IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA712/2020
[2021] NZCA 513

BETWEEN	CHANTELLE ELAINE ANDERSON Appellant
AND	THE QUEEN Respondent

Hearing:	1 September 2021
Court:	Gilbert, Duffy and Peters JJ
Counsel:	A J McKenzie for Appellant B C L Charmley and S E Trounson for Respondent
Judgment:	6 October 2021 at 2 pm

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Peters J)

[1] On 5 October 2020, following a jury trial before Judge B P Callaghan in the District Court at Christchurch, Ms Anderson was found guilty of wounding with intent to cause grievous bodily harm, kidnapping, and theft (under $500).[1] The jury also found Ms Anderson not guilty of assault with a weapon, being a hammer.

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1 Crimes Act 1961, ss 188(1), 209 and 219.

[2] Ms Anderson stood trial with her co-defendant, Mr Timothy Roberts. Mr Roberts was charged with common assault, kidnapping, theft (under $500) and as a party to the wounding. The jury found Mr Roberts guilty of the assault and theft.

[3] The victim of the wounding, kidnapping and assault was a Mr Scott Findlay. The theft (of petrol) occurred in the course of the kidnapping, and we say no more about it.

[4] On 9 November 2020, Judge Callaghan sentenced Ms Anderson to six years and three months' imprisonment on the wounding charge, and concurrent sentences of two years on the kidnapping charge and one month on the theft.[2] Ms Anderson also received a first strike warning on the wounding and kidnapping charges.

[5] Ms Anderson appeals against her convictions on the basis that a miscarriage of justice has occurred.[3] In particular, Ms Anderson submits several errors at trial created a real risk the outcome of the trial was affected.

[6] The principal error alleged is that the Judge ought to have directed the jury that they might draw an inference adverse to the Crown case as a result of the Crown's failure to call AS as a witness. AS was present during the relevant events and Ms Anderson contended that AS, not her, was responsible for Mr Findlay's injuries.

[7] Ms Anderson also contends the following errors themselves caused or contributed to a miscarriage:

(a) the Judge erred by declining Mr Roberts' application to dismiss the kidnapping and wounding charges against him, thereby precluding Ms Anderson from calling him as a witness in her defence; and

(b) the Judge's direction as to Mr Findlay's reliability or otherwise was insufficient.

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2 *R v Anderson* [2020] NZDC 23003.
3 Criminal Procedure Act 2011, s 232(2)(c).

[8] If her appeal is successful, Ms Anderson submits her convictions should be quashed with no retrial ordered, as she has already served two years and six months' imprisonment and the delay for any rehearing means it would be "inherently unlikely" for a new jury to convict.

[9] Ms Anderson required an extension of time in which to bring this appeal. Collins J granted the necessary extension in a minute issued on 2 February 2021.[4]

Background

Offending

[10] On 6 or 7 March 2019, Ms Anderson entrusted Mr Findlay with her vehicle to collect a friend of hers. Mr Findlay lived at the address of which Ms Anderson was a tenant.

[11] At the time Mr Findlay took the vehicle, Ms Anderson had forgotten she had left her wallet in the vehicle which, amongst other things, contained between $300 and $600 which was required to pay the rent.

[12] Mr Findlay did not return the vehicle until 8 March 2019, well after Ms Anderson expected him to do so. He was accompanied by AS. The cash that had been in the wallet was missing.

[13] The Crown case was that Mr Roberts, who was also present, punched Mr Findlay in the head. Ms Anderson was said to have shot at Mr Findlay numerous times with an air rifle, with several of her shots hitting Mr Findlay and wounding him.

[14] Mr Roberts was alleged to have aided and abetted Ms Anderson by intimidating Mr Findlay and preventing his escape.

[15] In the course of the events, Ms Anderson took photographs of Mr Findlay and his injuries, and sent text messages to several of her associates. She told one that she had shot Mr Findlay "20 times" and that she was enjoying hearing Mr Findlay scream,

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4 *Anderson v R* CA712/20, 2 February 2021(minute of Collins J) at [2].

and she told another that she wished him to "hurt more". The Crown adduced the photographs and texts at trial.

