against him in respect of F, including rape, does not raise a real risk that the outcome of his trial was affected so that a miscarriage of justice has occurred. The jury did not know any of the circumstances of F's allegations nor whether they had been resolved, and was given an appropriate direction to ignore the events of Monday.

[21] There is no evidence that the outcome of the trial might have been affected. There was no question from the jury about F, and no concern was expressed by the foreperson during deliberations. Significantly, the jury acquitted on half of the charges faced by Mr Olliver, including charges in relation to each complainant.

Result

[22] The appeal against conviction is dismissed.

Solicitors:
Crown Law Office, Wellington for Respondent