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THE QUEEN

v

WILLIAM McCALLUM and
DAVID ROSS WOODHOUSE

Hearing: 13 June 1988
Coram: Richardson J (Presiding)
Somers J
Hardie Boys J
Counsel: P.J. Morgan for Crown
C.J. O'Neill for Appellant McCallum
D.M. Wilson for Appellant Woodhouse
Judgment: 13 July 1988

JUDGMENT OF THE COURT DELIVERED BY HARDIE BOYS J.

After a three day trial in the High Court at Hamilton, notable for the number of formal rulings which the trial Judge was required to give, William McCallum and David Ross Woodhouse were found guilty on a joint charge that between 10 November 1986 and 20 November 1986 together with Gregory Raymond Richards (who had earlier pleaded guilty) they manufactured the Class B controlled drug morphine. Both apply for leave to appeal against conviction.

During the period referred to in the charge, Detective Sergeant Bardsley had been watching a flat in Kitchener Street, Hamilton. This had earlier been Richards' home but McCallum and his girlfriend had begun to live there too and

Richards was staying there only at times. This property abutted onto a property in Piako Road. By 20 November Richards had moved his possessions from it to a flat in the Piako Road property. McCallum assisted with the move. The detective sergeant had watched their movements, and those of others coming to and going from the Kitchener Street flat. One of those he saw was Woodhouse; although he did not identify him. Woodhouse later stated that he together with his wife and child had travelled from their home in Masterton to visit an elderly relative who lived near Hamilton. Quite fortuitously, on 13 November he met McCallum, whom he knew, in the city. McCallum was having trouble with his car, and so Woodhouse drove him to Kitchener Street, on the way stopping at another place to enable McCallum to collect a bag which contained two bottles. Woodhouse and his wife and child stayed in the flat for the next two nights, 13 and 14 November. The detective sergeant did not see the bottles carried into McCallum's flat, but during the evening of 13 November he saw bags and boxes carried in by a man named Martin. Later that night, Martin's car was stopped by the Police and in it were found various items which had been stolen from a chemist's shop in Masterton on the night of 10-11 November. There was however no sign of a large quantity of panadeine and similar tablets that had also been stolen. Earlier on the evening of 13 November at a time when Martin, McCallum and Woodhouse were all apparently inside, Detective Sergeant Bardsley saw Richards arrive at the Kitchener Street flat. Soon afterwards, he saw him standing at a bedroom window. He had a needle and syringe in his hand, and

walked with them to another room. In the early hours of 18 November Richards and another unidentified person were seen to leave the Kitchener Street flat and drive around the central city area finally entering an alleyway behind some shops, one of them a chemist's, and remain there for one or two minutes. That night, Detective Sergeant Bardsley saw McCallum and Richards drive to the same alleyway where they appeared to be manipulating an alarm box on the rear door of the chemist's shop. They finally desisted and returned to the flat.

On 20 November police parties searched the two flats. In the Kitchener Street flat they found a syringe and a bottle containing pyridine, a substance used in the home manufacture of morphine. On the bottle were fingerprints of both McCallum and Woodhouse. At the Piako Road flat were found a collection of implements capable of use as instruments of burglary, other items stolen from the Masterton chemist including quantities of empty boxes and packets of panadeine and other tablets, but relatively few intact tablets, a variety of equipment of the kind used in homebaking, including two bottles with McCallum's fingerprints on them, and a quantity of waste and residual material typical of the completed homebaking operation. The last mentioned included tablet excipient or residue which unchallenged scientific evidence showed was likely to have resulted from some 17 separate homebaking operations.

The Crown case was that Richards was the manufacturer; that it was highly unlikely that 17 bakes could

have taken place during the time in which he was in occupation of the Piako Road flat; that for that reason some of the manufacturing must have been done at the Kitchener Street flat; that Martin brought the ingredients from Masterton; that what he brought was largely exhausted by 18 November when McCallum and Richards went to attempt to obtain more; that because of his involvement in that attempt, the presence of his fingerprints on bottles and the fact that he was a permanent occupant of the flat and was there when Martin brought the tablets from Masterton and when Richards was seen with the syringe, McCallum was a party to the manufacture; and that Woodhouse's presence on these occasions, and his fingerprints on the pyridine bottle, established that he too was a party.

