IN THE COURT OF APPEAL OF NEW ZEALAND

CA747/2015
[2016] NZCA 357

BETWEEN	ZACHRIUS RAKENA Appellant
AND	THE QUEEN Respondent

Hearing:	19 July 2016
Court:	Randerson, Fogarty and Collins JJ
Counsel:	I M Brookie and C G Farquhar for Appellant B D Tantrum and S R Jacobs for Respondent
Judgment:	27 July 2016 at 11:30 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Collins J)

Introduction

[1] On 11 June 2015, Mr Rakena was convicted of one charge of aggravated robbery following a trial by jury.[1] Judge Paul sentenced Mr Rakena to four years imprisonment.[2]

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1 Crimes Act 1961, s 235(c). Maximum sentence is 14 years imprisonment.
2 *R v Rakena* [2015] NZDC 16601.

[2] Mr Rakena appeals his conviction on two grounds:

(a) The jury verdict was unreasonable having regard to the evidence.[3]

(b) A miscarriage of justice occurred through the Judge deciding not to poll the jury after delivering its verdict on 11 June 2015.[4]

[3] In the hearing before us, Mr Brookie, counsel for Mr Rakena, advised he did not wish to pursue a third point set out in his submissions, namely that Judge Paul should have discharged the jury on 10 June 2015. We explain this aspect of the case when considering the second ground of appeal.

Background

[4] On 26 February 2014, Mr Ameer and Mr Sahar were working at Bamian Auto Parts, an automobile parts and scrap metal business in Onehunga. At approximately 5.20 pm a man entered the premises carrying a handgun. The offender was described as being a male aged between 19 to 24 years old, about 180 to 185 centimetres tall, of medium build and weighing 75 to 80 kilograms. He was described as having brown skin and spoke with a "Māori accent". Counsel accepted that in general terms Mr Rakena's physical characteristics are similar to those of the description provided by Mr Ameer and Mr Sahar.

[5] Security camera footage from the scene showed the offender was wearing a cap, a bandana over his face, a fluorescent yellow-sleeved top under an orange fluorescent vest, and black track pants. The black track pants had two stripes down the side and a white logo on the upper left side adjacent to the offender's left thigh.

[6] The offender pointed his gun at the victims and demanded money. After taking approximately $300 cash and two cellphones the offender ran from the office and was pursued by Mr Sahar. The offender got into a silver Toyota Altezza. Mr Sahar recorded the number plate of the getaway car as FNC709.

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3 Criminal Procedure Act 2011, s 232(2)(a).
4 Section 232(2)(c).

[7] The police were called. They identified on CCTV footage a vehicle similar to the getaway car heading from the scene of the robbery in the direction of a motorway ramp, which led towards Mangere.

[8] Police then checked the details of the registration number recorded by Mr Sahar. The computer search revealed no vehicle had the registration number FNC709. The police then started to check other combinations by replacing the "F" with the letters A to I. Those checks found that two cars with the registration numbers ENC709 and DNC709 were both silver Toyota Altezzas. The second of those vehicles was registered to a person in Southland.

[9] The silver Toyota Altezza, registration number ENC709, was registered in the name of the mother of Mr Rakena's girlfriend. There is no dispute that the vehicle in question was usually in the possession of Mr Rakena's girlfriend. It was an agreed fact that Mr Rakena had been seen driving that vehicle in Onehunga earlier on the day of the robbery. The police located the vehicle at Mr Rakena's address in Mangere on 28 February 2014. The police also found at Mr Rakena's address a pair of black track pants with two white stripes down the side and a white logo on the left thigh. The pants were found in a recycling bin at the rear of Mr Rakena's address. The pants contained DNA from Mr Rakena and at least two other people.

[10] Mr Rakena was interviewed by the police. He explained that on the morning of 26 February 2014 he had taken his girlfriend to a job interview, returned home in her car and then worked for his father pouring concrete in New Lynn in the afternoon. He said he returned home with his father.

[11] Ms South, Mr Rakena's girlfriend, confirmed Mr Rakena had driven her in the Toyota Altezza to a job interview and that in the afternoon they had returned home and gone to sleep. At one point Ms South woke and realised Mr Rakena was not there and had taken the car. According to Ms South Mr Rakena returned home with the car when "it had just started to get dark".