[16] Accompanied by Mr Roberts and AS, and with Mr Findlay in the vehicle, Ms Anderson then drove to Mr Findlay's mother's address and demanded money in exchange for Mr Findlay's release. Mr Findlay's mother declined, following which Ms Anderson made the same demand of Mr Findlay's father, who agreed. Ms Anderson then left Mr Findlay at an agreed location. The Crown also adduced stills of CCTV footage of Ms Anderson driving Mr Findlay around Christchurch. The events in the vehicle gave rise to the kidnapping charge.

Trial

[17] The case first went to trial in February 2020. Mr Findlay did not appear and the Court issued a warrant for his arrest. As it turned out, Judge Kellar was required to abandon the trial shortly after Mr Findlay was located. Prior to this, the jury had enquired whether AS would be called to give evidence, having noted her omission from the Crown witness list. It is apparent from the material before us that Judge Kellar indicated that would be something the officer in charge, Detective Constable Cowles, would wish to bear in mind for the second trial.

[18] The second trial commenced on 22 September 2020.

[19] Mr Findlay's evidence as against Ms Anderson was consistent with the Crown case against her, referred to above. Mr Findlay denied the defence narrative which Mr McKenzie put to him in cross-examination, this being that Ms Anderson had fired a single shot only at Mr Findlay, that shot had not hit him, and that AS had fired the remaining shots and inflicted the injuries Mr Findlay sustained.

[20] Mr Findlay's evidence was that Mr Roberts had no active involvement in the attack and largely exonerated him. In this respect, Mr Findlay's evidence was inconsistent with the formal written statement he had given to the police shortly after the events, in which he said Mr Roberts "gave me a couple of punches to the face and kicks". Mr Findlay maintained this new version of events, even after Judge Callaghan granted the Crown permission to cross-examine him on the inconsistency.

[21] Mr Findlay also denied that AS played any part in the offending.

[22] Mr Roberts did not give evidence, but Ms Anderson did. She set out her account, and said her text messages had either been sent by AS, or were a face-saving exaggeration, so that her associates would believe that she had punished Mr Findlay.

Appeal

First ground — direction regarding failure to call AS

[23] After the Crown closed its case, both defence counsel made an application for a dismissal of the charges pursuant to s 147 of the Criminal Procedure Act 2011 (CPA). The basis on which Mr McKenzie put Ms Anderson's submission was that it was unfair to continue the trial in the absence of AS's evidence, particularly given what he contended was Mr Findlay's "unreliability". Alternatively, if his s 147 application was unsuccessful — which it was — Mr McKenzie asked the Judge to direct the jury that they were entitled to infer that AS, if called, would not have assisted the Crown case.

[24] The Judge declined to give this direction, saying, amongst other things, that he was unaware of any authority confirming that he could do so and that, in any event, it would be misleading because the Crown did not know what evidence AS would give. To the extent the Judge told the jury anything about AS's absence in summing up, it was to direct them to decide the case on the evidence before them and not to speculate on what AS might have said had she given evidence.

[25] Mr McKenzie's principal submission on appeal is that the Judge erred in refusing to give the jury the direction sought, which he described as being "along the lines" of the rule in *Jones v Dunkel* and that this error had given rise to a miscarriage of justice.[5]

[26] The Crown does not dispute that a direction such as the one Mr McKenzie sought might be given in an appropriate case, but submits that such a direction was not required in this case. If wrong in that, the Crown submits the error did not give rise to a miscarriage of justice.

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5 *Jones v Dunkel* [1959[] HCA 8, (1959) 101 CLR 298 at 308.

Jones v Dunkel and Ithaca (Custodians) Ltd v Perry Corporation

[27] *Jones v Dunkel* was a civil proceeding. Two trucks had collided, the driver of one had died, and his widow sued the other driver and his employer, seeking compensation. The employer did not call its employee driver to give evidence at trial. The trial Judge directed the jury that, the employer having called no evidence, it was a matter of common sense that the jury should accept the plaintiff's evidence as to the facts.

[28] The majority of the High Court of Australia held that this direction was incomplete and amounted to a misdirection.[6] The trial Judge ought to have directed the jury that they might draw an inference adverse to the employer's case as a result of its failure to call the employee driver as a witness, there being no evidence giving a "sufficient explanation" of the employee driver's absence.[7]

[29] In *Ithaca (Custodians) Ltd v Perry Corporation* this Court discussed *Jones v Dunkel*'s application in civil proceedings in New Zealand, saying:[8]

> [153] … Neither is it helpful to refer to the "rule" in *Jones v Dunkel*. There is no rule. Rather, there is a principle of the law of evidence authorising (but not mandating) a particular form of reasoning. The absence of evidence, including the failure of a party to call a witness, in some circumstances may allow an inference that the missing evidence would not have helped a party's case. In the case of a missing witness such an inference may arise only when:
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> (a) the party would be expected to call the witness (and this can be so only when it is within the power of that party to produce the witness);
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> (b) the evidence of that witness would explain or elucidate a particular matter that is required to be explained or elucidated (including where a defendant has a tactical burden to produce evidence to counter that adduced by the other party); and
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> (c) the absence of the witness is unexplained.

