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ACT 1985.**

IN THE COURT OF APPEAL OF NEW ZEALAND

**CA845/2011
[2012] NZCA 461**

BETWEEN	GRAEME ANDREW WASWO Appellant
AND	THE QUEEN Respondent

Hearing: 13 August 2012

Court: Arnold, Ellen France and Fogarty JJ

Counsel: G J King and L S Collins for Appellant
M F Laracy for Respondent

Judgment: 8 October 2012 at 10.30 am

JUDGMENT OF THE COURT

The appeals against conviction and sentence are dismissed.

REASONS OF THE COURT

(Given by Arnold J)

Introduction

[1] The appellant, Mr Waswo, was convicted following a jury trial before Judge Roberts of three counts of indecent assault, one count of sexual violation and

one count of arson. He was sentenced to a term of imprisonment of six years, six months.¹ He now appeals against both conviction and sentence.

Background

[2] Mr Waswo, who was 56 at the time of the offending, operated a successful limousine/executive taxi service. He was also heavily involved in motorsport. As a consequence, he had a number of teenage male acquaintances, including the complainants, A and B, whom the Judge at sentencing described as “unsophisticated and unsuspecting”.² These acquaintances visited Mr Waswo’s premises regularly to drink, play video games and generally socialise. A, who was associated with Mr Waswo for a longer period than B, said Mr Waswo had talked of finding him an apprenticeship in the motorsports industry and had given him a car, which his father required him to return. A and B said that Mr Waswo gave them money for doing various jobs. They also said that Mr Waswo had told them that he had connections with the Central Intelligence Agency (CIA).

[3] A and B alleged that the sexual offending against them occurred in the course of visiting Mr Waswo. Two of the indecent assault counts and the sexual violation count related to A. The Crown alleged, and the jury accepted, that Mr Waswo had touched A’s penis and performed oral sex on him. The other indecent assault count related to B, the allegation being that Mr Waswo had touched his penis.

[4] In relation to the arson charge, A and B were charged with setting fire to a motor vehicle which they (erroneously) thought belonged to C. They admitted that they had set fire to the car but said that they did so at the instigation of Mr Waswo, who had a dispute with C. The Crown alleged that Mr Waswo had a motive to get back at C arising from some damage to one of his cars and from a comment that C put on his Facebook page. C believed that Mr Waswo had started a rumour that C had raped someone. C responded by denying on his Facebook page that he had done so and saying that Mr Waswo had concocted the story because C “wouldn’t be his gay boy bitch”. Following the arson, A and B sent a text message to Mr Waswo,

¹ *R v Waswo* DC New Plymouth CRI-2010-043-3715, 13 December 2011.

² At [12].

which, the Crown alleged, said in code that they had succeeded. A and B said that Mr Waswo had paid them a few hundred dollars each to set fire to the car. A said in his evidence that Mr Waswo's claim to be involved with the CIA had intimidated him and led him to believe that Mr Waswo could square things away with the police if A's involvement in the arson was discovered. Mr Waswo was convicted on the basis that he incited or procured A and B to commit the arson.

[5] Mr Waswo was represented at trial by Ms Pascoe. When she first became involved in the case another barrister, Mr Wiles, had been retained by Mr Waswo to deal with pre-trial matters, principally in relation to propensity evidence. Ms Pascoe liaised with him, but ultimately he seems to have taken no steps in the case. Ms Pascoe accepted that she was the counsel responsible for the conduct of the trial.

[6] Mr Waswo did not give evidence at trial.

Basis of appeal

[7] For the appellant, Mr King advanced three grounds of appeal against conviction. He submitted, first, that there should have been three trials, two dealing with the charges involving sexual offending against each complainant and the third dealing with the arson or, in the alternative, that the arson charge should have been severed from the sexual offending charges; second, that the Judge's directions were inadequate in that there was no propensity direction and the Judge's warning in relation to the complainants' reliability was not sufficiently strong; and finally, that trial counsel had made significant errors in the conduct of the trial. Both Mr Waswo and trial counsel, Ms Pascoe, filed affidavits. Before us, Mr King cross-examined Ms Pascoe but the Crown did not cross-examine Mr Waswo.