McCallum gave evidence. He said that there had been no homebaking in the Kitchener Street flat while he was there; that he had not assisted Richards with homebaking; and that he was not aware that Richards was engaged in it. He did not recall being driven by Woodhouse, and denied having the pyridine bottle in his car. He said he had helped Richards move flats, and while doing so had seen the homebaking equipment, and had handled bottles. This evidence was largely consistent with answers he had earlier given during Police questioning, although at that stage he had been rather evasive, at first denying that he had assisted to move the equipment and declining to name its owner. Woodhouse did not give evidence but he answered questions put to him by the Police, and he gave a written statement to the Police in which he mentioned the matters already referred to,

said that he had handled the bottles in the car but had not seen them again, and then:

" Me and Kim stayed at the house with Willie and his Mrs for the next two nights. There was no homebake done at the address while I was there. I gathered that Willie was baking while I was there but he didn't come out and say it and I never asked him."

Two grounds of appeal were common to both applicants. The first was as to the conduct of the trial. It had commenced on a Wednesday and had taken longer than expected. The Crown case did not conclude until 12.08 pm on the Friday, and it was not until 4 pm that day that counsel were able to begin final addresses. A fresh jury panel had been called for the following Monday and the list for that week was full. The jury did not wish to sit on the Saturday and the Judge therefore concluded that he had no choice but to call on counsel to address late on the Friday and to sum up early on the Monday. Addresses were completed at 6.20 pm on the Friday, and the Judge commenced his summing up at 9 am on the Monday. This was not ideal, but the ideal must often yield to the practicable, and defence counsel having of course addressed last we cannot see any basis for Mr O'Neill's submission that his client was prejudiced by it. At most it can be said, as Mr Wilson submitted, that the time lag meant that the Judge had to be particularly careful to put the case for each accused fully and fairly before the jury when he came to address them on the Monday.

The second matter relied on by both counsel concerns an acquaintance the foreman of the jury is said to have had with the family of the young woman with whom McCallum was living at the Kitchener Street flat. An affidavit by the woman's mother was tendered to this Court. She stated that the foreman worked for what we understand is the same employer as her husband, that he had done some work in their home in 1981, and that she had since then seen him at work and in the course of regular social occasions connected with his employment. As a result, she deposed, the foreman knew the members of her family, particularly her daughter, and it was "probable" that he was aware of the drug dependency problem she has had for the past five years. Mother and daughter both attended the trial and on a number of occasions the daughter spoke to McCallum. The affidavit concluded:

" IT would have been obvious to persons in the Court that there was a relationship between my daughter and the Appellant, including the members of the Jury.

IN the course of the trial [the foreman] spoke to me and also spoke to Lynette in my presence."

In his evidence McCallum named the woman with whom he was living, and also mentioned the name of her brother, whom he described as a close friend of Richards. We therefore accept that the foreman may well have known that the woman with whom McCallum was living was the daughter of a couple who were known to him. Whether he knew that she had a drug dependency problem is less certain, for the affidavit is guarded about that. It does not state that either parent had disclosed the problem to the foreman or had

discussed it with him. By the use of the word "probable" it appears to assume that he would have known.

For McCallum - or Woodhouse - to be prejudiced by such knowledge, it would have to be assumed that the foreman might be influenced against McCallum in respect of this particular charge by the knowledge that his girlfriend was a drug addict. In that connection, it is to be noted that McCallum said in evidence that he was really a Wellington resident, and had come to Hamilton to see his girlfriend only six weeks before the events in question, and in that time had returned to Wellington on at least three occasions. It is not known for how long he had been associating with her.

It is inevitable, particularly in the circuit Courts, that from time to time a member of the jury panel will have some acquaintance with the accused or the witnesses or persons associated with them. Whether it is appropriate for such a person to serve on the jury will depend on the closeness of the acquaintanceship and the degree of knowledge of relevant facts and circumstances. The now quite general practice of informing the jurors prior to empanelling of the nature of the charge and the names of the witnesses, and asking them to disclose any knowledge of those involved, should ensure the identification and standing aside of the obviously inappropriate juror. Where a question arises after the trial, perhaps because the practice has not been followed, or because the juror has not been alerted, or has not thought his or her knowledge to be significant, the test is whether there is reasonable ground to suspect that the verdict

may have been influenced by bias against the accused or in favour of the prosecution: R v Papadopoulos (No.2) [1979] 1 NZLR 629, 634. In R v Sannd (C.A. 156/86, 2 March 1988) this Court reviewed some of the present New Zealand cases where information had come into the possession of a juror during the trial, and the test was expressed to be whether there was a reasonable suspicion or a real danger that the accused's position had been prejudiced. We do not read this as a different approach from that expressed in R v Papadopoulos. In England however the test has been put a little differently; and it has been applied somewhat more robustly than might be the case in New Zealand. The recent English cases are helpfully discussed in R v Bliss (1987) 84 Cr.App.R. 1, where the principle was expressed in this way at p 6:

" ...this Court will not interfere with the verdict of a jury unless there is either evidence pointing directly to the fact or evidence from which a proper inference may be drawn that the defendant may have been prejudiced or may not in fact have received a fair trial."

