IN THE COURT OF APPEAL OF NEW ZEALAND

CA260/03
CA264/03

THE QUEEN

v

MATTHEW NORMAN PAYNE
JOHN ARTHUR BURRETT

Hearing: 2 December 2003

Coram: Tipping J
Panckhurst J
Salmon J

Appearances: N J Sainsbury and M W Snape for Payne
R M Lithgow for Burrett
K G Stone and G J Burston for Crown

Judgment: 12 February 2004

JUDGMENT OF THE COURT DELIVERED BY SALMON J

---

[1] The appellants were convicted after trial before a jury on one count of conspiring to unlawfully detain a person without his consent with intent to cause him to be confined and one count of possession of a pistol otherwise than for some lawful, proper and sufficient purpose. They were acquitted on a charge of conspiring to unlawfully detain a person without his consent with intent to hold him for ransom.

[2] Mr Burrett was sentenced to seven years imprisonment, with a minimum non-parole period of two-thirds. Mr Payne was sentenced to five years

imprisonment, again with a non-parole period of two-thirds of the sentence. Both have appealed against conviction and sentence.

Background

[3] On the evening of 22 July 2002 the appellant Burrett and his nephew, the appellant Payne, were arrested as they entered the Wellington Botanic Garden in Glenmore Street. They were found to be in possession of a bag containing a sawn off shot gun and live ammunition, along with overalls, balaclavas and other items capable of being used for disguise and for the commission of a crime. They had been followed by the police from Upper Hutt, both on that night and on three previous occasions when they had visited the gardens.

[4] The appellants' vehicle had been fitted with an interception device pursuant to a warrant granted by the High Court. Conversations between the appellants and Mr Burrett's stepson, Simon Philpott, were recorded. Philpott, who was intended to be the get-away driver, pleaded guilty prior to the trial of the appellants. The conversations indicated that Mr Trotter, a Wellington businessman, who lived with his family in a street at the top of the Botanic Gardens was to be kidnapped. Earlier, as a result of information given to them, the police had found a large plywood box big enough to hold a man, buried in the ground in a bush reserve north of Upper Hutt. The box had a trap door, a supply of foods and words written on the inside wall, "Welcome to your new home. We will not hurt you. Max. stay 6 days."

[5] As a result of police inquiries the appellants were connected with the box, or the bunker as it was called, during the trial. The appellants did not deny that they had buried the box, nor was there any dispute as to what was said on the tape recorded intercepted conversation. The defence was that the appellants were playing a game and lacked any criminal intent.

[6] At the trial, which lasted for seven weeks, Mr Burrett represented himself. Mr Payne was represented by Mr Sainsbury. Both appellants had originally been charged with attempted kidnapping, but were discharged by the trial Judge before

trial because he was not satisfied that what the appellants had done, at the time the police apprehended them, went far enough to amount to a full attempt.

[7] Mr Burrett had worked as a barrister in England. In this country he worked first for a Wellington law firm and then as a barrister sole. His legal career seems to have come to a halt in 1999 and from that time he worked on a nine lot subdivision of land which had been purchased in his wife's name.

[8] The appellant, Payne, and Mrs Burrett's son, Simon Philpott, lived with Mr and Mrs Burrett and all worked to a greater or lesser degree on the subdivision and on a house which was being built on the subdivision for on sale.

[9] Both appellants maintained in their defence that they liked to engage in adventurous activities and that in particular they often had very detailed discussions about adventures which they proposed to undertake without any real intention of doing so. Sometimes, as part of those discussions they game-played by making preparations for the particular activity. Both maintained that the kidnapping plan was just such a game.

[10] The appellants' claimed the box or bunker was originally built as a result of a discussion during which Burrett said that, as a junior British Army Officer, stationed in Germany, he had lived for short periods in a pre-fabricated plywood box buried in the ground. The appellants said that from that came the idea to construct such a box and bury it, with the intention that Payne would live in it for a period.

[11] When they started on the kidnap game the box became incorporated in that.

[12] The crucial issue at the trial was whether the Crown could prove beyond reasonable doubt that what the appellants had done was not a game, but was a conspiracy to commit the crime of kidnapping.

[13] The central issue in the appeal against conviction was whether the trial process fairly left that critical question to the jury to decide. In particular the issue raised by the appellants was whether the trial Judge correctly and fairly summed up

the case, directed as to the applicable law and stayed out of the decision making process.

[14] The submission on behalf of the appellants was that the summing up of the trial Judge was wrong, unfair and created a fundamental injustice.

The appeal against conviction

[15] Mr Lithgow, for Mr Burrett, said that his appeal had two critical components. First, he submitted that the Judge took the side of the Crown, particularly in summing up and in sentencing, and during Mr Burrett's evidence. He criticised the direction on the effect of the accused giving evidence. He submitted that directions, if put wrongly, can affect the whole summing up in such a way as to cause a miscarriage of justice.

