IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA23/2024
[2024] NZCA 636

BETWEEN	GLENN NORRIE FERGUSON Appellant
AND	THE KING Respondent

Hearing: 4 November 2024

Court: Katz, Dunningham and Powell JJ

Counsel: R B Keam for the Appellant
J G Fenton for the Respondent

Judgment: 4 December 2024 at 9.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Powell J)

[1] Glenn Ferguson appeals his conviction on one charge of injuring with intent to injure following a jury trial in the District Court.[1]

[2] Mr Ferguson's sole ground of appeal is that his trial counsel erred during cross-examination of the complainant, thereby causing a miscarriage of justice.

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[1] Crimes Act 1961, s 189(2). Maximum penalty five years' imprisonment.

[3] The Crown accepts that trial counsel erred but submits there is no real risk that the error changed the outcome of the trial or otherwise resulted in a miscarriage of justice.

[4] The issue in this appeal is whether the acknowledged error has amounted to a miscarriage of justice for the purposes of s 232(2)(c) of the Criminal Procedure Act 2011 (CPA). Section 232(4) of the CPA defines miscarriage of justice as meaning any error, irregularity or occurrence in, 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.

What happened?

[5] There was no dispute an altercation took place at the Taumarumaru Reserve in Coopers Beach on 24 May 2022 while Mr Ferguson and the complainant were both walking their dogs. Mr Ferguson accepted that he injured the complainant. The issue at trial was whether he acted in self-defence.

[6] The altercation at issue followed a number of earlier incidents between the pair after Mr Ferguson became convinced the complainant had kicked his pregnant dog, an allegation the complainant denied.

[7] The complainant's evidence was that after a verbal exchange he started using his phone to video Mr Ferguson. Mr Ferguson had then advanced on him, punched him in the face and knocked him to the ground, whereupon Mr Ferguson kicked the complainant in the head and continued to hit him while he was on the ground, only stopping his assault when the complainant grabbed Mr Ferguson's hair. The complainant's evidence was that he received a cut to the head caused by Mr Ferguson kicking his head and this required a single stitch to close.

[8] Mr Ferguson gave evidence that, after the complainant started to verbally abuse him, he was going to walk away but changed his mind. He turned around and advanced on the complainant to "get up in the [his] face" and verbally abused the complainant. As he did so he said the complainant lunged at him and grabbed

Mr Ferguson's hair before he "faceplanted himself" to the ground, pulling Mr Ferguson with him. Mr Ferguson said the complainant "smacked his nose on the ground". Mr Ferguson described being over the top of the complainant "holding him down to the ground, … trying to get [the complainant] to let go of [his] hair".

[9] Mr Ferguson then said he told the complainant "let go of my hair and I'll let you up". He said he then let the complainant stand up because he thought the complainant might let go of his hair. He stood up and let the complainant stand up but, as the complainant was still pulling his hair, Mr Ferguson lifted his cell phone and hit the complainant on the side of the head with it. Eventually the complainant let go of his hair. Mr Ferguson's evidence was that the complainant's head injury was caused by Mr Ferguson hitting him on the head with his phone.

The error

[10] Mr Ferguson's sole ground of appeal is that his trial counsel erred during her cross-examination of the complainant by mistakenly putting a proposition to him that he had previously tried to hit Mr Ferguson with his car.

[11] The exchange occurred after the complainant introduced a fresh allegation against Mr Ferguson in the course of his evidence in chief that Mr Ferguson had on an earlier occasion tried to hit the complainant with his car.

[12] In cross-examination, Mr Ferguson's lawyer dealt with that new allegation as follows:

> Q. You said that on a previous occasion my client [tried] to hit you with his car.
>
> A. That's correct.
>
> Q. Wasn't it the other way around, didn't you ring the police and say that he'd, wasn't there an accusation by the police that you'd – sorry, I'll rephrase that. Wasn't there an accusation by my client to the police that you tried to hit him with your car?
>
> A. I'm blind, I haven't driven a car in 20/30 years, I wasn't driving, I think you're mistaken there.
>
> Q. I'm just asking you if you know of a complaint by him about your driving your vehicle trying to hit him.