In that case, a juror had fought with the appellant's son, and the appellant suspected not only that the juror would bear a grudge against him as a result, but also that he would know of his previous convictions and would reveal them to the jury. But there being no evidence of the kind referred to in the judgment, the Court declined to interfere. A similar conclusion was reached by a five Judge Court in R v Box [1964] 1 QB 430, 435,

where the foreman knew that the accused were villains, ex-burglars and friends of prostitutes.

It is not necessary to consider whether the same result would follow in a similar situation in this country. Each case will turn on its own facts. It is enough to say that in the present instance the evidence is insufficient to give rise to any reasonable suspicion of prejudice. There is no direct evidence that the foreman knew of the young woman's drug problem; and even if he did, there is no reason to think that his knowledge would have affected his impartiality towards her associates. It is to be noted that no question as to the propriety of the foreman serving on the jury was raised during the trial. If the matter gave no cause for concern then, there would need to be some indication of unfairness for it to give cause now; and there is none.

The first of the two grounds of appeal advanced for McCallum alone was that the Judge erred in allowing the evidence of Detective Sergeant Bardsley concerning the visit McCallum and Richards paid to the rear door of the chemist's shop. An objection was taken at the time on the basis that this was similar fact evidence, but we do not think that it was that at all. It was evidence of conduct capable of being seen as preparation for the continued commission of the crime alleged. As such it was part of the res gestae and was plainly admissible.

The second ground concerned certain comments about McCallum made by Woodhouse in the course of his interrogation by the Police and in his written statement. One of these has already been quoted from the written statement: "I gathered that Willie [McCallum] was baking while I was there but he didn't come out and say it and I never asked him". The other comments were made orally. The first was made in this context:

" Q.Have you got a homebake kit yourself?
 A.No.
 Q.Do you know if Willie had one?
 A.No, I don't know. I know he may have had one.
 Q.Did you see it while you were in Hamilton?
 A.No."

The second was made when Woodhouse was being questioned about the pyridine bottle:

" Q.You knew it was pyridine and you know what pyridine is used for?
 A.I know now what it was for, it must have other uses too.
 Q.You know Willie, right, you know he is a junkie?
 A.I know he has a drug problem, he probably still has one.
 Q.So you must have known what the pyridine was for?
 A.He didn't say he was doing homebakes. I didn't ask him. I wish to God I had never met him."

The third requires explanation. In response to an objection by Mr Wilson for Woodhouse concerning various questions that the police officer had asked, the Judge had directed that there be one, and only one excision. In the following passage, the question and answer excised are in parenthesis:

- " Q.Did you use any homebake while you were up there?
 A.Am I going to be charged if I say?
 Q.Did Willie give you some?
 A.Um.
 [Q.Is that a yes?
 A.No, I take methadone.]
 Q.Did you take homebake? He did not reply to this question.
 Q.Did they do any homebake while you were there?
 A.No, they didn't bake any while I was there in the flat, I put 2 and 2 together.
 Q.Did you take any pyridine up there?
 A.They had enough with the bottle they had there for what they wanted.
 Q.What was the story about the pyridine?
 A.I saw Willie in town. He asked me to take him to pick up something. He picked up 2 bottles in a bag. I was nosey so I looked in and saw one of them was pyridine.
 Q.What was in the bottle? Referring to the other bottle.
 A.It didn't have a label on it, I thought Willie was into it again.
 Q.So you stayed there 2 nights?
 A.I wasn't there all the time. They went out to do a bake once, they must have but they didn't tell me."

Finally, there was this interchange with another Police officer:

- " Q.I understand that you were aware that Willie was making homebake but that he didn't do so while you were there?
 A.Yes.
 Q.How did you come to that conclusion?
 A.Based on the pyridine. I've seen people that have been baking before and have seen what it can do to them and how hard it is to stop. I'm not in favour of homebaking. I am not a homebaker and have never participated in it."