Criminal proceedings

[30] In *R v Nobakht* this Court confirmed that the principle referred to in *Ithaca* "applies in criminal cases, although, in practice, with greater caution".[9] The need for

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6 At 308 per Kitto J, 312 per Menzies J and 320–321 per Windeyer JJ.
7 At 308 per Kitto J.
8 *Ithaca (Custodians) Ltd v Perry Corporation* [2004] 1 NZLR 731 (CA).
9 *R v Nobakht* [2007] NZCA 488 at [91].

caution arises as the prosecution too could rely on the principle, and it is necessary not to impinge on "the fundamental right of an accused not to be compelled to be a witness".[10]

[31] As to the nature of the direction a trial judge might give a jury if he or she considered it appropriate, this Court made the following comments:[11]

> ... the "particular form of reasoning" which is authorised (but not mandated) in situations of missing evidence is subtle, as the extract from *Ithaca*…shows. If a judge were to direct a jury as to inferences that can be drawn from a party's failure to call a witness, he or she would have to be careful to direct not only on the three criteria that must be established before the absence of a witness becomes material but also on the nature of the inference to be drawn from the failure to call a witness. In most cases, judges conclude it is safer not to enter this particular minefield and instead instruct juries to decide the case on the evidence they have heard and not to speculate on what others might have said if called.

[32] It appears from this passage that whether or not to give the jury a direction as to the absence of a witness is a matter for consideration in the individual case, and a trial judge might well decide it best to refrain from doing so.

[33] Other cases in which the point has arisen are *Waterworth v R* and *JEW v Police*.[12]

[34] In *Waterworth*, the appellant submitted that the trial Judge ought to have directed the jury that the Crown's failure to call a witness (a co-defendant who had pleaded guilty prior to trial) permitted the jury to infer that witness would not have assisted the Crown's case against the appellant.[13]

[35] This Court did not accept the submission.[14] It referred to *Dyers v R* in which the High Court of Australia discouraged trial judges from directing juries that they might draw an adverse inference from the absence of a witness in a criminal trial, subject to the possibility such a direction might be required if the prosecution failed to

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10 At [91].
11 At [92].
12 *Waterworth v R* [2012] NZCA 58; and *JEW v Police* HC Christchurch CRI-2010-409-87, 22 December 2010.
13 *Waterworth v R*, above n 12, at [5(c)].
14 At [36].

call "all material witnesses".[15] *Waterworth* was not such a case. This Court said the prosecution was not bound to call the co-defendant; defence counsel had not asked the Crown to call him; there was no evidence the co-defendant would have agreed to give evidence if asked; and there was no evidence as to what his evidence would have been had he been called.[16]

[36] In *JEW*, the Crown had not called relevant witnesses whom it had briefed, and whom the defence contended ought to have been called. The trial Judge (in a judge-alone trial) did not accept defence counsel's submission that he ought not to draw inferences favourable to the prosecution as a result. On appeal to the High Court, Chisholm J held that the trial Judge was under no obligation to draw an adverse inference against the prosecution, saying whether or not to do so was a matter of judicial discretion.[17]

Discussion

[37] Mr McKenzie also referred us to *J (CA89/2016) v R*.[18] This case was concerned with a different point, namely a failure by the Crown to put material evidence before the jury. There was no suggestion the witnesses concerned were unavailable. This Court said the fact this materially relevant evidence was not put before the jury gave rise to a real risk of a miscarriage of justice.[19]

[38] Coming back to this case, we are not persuaded the Judge erred in declining to give the direction sought. First, his refusal is consistent with the restraint this Court in *Nobakht* suggested would often be the best course in criminal proceedings.[20] Secondly, we are not persuaded there was any basis for considering the *Ithaca* criteria were met in any event.[21] We accept that, in the usual course of events, the Crown would have been expected to call AS to give evidence, given that she was present

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15 At [35], citing *Dyers v R* [2002] HCA 45, (2002) 210 CLR 285 at [6].
16 *Waterworth v R,* above n 12, at [36].
17 *JEW v Police*, above n 12, at [75].
18 *J (CA89/2016) v R* [2016] NZCA 528.
19 At [29]–[30].
20 *R v Nobakht*, above n 9.
21 *Ithaca (Custodians) Ltd v Perry Corporation*, above n 8.

throughout the relevant events. The second jury, like the first, also asked at a relatively early stage why AS was not on the Crown witness list.