A. No.

Q. What's funny [complainant]?

A. The funny thing is I'm blind, I haven't driven in 20 years.

Q. Is that what's funny about this?

A. That's what's funny about the question.

[13] In his affidavit on appeal, Mr Ferguson states that he "briefly discussed the car allegation" with his trial counsel. He instructed her that he denied the allegation, but that they did not discuss the matter in any detail. He stated he certainly never said anything to his trial counsel about the complainant trying to hit him with his car, and he stated that his counsel was aware from the Police disclosure that the complainant was vision impaired. He considered that this cross-examination painted him as "a liar and a false accuser". He believed that even though he gave evidence at trial, the unfair prejudice caused against him was irreparable.

[14] Mr Ferguson's trial counsel provided an affidavit to the Court in which she acknowledges she made a mistake:

> I recall Mr Ferguson instructing me about an allegation involving one party trying to hit the other party with a car. I cannot recall exactly when Mr Ferguson told me this but I believe it was after the complainant had started giving evidence. I recall it was a verbal instruction.
>
> I put the allegation to the victim during cross-examination but clearly, I did so incorrectly. I accept that Mr Ferguson is correct in that regard.
>
> I have reviewed the evidence while preparing this affidavit and I see the victim's wife said in her formal written statement the victim had five per cent peripheral vision. That did not register with me when I received Mr Ferguson's instructions about the incident involving the car; I did not query the instruction I thought I was receiving.

Submissions for Mr Ferguson

[15] On behalf of Mr Ferguson, Mr Keam submitted that the acknowledged error was serious: it "irredeemably damaged [Mr Ferguson's] credibility before the Crown had even finished its case". Indeed, Mr Keam went so far as to submit the "impact of the error was such that [Mr Ferguson's] credibility was destroyed."

[16] In Mr Keam's submission, this was a case which hinged entirely on the credibility of the two parties. He argued that the video taken by the complainant did not provide enough evidence to prove which party initiated the interaction beyond a reasonable doubt: there were no other witnesses or any other external evidence. Instead, the nature of the errant question from counsel was such that it:

(a) wrongfully enhanced the credibility of the complainant and, by implication, impinged on the credibility of Mr Ferguson. The complainant's wife's evidence regarding his limited vision further enhanced the complainant's credibility;

(b) suggested to the jury that Mr Ferguson had lied to his counsel and wrongfully accused the complainant of attempting to hit him with his car; and

(c) accordingly, Mr Keam submitted that had the error not occurred, it is unlikely that Mr Ferguson would have been found guilty.

[17] Mr Keam further noted that this error was not corrected throughout the trial, either by counsel in closing addresses or by the trial judge in summing up. In Mr Keam's submission, in reliance on *Haunui v R* and *Sungsuwan v R,* there is a reasonable possibility that a not guilty (or a more favourable verdict) might have been delivered if nothing had gone wrong, and therefore there was a real, as opposed to a speculative, risk of an unsafe verdict caused by the error made by trial counsel.[2] Accordingly, Mr Keam submitted that the conviction should be quashed and a new trial ordered.

Discussion

[18] We accept at the outset that the proper approach to s 232(4)(a) is as set out by the Supreme Court in *Haunui v R* and:[3]

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2 *Haunui v R* [2020] NZSC 153, [2021] 1 NZLR 189 at [67]; and *Sungsuwan v R* [2005] NZSC 57, [2006] 1 NZLR 730 at [110].

3 *Haunui v R*, above n 2, at [67] (footnotes omitted).

> … "requires consideration of whether there is a reasonable possibility another verdict would have been reached". If the answer to that question is "no", that is the end of the matter and the appeal will be dismissed. If the answer to that question is "yes", … the appeal court then asks whether it is sure of guilt. If the answer is "no", the appeal will be allowed. If the answer is "yes", the court determines the error did not in fact create a real risk that the outcome was affected and the appeal will be dismissed.

[19] Likewise, it is clear that a:[4]

> … real risk arises if there is a reasonable possibility that a not guilty (or a more favourable verdict) might have been delivered if nothing had gone wrong. It is, of course, trite law that an appellant does not have to establish a miscarriage in the sense that the verdict actually is unsafe. The presence of a real risk that this is so will suffice.

[20] As Mr Keam submitted, in this case Mr Ferguson must establish a real, as opposed to a speculative, risk an unsafe verdict resulted from the admitted error made by trial counsel.