[12] Mr Rakena's father gave evidence and said Mr Rakena worked with him from 1.30 pm to just after 6.00 pm pouring concrete in New Lynn on 26 February 2014.

First ground of appeal

[13] Mr Brookie argued the jury could not have been satisfied beyond reasonable doubt Mr Rakena was the offender. Mr Brookie endeavoured to impeach the strength of the Crown's evidence concerning the car registration number, the track pants, the timing of Mr Rakena's return to his home and the other circumstantial evidence relied upon by the Crown.

[14] The law governing the test for determining whether or not a verdict is unreasonable has been explained by the Supreme Court in the following way:[5]

> A verdict will be unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the accused was guilty.

[15] Having carefully reviewed the evidence, we are satisfied there was sufficient evidence for the jury to have been satisfied beyond reasonable doubt Mr Rakena was the offender. In particular, the evidence relating to the registration number of the getaway car, the location of the pair of track pants at Mr Rakena's home that corresponded with the track pants worn by the offender and the evidence that Mr Rakena was driving a car that matched the getaway vehicle in the vicinity of the robbery were all powerful pieces of circumstantial evidence that properly convinced the jury of Mr Rakena's guilt.

[16] Mr Brookie's criticisms of the evidence concerning the registration number of the car were not persuasive. Mr Sahar was clear in his evidence that he recognised the make of the getaway vehicle. We accept Mr Sahar made errors when he recorded the registration number of the vehicle and when he said that it had tinted windows, but these were minor errors which did not detract from the overall force of his evidence. No further inquiries were required of the police about the identity of

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5 *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37 at [5].

the getaway vehicle once the vehicle was linked to Mr Rakena through his girlfriend and through the fact that he had been seen driving a similar vehicle earlier that day.

Second ground of appeal

[17] The jury retired to consider its verdict at 12.43 pm on 10 June 2015. At 3.28 pm the jury returned to the courtroom. Judge Paul had been led to believe the jury had a verdict. When the Registrar asked the foreman whether the jury had reached a unanimous verdict Judge Paul noticed one member of the jury shaking his head thereby indicating that the jury were not unanimous. Judge Paul decided not to accept any verdict and instructed the jury to return to the jury room while he conferred with counsel.

[18] At 4.08 pm Judge Paul asked the jury to return to the courtroom whereupon he "polled" each member of the jury. We use the term "polled" although what occurred was not a "polling" in the conventional sense of the term, which involves individual jurors being asked after the verdict is announced if they agree with the verdict. The process followed by Judge Paul resulted in three members of the jury saying that they did not at that stage agree with the conclusions reached by the other members of the jury. Judge Paul then asked the jury to return to the jury room.

[19] In his oral submissions Mr Brookie questioned the appropriateness of Judge Paul polling the jury before their verdict was delivered. It is sufficient for us to record we also have reservations about the appropriateness of a jury being polled before their verdict is delivered. Our concern is that polling the jury in this case before verdict had the unfortunate consequence of disclosing a confidential aspect of the jury's deliberations. The polling revealed that at that time the jury were divided 9 to 3. This is information that should not have been disclosed.[6]

[20] After the jury were polled defence counsel urged Judge Paul to discharge the jury. Judge Paul declined to do so. In his written submissions Mr Brookie said Judge Paul was required to discharge the jury after he had polled them. We understood this submission to be based on the proposition that the jury were

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6 *R v Hookway* [2007] NZCA 567 at [180].

effectively functus officio after they were polled.[7] This aspect of the appeal was not pursued however when Mr Brookie appreciated the polling took place before the jury had given its verdict and that it was not possible to argue a miscarriage of justice arose when Judge Paul required the jury to continue to deliberate.

[21] At 4.19 pm Judge Paul gave the jury a standard "*Papadopoulos* direction".

[22] Although the decision to give a *Papadopoulos* direction was not pursued as part of the second ground of appeal, Mr Brookie was also concerned Judge Paul decided to give a *Papadopoulos* direction on the afternoon of 10 June 2015. We also have reservations about Judge Paul giving the jury a *Papadopoulos* direction when the jury had deliberated for approximately three and a half hours. It may have been better to have allowed the jury to continue to deliberate for at least four hours and then given the jury a majority verdict direction before contemplating a *Papadopoulos* direction.