Mr O'Neill correctly described much of this comment as speculation or suspicion on Woodhouse's part, inadmissible against McCallum even if given in evidence by Woodhouse, and certainly so in the hearsay form in which it was adduced, but seriously prejudicial to him despite any warnings given by the Judge. For this reason, counsel submitted, the Judge ought to have directed the exclusion of it all.

A Judge's right to edit a statement by one accused in the interests of another was discussed by this Court in R v Genet, Rewi & Jackson (C.A.146/83, 10 April 1984) in this way:

" The judge's right to edit the statement of one accused in the interests of another was not questioned by the Crown or the applicants in this case. Accordingly we had no argument and can express no opinion on that issue. It is however obvious that such a course may conflict with other interests. First there is the interest of the maker of the statement who may wish to cast all or part of the blame upon his co-accused and against whose wishes editing does not seem possible. Then there is the claim of the Crown to have at least those parts of the statement which incriminate the maker put in evidence regardless of the prejudice to co-accused; in Re Attorney-General's Reference No.1 of 1977 [1979] W.A.R. 45 it was held there was no discretion to exclude evidence admissible against the maker on the ground that it was inadmissible against and prejudicial to co-accused. Then in some cases, and the present may be one, the effect of such editing could tend to convey a corporate criminal responsibility by all accused. We express no concluded view on these matters and do no more than observe that if editing of the statement of one accused in the interests of another is permissible its undertaking may prove to be required only in rare cases. Reference may be made to Archbold Criminal Pleading Evidence & Practice 41st Ed., paras. 4-186, 4-434, 15-62 to 15-64; R. v Rogers and Tarran [1971] Crim.L.R. 413; Re Attorney Generals Reference No.1 of 1977 [1979] W.A.R. 45."

The matter was also adverted to in the judgment in R v Hereora & Ors (C.A. 228/85, 14 March 1986).

No objection appears to have been taken at the trial to the admission of Woodhouse's written statement in its entirety; but both Mr O'Neill for McCallum and Mr Wilson for Woodhouse sought exclusion of parts of the oral questioning.

Mr Wilson's objection, already referred to, was based on R v Halligan [1973] 2 NZLR 158, and was to certain assertions put to Woodhouse by the officer and denied by Woodhouse. It was this objection, not relevant to the point taken on appeal by Mr O'Neill, that resulted in the exclusion already described. When Mr O'Neill made his objection, it was opposed by both Mr Wilson and Mr Morgan for the Crown; the former because some of what Mr O'Neill wished to have excluded was exculpatory of Woodhouse, the latter because some might be seen as inculpatory of Woodhouse, and some might be required as material for cross-examination should Woodhouse give evidence. These were all matters relevant to the exercise of the Judge's discretion. The discretion is one to be exercised sparingly, only where all-round justice clearly requires exclusion, and this Court will be slow to interfere with the trial Judge's exercise of it: R v Hereora & Ors. The Judge had the benefit of full argument at the time, and in the exercise of his discretion he had regard to the relevant factors already mentioned. We see no reason to differ from the conclusion to which he came. Having come to that conclusion, the Judge was at pains in his summing up not only to direct the jury that what Woodhouse had said was not evidence against McCallum, but also to explain why that was so. It was a full and clear direction and Mr O'Neill made no complaint about it.

There is one further point to be mentioned, and it is one to which the Judge also referred. Where there is more than one accused, and there is a real risk of prejudice as a result of allegations made in out of Court statements by one against

another, the remedy is severance of trials. That was not sought here. And Mr O'Neill realistically acknowledged that this was not in any event a case where an application for severance was likely to be successful.

We turn now to the further grounds of appeal advanced on behalf of Woodhouse. These were argued under two broad heads. A further submission that there was insufficient evidence to support the verdict was mentioned in Mr Wilson's synopsis of argument but was not actively pursued; and we are satisfied that it has no substance.

First, Mr Wilson submitted that much of the prosecution evidence was relevant only to the case against McCallum, but that the Judge in his summing up did not sufficiently emphasise that to the jury, or adequately differentiate between the two accused in his discussion of the evidence. As a result, counsel contended, there was a real risk of Woodhouse being judged on the basis of evidence that did not in fact implicate him at all. He referred in particular to the evidence, vital to the Crown case, of the movements and activities of Richards, with whom McCallum was shown to have had a much closer association than Woodhouse, the latter having been in the Kitchener Street flat for only two nights, several days before the homebaking equipment and other items were found by the Police in the Piako Road flat.