[8] As to sentence, Mr King submitted that the starting point was too high and the Judge had failed to take sufficient account of mitigating factors.

Discussion: conviction appeal

[9] We will address the issues on the conviction appeal under three heads: severance, the trial Judge's directions and trial counsel error.

(i) *Severance*

[10] Mr King submitted that there should have been three trials in this case – one in relation to the sexual offending against A, one in relation to the sexual offending against B and one in relation to the arson count. In the alternative, he argued that the arson count should have been severed from the sexual offending counts.

[11] The principles relevant to the severance of charges were recently summarised in *Smith v R*.³ This Court said:

[7] Section 340(1) of the Crimes Act 1961 provides that any number of counts for any crimes whatever may be joined in the same indictment. At the same time, subs (3) provides that if the Court thinks it conducive to the ends of justice to do so, it may order that the accused shall be tried upon any one or more of such counts separately.

[8] The well-known general principle, set out in *R v W*,⁴ is that counts arising from incidents unrelated in time or circumstance are not to be tried together unless evidence as to one is relevant to another, to an extent that its probative value outweighs its prejudicial effect.

[9] In *R v Anderson*,⁵ this Court observed that the discretion to sever is wide. In the end what is required is a balance between the legitimate interests of an accused and the public interest in a fair and efficient despatch of the Court's business.

[10] More recently, in *R v S*,⁶ this Court observed that:

... cross-admissibility of evidence is not a pre-requisite, nor is absence of relationship in terms of time or circumstance necessarily decisive. The ultimate consideration is whether a fair trial will remain attainable, absent severance, which will depend on amongst other considerations the nature of the allegations, the degree of commonality and whether proper directions to the jury will provide an adequate safeguard against the risk of propensity reasoning.

³ *Smith v R* [2011] NZCA 103.

⁴ *R v W* [1995] 1 NZLR 548 (CA).

⁵ *R v Anderson* CA144/01, 1 August 2001.

⁶ *R v S* CA323/05, 3 November 2005 at [14].

[12] Here Mr King accepted that the charges were, to some extent at least, related in time and circumstance: the sexual offending against B was linked in time to the arson and the sexual offending against both A and B was linked in circumstance. However, there was, he submitted, a significant risk that the jury would have been influenced by illegitimate propensity reasoning.

[13] In relation to the sexual offending, we can see no basis on which severance could properly have been granted. The incidents were linked as a matter of fact: B became involved with Mr Waswo through A; both complainants were impressed, perhaps overawed, by Mr Waswo with his access to cars and money, his promises of apprenticeships and his stories about being connected to the CIA. The incidents were also linked as a matter of timing and have distinct similarities, together with the unusual feature of a middle-aged male having a sexual interest in teenage boys. Accordingly, the evidence of the complainants would have been cross-admissible as propensity evidence (an important consideration in this context),⁷ or perhaps simply on the ground that it was relevant given the factual linkages. In these circumstances, it would have been artificial to have severed the narrative or required witnesses to go over the same ground twice.

[14] In relation to the arson charge, the position is less clear-cut. There was no suggestion that the sexual offending was in any way linked to the arson, although it seems that the complainants' awe of Mr Waswo played a significant part in their willingness to commit the offence: in sentencing Mr Waswo, Judge Roberts said "Such was the extent of your complete domination, you had those two impressionable young men torch a motor vehicle ...".⁸ Nor is there any propensity link such as existed in relation to the sexual violation charges. However, there are two points to be noted here.

[15] First, Ms Pascoe's evidence was that she discussed the question of severance with Mr Waswo. His instructions to her were clear, namely that he considered that A and B had fabricated the allegations of sexual assault because they needed to

⁷ See, for example, *R v Banks* [2011] NZCA 469 at [12] and following. We note, however, that the Crown did not in fact seek to use the evidence of one complainant as propensity evidence in relation to the other.