[23] The Supreme Court has explained that trial judges have a degree of latitude in determining when a *Papadopoulos* direction should be given. In *Hastie v R* the Supreme Court said:[8]

> [13] How a trial judge reacts to an indication that a jury is having difficulty in reaching unanimity is a question to which no standard response can be made. The trial judge must assess the matter carefully. He or she will need to take into account the number of the accused, the number of charges, the complexity of the issues and the length of time for which the jury has been deliberating. The judge may also have an impression of how the jury is functioning. The trial judge is uniquely placed to weigh all those considerations when deciding how to react to an indication of difficulty in achieving unanimity or indeed deadlock.
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> [14] Without limiting that discretion, we observe that, generally speaking, we think it desirable to keep an informational direction about the mechanics and requirements of majority verdicts separate from any *Papadopoulos* direction or its equivalent. It would be rare, we think, for a judge to give a *Papadopoulos* direction prior to giving a majority verdict direction. Probably the only occasion when that might be appropriate is when the indication of deadlock arises before the jury has been deliberating for four hours, at which point a jury cannot be discharged.

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7 Citing *R v Miki* (2004) 21 CRNZ 183 (CA).

8 *Hastie v R* [2012] NZSC 58, [2013] 1 NZLR 297 (footnote omitted).

[24] Despite our reservations about the giving of the *Papadopoulos* direction we are satisfied that no miscarriage of justice resulted. That is because the jury had ample time thereafter to reach a verdict which, as we shortly explain, was not given until the afternoon of the following day. There was no evidence to suggest the jury was placed under any improper pressure by the giving of the *Papadopoulos* direction. We now set out in more detail the events that occurred after the *Papadopoulos* direction was given.

[25] The jury retired to the jury room at 4.23 pm and concluded their deliberations for the day at 5.04 pm.

[26] The jury resumed their deliberations on the morning of 11 June 2015. At a little after 2.00 pm, Judge Paul received a request from defence counsel to again discharge the jury. Judge Paul declined to do so.

[27] At approximately 2.20 pm Judge Paul received a note from the jury saying:

> We have reached a unanimous verdict. If we deliver a verdict will we have to individually stand up and acknowledge the verdict? One member of the jury does not feel comfortable standing & verbally confirming the verdict in the courtroom.

[28] Judge Paul sent a note to the jury saying he would accept the jury's verdict in the usual way and not poll them unless it was necessary to do so.

[29] The jury returned to the courtroom at approximately 2.35 pm. Judge Paul explained what then happened in a minute:

> [2] Madam Registrar then enquired whether the jury unanimously agreed on the verdict. I watched with care the reaction of all jurors as Mr Foreperson answered, "Yes." There was nothing that I could see from any of the 12 jurors in any way indicating dissent by any action of theirs.
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> [3] Mr Foreperson was then asked whether the verdict was guilty or not guilty and he informed the Court it was guilty. At no time did any of the jury members, while they were under my observation, indicate by words or actions that they were in disagreement with that verdict.

[30] The gravamen of the second ground of appeal was that Judge Paul should have polled the jury after the verdict was delivered on 11 June 2015 and that his failure to do so constituted a miscarriage of justice.

[31] This submission was advanced on the basis that the events of 10 June 2015 and the jury's note saying one member of the jury did not wish to stand and verbally confirm the verdict required Judge Paul to poll the jury after the verdict was delivered.

[32] Polling a jury is not a normal practice in New Zealand. It is an option that should be rarely exercised and only if the trial judge has reason to doubt the jury's unanimity.[9]

[33] In the present case, Judge Paul was alert to ensuring the jury was unanimous. He was justified in being confident the jury was unanimous because he had a written assurance from the foreman that the jury were unanimous in their verdict. He also had the assurance of the foreman announcing in open court that the verdict was the unanimous verdict of the jury.

[34] Judge Paul also carefully scrutinised the jury during and after the verdict was taken. There was no indication from any member of the jury that they disagreed with the verdict that was announced.

[35] In these circumstances we are satisfied Judge Paul was not required to poll the jury. No miscarriage of justice occurred by reason of his failure to do so.

Conclusion

[36] The appeal against conviction is dismissed.

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9 *R v Papadopoulos (No 2)* [1979] 1 NZLR 629 (CA).

Solicitors:
Crown Solicitor, Auckland for Respondent