[39] That said, the prosecution did not know the gist of the evidence AS might give, nor was AS's absence unexplained. This was not, for instance, a case in which the prosecution had deliberately refrained from calling a witness who might be unhelpful. In fact, Detective Constable Cowles' evidence was that he made six attempts to obtain a statement from AS. AS had denied any offending when spoken to at a time close to the events but the police had no more than this.

[40] On the first of Detective Constable Cowles' attempts, on 11 June 2019, AS agreed to make a statement the following day, but was not present when the Detective returned. The Detective made subsequent visits to AS's address in September, October and December 2019, and then again in August and September 2020, these latter two being in advance of the second trial. In the course of these visits, AS vacated her first address. The Detective visited her new address, having obtained it from the Ministry of Social Development.

[41] Mr McKenzie put it to the Detective that it should have been a relatively straightforward matter to locate AS, as she was subject to a sentence of community detention and of intensive supervision in late 2019. The Detective's evidence was that he was unaware that AS was subject to any sentence but, in any event, every time he called at her address his knocks at the door were unanswered or he was told AS was absent, with her failing to telephone him as he asked.

[42] On appeal, Mr McKenzie submits that Detective Constable Cowles' evidence does not sufficiently explain AS's absence. He submits the established "good reasons" for failing to call a witness include unreliability; that the witness's evidence is unimportant; that the witness cannot be compelled or his or her evidence is privileged; and an inability to locate the witness.[22]

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[22] Citing *R v Apostilides* [1984] HCA 38, (1984) 154 CLR 563 (HCA); *R v Reardon (No 2)* [2004] NSWCCA 197, (2004) 60 NSWLR 454; *Police v Kyriacou* [2009] SASC 66, (2009) 103 SASR 243; and *Solis v R* [2018] VSCA 275.

[43] We do not accept this submission. Our view is that Detective Constable Cowles' evidence gave a sufficient explanation of AS's absence, if indeed one was required.

[44] If we are wrong in that, we do not accept the absence of a direction gave rise to a miscarriage of justice in the required sense. The case against Ms Anderson was compelling. Mr Findlay incriminated her in his formal written statement and in his evidence and, as we have said, she had spoken of the offending in her contemporaneous text messages.

[45] We mention one other point. Section 113 of the CPA permits the Court to make an order that a party should call a particular witness at trial.[23] Crown counsel submits it was open to Mr McKenzie to make such an application regarding AS and it is fatal to his submission that he did not do so. It is unnecessary for us to address this submission, but we note that the absence of such an application was not fatal to the appellant in *J (CA89/2016) v R*.[24]

[46] To conclude, we are not persuaded the Judge erred in declining to give the direction sought or, if we are wrong, that the failure gave rise to a miscarriage of justice. This ground of appeal must accordingly be dismissed.

Second ground — failure to discharge Mr Roberts

[47] Mr McKenzie submits the Judge erred in failing to grant Mr Roberts' application to be discharged under s 147 of the CPA on the wounding and kidnapping charges, and that this error caused a miscarriage of justice as it precluded Mr Roberts from being called as a witness in Ms Anderson's defence.

[48] The Crown does not accept this submission, contending it remained open to the jury to find Mr Roberts guilty on the wounding and kidnapping charges on the basis of Mr Findlay's original statement to police, despite Mr Findlay's later evidence at trial that largely exonerated Mr Roberts.

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23 As did its predecessor; Crimes Act 1961, s 368.

24 See *J (CA89/2016) v R*, above n 18, at [27]–[30].

[49] Regardless, and whatever the merits of the Judge's decision on the application, there is simply no suggestion in the material before us that Mr McKenzie wished to call Mr Roberts in Ms Anderson's defence. There is no record of any such indication to the Judge, and nor was there any application for severance. If Mr McKenzie considered it in Ms Anderson's best interests to call evidence from Mr Roberts in her defence, he could have made such an application, even at trial if necessary.