[16] He submitted that the fact that the jury acquitted the appellants on the charge of conspiring to unlawfully detain for ransom, meant that they must have been close to accepting the defence that the appellants were engaged in a game. He submitted that if the directions had been correct and that if the Judge had not put his weight behind the Crown case, the result may well have been different.

[17] He also submitted that the Judge had, through his questions, thrown doubt on aspects of Mr Burrett's evidence which had not been challenged by the Crown. Mr Lithgow's criticism of the Judge in relation to questions asked related particularly to this passage in the concluding stages of Mr Burrett's evidence:

> Prob as an aside who ws the most famous GOC of 3 Div … I don't know our Gen Officer was Major Gen Young and he was our boss at the time.
>
> I think most of us wd no Bernard Law Montgomery ….. he wd hv commanded the whole army, cert from soon after D day h wd have commanded
>
> Div officers wd be expected to know he led the div back to Dunkirk wdnt they – that's an aside.

[18] There was also criticism of a series of questions which examined the subdivision being undertaken by the Burretts and the financial implications of that, particularly insofar as Mr Burrett's personal worth was concerned.

[19] As to the summing up, there was specific criticism of the following direction:

> In this case both the accused have given evidence. I emphasise in each case that his giving evidence does not alter the onus of proof. You may accept his evidence on the essential ingredients. He may have created a reasonable doubt. If so, you will find him not guilty. You may reject his evidence on the essential ingredients or you may be unsure whether to accept or reject his evidence. In either case you still examine all the evidence to decide whether the Crown has proved all the essential ingredients beyond reasonable doubt.

[20] As Mr Lithgow submitted, a very similar direction was the subject of criticism in this Court in *R v McI* [1998] 1 NZLR 696. The Crown accepted in that case, and in this, that there is a flaw in that direction, in relation to what the jury should do if they were unsure whether to accept or reject the evidence of an accused person. As the Court said in *McI*:

> Logically, if the jury were unsure whether to accept or reject the accused's evidence, this must, as the Judge said in his first proposition, have left them with a reasonable doubt leading to a not guilty verdict. The idea of the jury nevertheless going on to consider whether all the evidence proved guilty beyond reasonable doubt cannot logically follow. (page 708)

[21] The Court went on to say that overall they did not consider the jury to have been misled because the overall impression of the summing up sufficiently advised the jury of the correct approach.

[22] We take the same view in this case and like the Court in *McI* we emphasise that such a direction should follow the logically correct form:

> … that is, if you accept the accused's evidence on the key issues, you should acquit; if you consider there is a reasonable possibility the accused's evidence on the key issues might be true, you should acquit; if you reject the accused's evidence on the key issues, you must not automatically conclude he is guilty, you must still examine all the evidence which you do accept and decide whether it establishes the accused's guilty beyond reasonable doubt. (page 708)

[23] We are satisfied in this case that looking at the whole of the summing up the jury was sufficiently advised of the correct approach. The Judge made the point

several times, that if the jury had a reasonable doubt as to whether or not to accept the accused's account they must acquit. For example, at paragraph 141 the Judge said:

> At the end of the day in this case there is simply no getting away from whether you believe the accused's explanation as to their intention or whether you have a reasonable doubt on that score.

And at paragraph 150 he said:

> … in this case it is a question of whether there is any reasonable doubt which has been raised by one or both of these accused?

And, at paragraph 157:

> It is for you . Remember the golden rule: if sure, convict. The Crown must displace any reasonable doubts. If you entertain a reasonable doubt: acquit.

[24] We consider that the combination of these directions dispels any incorrect impression which may have been given by the original direction.

[25] The final area of criticism related to the summing up generally. Mr Lithgow submitted that the summing up was structured in such a way as to damage the defence case. He referred to paragraph 152 where he submitted that the Judge described Mr Burrett's evidence in a manner which was not correct and suggested that he was perhaps a blow hard, "and conveniently so for the purposes of this case". He criticised two passages where he said the Judge had invented an obligation to provide a right of reply on behalf of the Crown.

[26] There was criticism too of the direction the Judge gave concerning questions asked of witnesses in cross-examination. The Judge directed the jury that the questions should be disregarded unless they were adopted by the witness, in which case they became part of the evidence. Mr Lithgow submitted that this direction was incorrect because he said questions test the evidence and the witness. While that is no doubt so, we consider that the Judge's direction was perfectly correct in the context in which it appeared. Questions are not evidence and in a lengthy trial where there is much cross-examination it will often be appropriate for the Judge to emphasise this point.