[21] In this case, having considered the nature of the error at issue, we do not accept that it gives rise to a miscarriage of justice.

[22] On the contrary, we accept the submissions made by Ms Fenton, on behalf of the Crown, that:

(a) The mistake was minor and involved a peripheral matter: neither side relied on it or mentioned it at any other point in the trial.

(b) Mr Ferguson's self-defence case was implausible and the evidence for the Crown was strong: it was these two factors, rather than trial counsel's error, that lead to Mr Ferguson's conviction.

[23] As noted, the error was an attempted response to a new allegation raised by the complainant in the course of his evidence. The new allegation itself had no direct bearing on the altercation at issue and, in particular, who was assaulting who. Instead, it formed part of the background to the incident, and was not mentioned again following the cross-examination at issue.

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4 *Sungsuwan v R*, above n 3, at [110] (footnote omitted).

[24] Furthermore, the exchange in cross-examination was brief. It consisted of only two substantive questions and counsel appropriately did not pursue the issue when the responses received from the complainant made it clear there was no basis for continuing that line of questions. Importantly, when looked at objectively, the answers given by the complainant did not, on their face, suggest anything other than that trial counsel for Mr Ferguson had made an error, rather than in any way impugning the credibility of Mr Ferguson himself.

[25] It was certainly not treated as such by trial counsel for the Crown who did not attempt to cross-examine Mr Ferguson on either the complainant's own additional allegation or the questions asked by his counsel. The overall lack of importance of the exchange was further emphasised by the fact that neither counsel referred to the issue in their closing addresses to the jury, nor, appropriately, was it referred to by the trial judge in summing up given nothing turned on it. Instead, there can be no doubt that, other than the exchange in issue, Mr Ferguson's counsel appropriately put Mr Ferguson's case to the jury both in questioning the Crown witnesses, leading Mr Ferguson's evidence and in her closing address to the jury.

[26] We also accept it would not have been tactically sensible for trial counsel to revisit her error, either while Mr Ferguson was giving evidence or in her closing address. Any attempt to correct the error would only serve to draw attention to a moment the jury had most likely ignored or overlooked.

[27] In any event, it does not appear Mr Ferguson made his trial counsel aware of her error during the trial — he stated in his affidavit that it was not until a few days after the trial that he telephoned his counsel to confront her about the cross-examination. He clearly was not concerned enough about the error that he felt the need during the trial to instruct his counsel to correct it, or even to make her aware that he felt such an error had occurred. In those circumstances, she can hardly be criticised for failing to correct the error during trial.

[28] With regard to Mr Ferguson's claim of self-defence, it is clear, as Ms Fenton submitted, that Mr Ferguson's account was both inherently and anatomically implausible, given that it involved the complainant being seemingly able to grasp and

hold on to Mr Ferguson's hair while falling face-first to the ground, and continuing to hold on to Mr Ferguson's hair despite lying face down on the ground.

[29] In contrast, the complainant's account of being punched and knocked backwards onto the ground was far more plausible and corroborated by:

(a) the video taken by the complainant which showed Mr Ferguson initially walking away before turning around and advancing quickly and aggressively towards the complainant;

(b) Mr Ferguson's evidence that he:

(i) had on previous occasions "got up in [the complainant's] face" and verbally abused him and that behaviour had been the subject of earlier complaints by the complainant to the Police;

(ii) on this occasion deliberately turned back to confront the complainant so as to get "up in [the complainant's] face" and verbally abused the complainant; and

(iii) did indeed hit the complainant on the head (albeit with his cell phone) and inflicted the injuries on the complainant; and

(c) The photos and medical evidence of the complainant's injuries: minor abrasions to the head and nose, and a two-centimetre laceration to the scalp.

[30] Taking these matters together we consider that the error made by Mr Ferguson's trial counsel was not material and in the circumstances there was no real risk of it effecting the outcome of the trial. Therefore, there was no miscarriage of justice for the purposes of s 232(2)(c) of the CPA, as defined in s 232(4)(a), and the appeal must be dismissed.

Result

[31] The appeal is dismissed.

Solicitors:
Keam Law, Auckland for Appellant
Crown Law Office | Te Tari Ture o te Karauna, Wellington for Respondent