⁸ At [13].

extricate themselves from a difficult situation, having been apprehended in relation to the arson. He wanted her to pursue that theory vigorously at trial, which she did. This is apparent from the record of the case and from Ms Pascoe's contemporaneous notes, which indicate that Mr Waswo expressed his satisfaction with the way Ms Pascoe was presenting his case as the trial progressed. Consistently with the defence theory, there was some benefit in having the arson count heard in conjunction with the other counts. Despite Mr King's suggestion that this theory might have been advanced even if the arson count had been severed, we consider that the decision not to seek severance was not only consistent with but also furthered Mr Waswo's trial strategy.

[16] We note at this point that what Ms Pascoe said about her discussions with Mr Waswo about severance was not dealt with in her affidavit but came out in her oral evidence. Mr King asked that, if the Court considered the question of Mr Waswo's instructions in relation to severance to be material, he be given an opportunity to address the matter further. We do not see that anything further could assist, however, given the point we have just made.

[17] Second, assuming that severance should have been sought, the issue would be whether a miscarriage of justice resulted from the fact that the arson count was heard with the other counts. In that context, it is noteworthy that the Judge directed the jury that they should look at the evidence separately in relation to each count. He said:

Your verdicts need not all be the same. You would not, for example, conclude and reach a verdict on count 1 and then reason that like the dominoes falling over, the same verdict applies to all. You must look at each charge separately and render verdicts in relation to each charge.

And later:

I've already mentioned this issue of separate trials, separate verdicts and avoiding the domino situation. For convenience, all of these matters are being heard together. It's really as if we are conducting five trials at the same time and that, of course, is for the convenience of many. Where there is evidence that relates only to one count be careful not to use it and factor it into your consideration of others. I repeat, look at it when you're looking at these counts individually as though you are conducting separate trials. Isolate the evidence, the issues and the law relevant to one count, make your call and move on.

[18] Naturally enough, the question trail which the Judge provided to the jury took a count by count approach, which reinforced the instructions just mentioned. There is no reason to think that the jury did not comply with the Judge's directions.

[19] Accordingly, we reject this ground of appeal.

(ii) *Trial Judge's directions*

[20] Mr King submitted that the Judge's instructions to the jury were inadequate in two respects:

- (a) First, the Judge did not give a propensity direction, so that there was a risk that the jury used illegitimate propensity reasoning particularly in relation to the arson charge.
- (b) Second, the Judge's warning about the reliability of the complainants' evidence was insufficient.

[21] As we have said, Mr Waswo denied any sexual conduct with the complainants or involvement in the arson and said that their story had been concocted after they had been apprehended for setting fire to what they thought was C's car. He noted that the complainants had set fire to cars previously. In her closing address, Ms Pascoe explained to the jury, forcefully and in some detail, why they should regard the evidence of each complainant as unreliable.

[22] In its closing address, the Crown counsel pointed to a number of features which he said were inconsistent with the claim that A and B had fabricated the story about undertaking the arson at Mr Waswo's request. One of the features counsel emphasised was the consistency in their accounts on this aspect. In relation to the sexual offending, counsel did not seek to use propensity reasoning. Rather, he discussed the evidence of each complainant in turn.

[23] In summing up, Judge Roberts cautioned the jury against allowing any prejudices they may have had in relation to homosexual conduct to influence them in their decision-making. As previously noted, he told them that they must approach

each count individually and avoid “the domino situation”.⁹ And he gave the jury the following warning about the evidence of the complainants:

Before I move on to deal with the respective cases, I just want to give you this warning. [A and B] are offenders. They don't shy away from the fact that together they travelled to the address and saw the torching undertaken, the arson, on the motorcar. It's a matter for you what weight you give to their evidence. You might be inclined to treat with caution the evidence of anyone who might have his own purpose to serve. You'd want to be sure the witnesses here were not giving false evidence to advance their own interests. These are people who have participated in a crime with one another. In some circumstances co-offenders may have an incentive to incriminate another person, to throw blame from themselves. Whether you think they might have that reason or some other reason for wanting to falsely implicate this accused, it's entirely for you to decide. This will involve an assessment by you as to their individual credibility and reliability. The Crown commend them to you as reliable and honest witnesses. The defence have another take. That they are inconsistent, internally and externally.