[27] Mr Lithgow was also critical of what he described as an obligation invented by the Judge to provide a right of reply on behalf of the Crown. He referred to two passages of the summing up where the Judge was putting the defence case to the jury and referred to a contrary argument or explanation which he prefaced by indicating that the Crown had no right of reply. In our view the Judge was not "inventing an obligation". He was just following the course often followed in a summing up, of ensuring that the jury had appropriate assistance on both sides of a particular issue.

[28] Finally, Mr Lithgow submitted that the Judge had failed to put the defence case adequately and fairly. We will have something more to say about this later, but we observe that the defence case was a very simple one. There was no dispute as to the primary facts. The only dispute was as to intent. The defence proposition that it was all a game and that there was no intention to commit a crime, was put by the Judge to the jury very clearly on more than one occasion.

[29] Mr Lithgow's submissions were supported by Mr Sainsbury. He submitted that because the defences stood or fell together undermining one, undermines the other. As to the Judge's questioning of Mr Burrett, he submitted that that came at the "working end" of the case, close to the jury's decision. He submitted that the Judge's implicit attack on Burrett's army experience, his questioning in respect of financial matters and the general tone of the summing up, effectively told the jury that he had a view on the matter. He submitted that the Judge was not willing to trust the good sense of the jury or the prosecutor.

[30] Mr Sainsbury was critical of a passage in the summing up where he said that his submissions had been inaccurately summarised by the Judge. While this may be so, we do not consider that that has led to any misdirection in relation to any essential issue.

[31] The submissions made on behalf of the appellants which have occasioned the Court the greatest concern, are those relating to the questioning by the Judge in the passage set out above and the submissions relating to the general tone of the summing up. We are not concerned about the questioning relating to financial matters. We consider that was properly a matter of clarification for the jury.

[32] The questioning relating to Bernard Montgomery was, however, quite unnecessary, but we do not consider that in the context of the case it is likely to have had any significant impact on the jury. Mr Sainsbury described that questioning as coming at the working end of the case, close to the jury's decision. In fact, it was a week prior to the summing up that these questions were asked. The Judge should not have asked the questions, but in the context of the case as a whole we do not consider any real risk of a miscarriage of justice arose.

[33] Parts of the summing up are more problematic. The relevant law relating to the content of summings up is appropriately summarised in *R v Keremete* (CA247/03, 23 October 2003) at paragraphs 18 and 19:

> [18] The other ground of appeal against conviction was that the Judge's summary of the defence case was inadequate and dismissive. 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 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.

[34] There are statements towards the end of that part of the summing up which relates to the kidnapping which give us concern; for example the question as to whether Mr Burrett is "a blow hard and conveniently so for the purposes of this case" and the suggestion to the jury that they should ask themselves:

> Were the eccentricities Mr Burrett put on display in this Court themselves manipulatively advanced as a display to show how he is capable of doing silly things?

[35] Then there is the question as to whether that portion of the summing up is adequately balanced. We have read and re-read the summing up with these issues in mind. At the end of the day we have concluded that it does not go beyond the bounds of what is permissible. The Judge would have been better to have used less colourful terms, but when the passages complained of are read in context, it is clear that what the Judge is doing is emphasising to the jury the importance of making an evaluation of the appellants. Their credibility was, as counsel have pointed out, crucial. So it was important, as the Judge said, that the jury ask themselves the hard questions. It was important that the jury look at the way these men behaved both in the period leading up to their arrest and during the trial.

[36] It was important for the jury to determine the question of whether Mr Burrett in particular, was behaving manipulatively in the manner in which he conducted his case. It was essential that the jury reach conclusions on these issues because only by doing so could they reach a view as to whether this was a game, as the appellants contended, or whether what they were doing was in fact criminal in nature.

[37] It should be noted that the Judge, while posing the questions, made it clear that it was for the jury to make the decisions, and it is important to give adequate weight to the final passage of this part of the summing up. In that the Judge said:

> On the other side there is, of course, the absolute insistence of both accused that this was all just a silly game. And they say, what more can we say, other than that what happened is consistent with our past behaviour, and the degree of detail and realism they went to in this game. It is for you. Remember the golden rule: if sure convict. The Crown must displace any reasonable doubts. If you entertain a reasonable doubt acquit.

[38] We have concluded that the that in the end the ultimate and only issue in the case was isolated for determination by the jury and that the Judge provided an adequate balance to those parts of the summing up where he undoubtedly expressed himself in strong terms. The fact is that the Crown case was a strong one. The Judge was entitled to reflect that in his summing up.

[39] The appeals against conviction are dismissed.