Third ground — inadequate direction as to reliability and weight under s 122 of the Evidence Act 2006

[50] Mr McKenzie submits the Judge's direction to the jury as to the reliability or otherwise of Mr Findlay's evidence was insufficient. Mr McKenzie submits that a more fulsome direction was required, given that Mr Findlay was plainly untruthful at trial, and his evidence was the only oral evidence incriminating Ms Anderson.

[51] The direction the Judge gave the jury in his summing up regarding Mr Findlay's evidence was as follows:

> … [Mr Findlay] says that it is not safe to rely on his 1st of May 2019 statement. He cannot remember it and he was on medication. Generally the complainant acknowledged his memory was likely to have been affected by medication and you saw him give evidence and there were some things that he said he could not remember. He admitted to having prior criminal convictions and to the fact that he seemed to have been wanted by the Court during this time because he had not answered his bail and there was a warrant out for his arrest.
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> So all of that does bring into question the accuracy and reliability of his evidence because of all those matters that have been raised and others that were raised with him so that is why his credibility has been challenged. That does not mean you cannot accept all or part of his evidence. It just means that you need to be careful and cautious when assessing his evidence. So you heard and saw him give evidence, but you need to carefully assess his evidence particularly when relying on it for Ms Anderson's charges and to a lesser extent Mr Roberts' charges. So if you accept all or part of his evidence you also need to carefully take into account and assess what weight, we lawyers call it weight, but its importance you give to it, all right.
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> Mr Bowry [a witness whose evidence was relevant to the charges against Mr Roberts] also had memory problems … He also said he had issues with his, as I mentioned, with his memory and he could not remember making this particular part of the statement. So his evidence because it is out there in front of you there are issues about memory, there are conflicting inconsistencies in his evidence, you also need to apply caution to assessing his evidence and whether or not you accept it in whole or in part and if you do what importance or weight you give it.

[52] Mr McKenzie submits the Judge was required to go further in his direction regarding Mr Findlay by, for example, giving the jury examples of Mr Findlay's inconsistencies and explaining why they would need to take special care with his evidence. In addition, Mr McKenzie submits the Judge undermined the direction that he did give by referring to another witness, Mr Bowry, as "also" having "memory problems". Mr McKenzie submits this implied the issue with Mr Findlay's evidence was primarily his memory, rather than his being deliberately untruthful.

[53] The Crown submits the Judge's direction was adequate. In support of this submission, Crown counsel referred us to *B (CA58/2016) v R* in which this Court said that a judge must take care in delivering a warning to the jury if a witness's reliability is a central feature of the trial.[25] Care is required because the jury may take the direction as an indication the judge thinks the witness is lying. In such a case, it is sufficient to tell the jury that credibility and reliability is a central issue which they must resolve.

Discussion

[54] The jury could not have been in any doubt that they needed to take great care with Mr Findlay's evidence. He had been declared a hostile witness; their attention had been drawn to the inconsistencies between his formal written statement on the one hand and his evidence at trial on the other; and he had been cross-examined thoroughly by Mr McKenzie. Moreover, both Crown and defence counsel referred in their closing remarks to Mr Findlay's deficiencies as a witness. Mr White for the Crown suggested the jury could refer to "other evidence in the trial as a sort of cross-check". In his closing remarks Mr McKenzie said he thought "this will be the only trial where the Crown says: 'Don't believe the witness under oath, believe the witness high on rohypnol who can't remember what he said'". He also suggested Mr Findlay had lied to the jury.

[55] In those circumstances, any further direction from the Judge was unnecessary, and would have risked giving the signal this Court referred to in *B (CA58/2016) v R*.

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[25] *B (CA58/2016) v R* [2016] NZCA 432 at [60]–[61].

[56] Nor is there anything in Mr McKenzie's submission that the Judge's reference to "memory problems" undermined the direction he had just given. Again, we think the jury were well aware that there were grounds for doubting Mr Findlay's truthfulness. More importantly, the issue for the jury was whether or not they accepted Mr Findlay's evidence and, if so, what weight they would give it. If they did not accept his evidence, it was immaterial whether that was because they considered Mr Findlay untruthful or because he did in fact have memory problems.

Result

[57] The appeal against conviction is dismissed.

Solicitors:
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