The Judge then went on to summarise the respective cases of the Crown and the defence, again emphasising the defence case that the evidence of the complainants could not be believed.

[24] Against this background, we do not accept that the Judge was required to give a propensity direction or a more detailed warning about the complainant's reliability. We do not see any risk that the jury might have reasoned in an illegitimate way, by, for example, deciding that because they believed A in relation to the sexual offending counts against him, Mr Waswo must also be guilty of all the remaining offences. As we have said, the Crown did not adopt propensity reasoning in relation to the sexual offending counts. More importantly, the jury's view of the credibility of A and B was critical in relation to the relevant sexual offending counts and the arson count. Both Crown counsel and Ms Pascoe in their addresses, and the Judge in his summing up, emphasised that to the jury. The Judge instructed the jury to consider the evidence in relation to each count separately. He also warned the jury to exercise caution in relation to the evidence of A and B. Mr King submitted that he should have done so in stronger terms. But we see nothing wrong with the warning he gave, particularly when it is viewed against the background of Ms Pascoe's closing address. In these circumstances, a propensity warning would have added nothing.

⁹ See [17] above.

[25] Accordingly, we reject this ground of appeal.

(iii) *Errors by trial counsel*

[26] In his affidavit, Mr Waswo made a number of complaints about Ms Pascoe's conduct of the trial. Some of these complaints, for example as to whether or not he would give evidence, were not sustainable in the face of Ms Pascoe's very detailed and careful contemporaneous notes. Ms Pascoe kept a running note, which began on the Saturday before the start of the trial and covered each day of the trial. In it she recorded her discussions with Mr Waswo in relation to various matters. These notes recorded that Mr Waswo had expressed a reluctance to give evidence, but that the matter was to be kept under review. They also recorded that Mr Waswo expressed his satisfaction on a number of occasions with the way that Ms Pascoe was conducting his case.

[27] The matters that were ultimately focussed on by Mr King in his submissions and cross-examination of Ms Pascoe were counsel's failure to seek severance of the charges and her failure to challenge the complainants adequately, in particular by formally impeaching their evidence by reference to their out-of-court statements.

[28] As we have already said, we do not accept that any miscarriage of justice arose from the failure to seek severance. Accordingly, we put that matter to one side and turn to the other principal complaint, the failure to challenge complainants' credibility adequately.

[29] We begin by restating the relevant principles. In *R v Scurrah*, this Court described the principles emerging from the leading case, *R v Sungsuwan*,¹⁰ as follows:¹¹

[17] The approach appears to be, then, to ask first whether there was an error on the part of counsel and, if so, whether there is a real risk that it affected the outcome by rendering the verdict unsafe. If the answer to both questions is "yes", this will generally be sufficient to establish a miscarriage of justice, so that an appeal will be allowed.

¹⁰ *R v Sungsuwan* [2005] NZSC 57, [2006] 1 NZLR 730.

¹¹ *R v Scurrah* CA159/06, 12 September 2006.

[18] On the other hand, where counsel has made a tactical or other decision which was reasonable in the context of the trial, an appeal will not ordinarily be allowed even though there is a possibility that the decision affected the outcome of the trial. This reflects the reality that trial counsel must make decisions before and during trial, exercising their best judgment in the circumstances as they exist at the time. Simply because, with hindsight, such a decision is seen to have reduced the chance of the accused achieving a favourable outcome does not mean that there has been a miscarriage of justice. Nor will there have been a miscarriage of justice simply because some other decision is thought, with hindsight, to have offered a better prospect of an outcome favourable to the accused than the decision made.

[19] This analysis will be sufficient to deal with most cases.

[20] But there will be rare cases where, although there was no error on the part of counsel (in the sense that what counsel did, or did not, do was objectively reasonable at the time), an appeal will be allowed because there is a real risk that there has been a miscarriage of justice.