The appeal against sentence

[40] The Judge did not call for a pre-sentence report. He sentenced on the Wednesday following the jury's verdict, which had been delivered the previous Friday. In his sentencing remarks the Judge outlined the facts, and controversially, given the acquittal on this charge, he made some point of the fact that the co-offender, Philpott had acknowledged that a ransom demand was to be made. He noted the extraordinary lengths to which Mr Burrett had gone in cross-examination. He recorded that the reason why he had not called for a probation report was because each appellant had led a great deal of evidence as to their personal circumstances at trial and because a psychiatric examination had been made of Mr Burrett in the course of the trial. The Judge concluded that this was offending of the gravest kind. He sentenced Mr Burrett to the maximum term of seven years imprisonment on the conspiracy charge and imposed a two year concurrent sentence on the firearms charge. He required him to serve a minimum of two-thirds of that sentence. He discounted the sentence imposed on Mr Payne to take account of his youth and the influence of Mr Burrett. He sentenced him to five years imprisonment on the conspiracy charge and a two year concurrent sentence on the firearms charge. Again, he imposed a minimum term of two-thirds of the sentence.

[41] It was submitted on behalf of both appellants that the sentences imposed upon them were manifestly excessive.

[42] Mr Sainsbury submitted that the Judge failed to sufficiently take into account mitigating factors and that the sentence was excessive when viewed against sentences for similar types of offending. He noted that the Judge referred to the influence of Mr Burrett, the unlikelihood of Payne re-offending and the fact that he was a first offender. He submitted that if appropriate weight had been given to the mitigating factors, the correct sentencing range would have been four to four and a half years, if Mr Burrett's sentence were to remain at seven years. If the Burrett sentence was to be reduced then he submitted Mr Payne's sentence should be correspondingly reduced as well.

[43] He referred to decisions of this and other Courts in kidnapping cases. We do not find those cases particularly helpful because they all relate to actual kidnapping, rather than to conspiracies. We do note, however, the substantial penalties imposed in several of these cases. Sentences of between 10 and 12 years are not unusual.

[44] Mr Lithgow adopted Mr Sainsbury's submissions. He submitted too that the Judge should not have referred to Mr Philpott's conviction or statement because the jury acquitted on the charge of abduction for a ransom. He submitted that there was the perception that the ransom element coloured the Judge's thinking in the sentence he imposed. He submitted that it was not appropriate on the basis of the jury's verdict to treat this case as being in the worst category of its kind, and that putting a person in a box as part of a game is not as serious as kidnapping for ransom or for some other criminal purpose.

[45] We refer to, and adopt, the approach of this Court to sentencing in conspiracy cases set out in *R v Henry* [1997] 1 NZLR 150 at 152.

> In assessing culpability for the purposes of sentencing, the nature and scope of the conspiracy and the extent to which the offender participated and persisted in it must be relevant considerations. In *Savvas v R* (1995) 183 CLR 1, 6 and 7, the High Court of Australia accepted the view taken in *R v Kane* [1975] VR 658, 661 that "any considerations which advert to the content and duration and reality of the conspiracy are proper to be taken into account".

[46] We are not persuaded by the arguments put forward on behalf of the appellants. We do not think that the sentence imposed was influenced by Mr Philpott's admissions. We consider that the Judge was entitled to regard what happened in this case as being at the most serious end of offending of this nature. The presence of the sawn off shotgun and ammunition for it, is a serious aggravating factor, as is a proposal to detain someone in an underground bunker. The traumatic effect of such a detention had it been carried out, is obvious.

[47] The Judge's starting point for Mr Payne was also seven years. He gave a discount of two years to reflect the mitigating factors to which he referred. In our view this was adequate.

[48] As to the non parole period, Mr Sainsbury submitted that the circumstances of the offending were not sufficiently serious so as to take the offence out of the ordinary range of offending of the particular king. He referred to the decisions of this Court in *R v Brown* (2002) 19 CRNZ 534 and *R v Boyd* (CA89/03, 24 June 2003) and to this statement at paragraph 21 of *R v Moon* (CA366/02, 27 February 2003):

> Adopting what we said in *Brown* a minimum period of non parole must be intended for cases of such seriousness that the Court considers that release after one-third of the sentence has been served would represent insufficient denunciation, punishment and deterrence in all the circumstances. The focus is on the circumstances of the offence. The provision is intended to apply where culpability is high.

[49] He submitted that it is difficult to see how s86 of the Sentencing Act can ever apply to a conspiracy charge.

[50] Mr Lithgow submitted that as it turned out the principal victims in this case are the appellants and that the Judge did not pay sufficient regard to personal circumstances such as the sudden end to Mr Burrett's professional career. We do not regard this submission as being of any particular assistance in relation to the fixing of a minimum period.

[51] We consider that the passage cited from *R v Moon* is apposite. The minimum sentence would indeed represent insufficient denunciation, punishment or deterrence in this case. We do not consider that the Judge was wrong in determining that two-thirds of the sentence should be served.

[52] Accordingly, the appeals against sentence are also dismissed.

Solicitors:
Crown Solicitors Office, Wellington