In reply to this submission, Mr Morgan pointed out that the Crown case was that Woodhouse's involvement was to be inferred from all the circumstances; not merely from his presence in the flat for two days and his fingerprints on one bottle, but from all that occurred whilst he was in the flat and also after he had left. And so the main focus of the trial was on the activity that occurred during those two days, and on the connection between that activity and what was later found in the two flats. The Crown was entitled to put its case in this way, and this meant that there was little distinction between the evidence that was relevant to McCallum alone and that which was relevant to both accused.

The summing up reflects this approach to the case. The Judge commenced by emphasising that the case against each accused had to be considered separately. He explained that the fact that McCallum had given evidence and Woodhouse had not could not reflect upon Woodhouse. He gave the direction already mentioned that Woodhouse's statements to the Police were not evidence against McCallum. He went on to explain that a mere bystander is not a party to an offence, in a way that made it clear that both or either one of the accused could be so regarded. These observations were all made before he began to discuss the evidence, and so the need for the jury to differentiate between the accused was made very clear from the outset. He then proceeded to refer to the facts which the Crown contended were relevant to both accused, and the inferences the Crown contended should be drawn from them, at the same time

indicating the answer of the defence to each. As Mr Wilson said, he mostly did that in a general way, not naming the particular accused on whose behalf the answer had been made, but to the extent that the answer was not common to both accused that would not have caused confusion. Having surveyed the Crown and defence cases in this manner the Judge then turned to deal with each of the accused separately, taking Woodhouse first, and discussing in particular the brief period he had been in the flat and the possible explanations for the fingerprints. He then went on to deal with the case against McCallum and in that context made particular reference to the association with Richards.

It was not incumbent on the Judge to analyse each piece of evidence, but to survey fairly the Crown case and to put fairly the case for each accused. We consider this was a very fair and balanced summing up and we do not accept that there is any foundation for Mr Wilson's criticism of it.

Under his second general ground Mr Wilson submitted that the Judge did not give an adequate direction on a number of specific topics; and further that an injustice had resulted from the single piece of editing that the Judge had allowed, which as appears from the passage already quoted, resulted in the exclusion of Woodhouse's explanation of his equivocal answer "Um" to the question whether McCallum had given him any homebake.

This last point demonstrates the difficulties that an attempt at editing may cause. No doubt the effect of the Judge's willingness to allow only the one deletion was not

appreciated at the time. If it had been, counsel had only to ask the Judge not to make it, and he would not have done so. As it was, the answer the jury heard was not the apparently unequivocal denial it would otherwise have been. However the next question "Did you take homebake?" was so far as Woodhouse was concerned a repetition of the earlier "Did Willie give you some?" and Woodhouse simply did not reply. He was of course not charged with possession of morphine but with being a party to manufacture, and the next question was directed to that: "Did they do any homebake while you were there?" This was the most important of the questions, and to it he gave a full answer which was duly recorded. In the light of that it cannot be said that the exclusion which he had himself sought did him any real injustice. Mr Wilson also referred to the question of severance; but there were no grounds on which Woodhouse could have applied for severance. Indeed a joint trial, where so much of the evidence pointed more immediately to McCallum, was considerably to his advantage.

Mr Wilson's next point concerned Woodhouse's fingerprints on the pyridine bottle. He submitted that the Judge ought to have spelled out to the jury that they had to be satisfied beyond reasonable doubt that Woodhouse had handled this bottle in the course of a homebaking operation with the intention of assisting or encouraging Richards in that operation. This however is to put the matter too narrowly, for the Crown case did not require such specific proof. The handling of the bottle in other circumstances could equally be indicative of active

participation. The Judge explained the intention that is required for a person to become a party and he discussed the competing submissions as to the inferences to be drawn from the prints on the bottle. We consider that he dealt with the point adequately.

We have carefully considered the other respects in which Mr Wilson submitted that there should have been a fuller direction. We do not think it necessary to elaborate upon them. It suffices to say that we are satisfied that there is no substance in the criticisms.

It follows that neither appeal can succeed, and in each case leave to appeal is refused.

A handwritten signature in dark ink, appearing to be 'R. S. L.', is written in a cursive style.

Solicitors:

Crown Solicitor, Hamilton, for Respondent