[30] We should note at this stage that Mr King did not allege that Ms Pascoe had acted incompetently. Rather, he submitted that there was the potential for a miscarriage of justice as a consequence of the approach she adopted. In other words this was a case falling within either [17] or [20] of the extract just quoted.

[31] Mr King cross-examined Ms Pascoe extensively as to why she had not sought to use the complainants' prior statements, which were in some respects inconsistent with their evidence at trial, to undermine their credibility. Ms Pascoe said that she had succeeded in her cross-examination in getting A in particular to accept that his story had changed over time. She said that she had focussed on what she considered to be the major points in terms of inconsistencies and gaps rather than attempting to deal with what she described as "every minor detail".

[32] The essence of Mr King's argument was that Ms Pascoe's cross-examination would have been more effective if she had used the complainants' previous statements to impeach their evidence in a more formal and more extensive way. In support of that contention, he provided an 11 page table in which he compared what A and B had said in their evidence-in-chief, under cross-examination and in their out-of-court statements in relation to various incidents. He put several of these instances to Ms Pascoe in cross-examination by way of example to highlight the inconsistencies.

[33] We do not propose to examine the incidents that Mr King has identified in detail. In our view, the complaints raised, in the context of this case at least, come down to matters of style rather than of substance. It was clear from her evidence that Ms Pascoe had thought carefully about how she would approach the cross-examination of the complainants. It is also clear that she made some inroads in her cross-examination of them. Although Ms Pascoe did not use the police statements to formally impeach the witnesses, she did put their statements to both complainants in an effort to show that there were important inconsistencies and gaps in their accounts. A accepted that there were differences in the stories that he had told the police, his father and the Court and that he had lied “to an extent”. B acknowledged that he had not mentioned certain important details about the sexual offending in his initial interview with the police. Moreover, Ms Pascoe did not rely simply on cross-examination to present the defence case – in relation to some of the matters raised by Mr King, she did call evidence.

[34] Ms Pascoe put the defence squarely to the complainants – that they had fabricated the sexual allegations in order to deal with difficulties they faced having been apprehended for the arson. She explored their evidence-in-chief in some detail, and challenged them as to their consistency and accuracy. Different counsel may well have approached this task in a different way. But that is not enough to establish a ground of appeal. There was a sensible rationale for Ms Pascoe’s approach and she did, as we have said, make inroads in her cross-examination. The fact that other counsel might have adopted another approach, or supplemented what Ms Pascoe did, is not a basis for interfering, even if that other or supplementary approach might be thought to have been more effective. We do not consider that this is a case where there is potential for a miscarriage of justice as a result of the strategic choices made by counsel.

[35] In these circumstances, this ground of appeal must also fail.

Discussion: sentence appeal

[36] Mr King invited us to consider whether the starting point adopted by the Judge was too high and whether he had taken sufficient account of any mitigating factors. Mr King did not develop these points in any detail, however.

[37] In sentencing Mr Waswo, Judge Roberts took the sexual violation against A as the lead offence and followed the guidance of this Court in *R v AM* in fixing the starting point of four years' imprisonment.¹² The Judge then increased this by one year to reflect the totality of the sexual offending. In relation to the arson, the Judge said that, on its own, it might attract a sentence of two to two and a half years' imprisonment. He considered that the sentence should be cumulative and, to reflect the totality principle, increased the five year sentence by 18 months to accommodate the arson. This led to a total sentence of six and a half years' imprisonment. The Judge declined to give any reduction for good character given that he had information indicating that Mr Waswo had been involved in offending against children in the United States of America. He also refused to impose a minimum period of imprisonment.

[38] Mr King was not able to identify any error of principle or approach in the Judge's sentencing and we have found none. Accordingly, we dismiss the appeal against sentence.

Decision

[39] The appeal against conviction and sentence is dismissed.

Solicitors: Crown Law Office, Wellington for Respondent

¹² *R v AM (CA27/2009)* [2010] NZCA 114, [2010] 2 NZLR 750.