IN THE COURT OF APPEAL OF NEW ZEALAND

CA428/2014
[2015] NZCA 182

BETWEEN	JOHN ARCHIBALD BANKS Appellant
AND	THE QUEEN Respondent

Hearing:	28 April 2015
Court:	Ellen France P, Wild and Miller JJ
Counsel:	DPH Jones QC for Appellant Solicitor-General, M R Heron QC for Respondent
Judgment:	19 May 2015 at 11.30 am

JUDGMENT OF THE COURT

The application for recall of our judgment of 28 November 2014 is granted. We cancel the retrial order and direct that a verdict of acquittal be entered.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] In our judgment of 28 November 2014 we quashed Mr Banks's conviction on one charge of transmitting a return of electoral expenses knowing it to be false in a material particular.[1] We ordered a retrial, which the Crown has elected to pursue.

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1 *Banks v R* [2014] NZCA 575 [Appeal judgment].

[2] Mr Banks has now moved for recall of our judgment, asking that we cancel the retrial order and substitute an acquittal for the guilty verdict entered at first instance. He has brought the application because he says the Crown knew, but did not tell us, that its principal witness, Mr Kim Dotcom, had changed his evidence when confronted with affidavits filed on appeal for the defence. He maintains that had we known the true position we would not have ordered the retrial.

[3] The Crown resists the recall application, saying that the retrial order was orthodox, there are no sufficient grounds to substitute an acquittal, and Mr Banks has a remedy in the High Court, to which he has applied, citing the same grounds, for a discharge under s 347 of the Crimes Act 1961.

Narrative of the appeal

[4] We will summarise the background briefly, assuming that the reader is familiar with our first judgment. For reasons given there, the Crown case against Mr Banks rested on oral evidence of an understanding reached between Mr Banks and Mr Dotcom over lunch at the Dotcom mansion at Coatesville. The gist of the evidence, given by Mr Dotcom, his wife Mona Dotcom and his head of security, Wayne Tempero, was that the two men agreed that Mr Dotcom would make two donations, each of $25,000, which would be treated for disclosure purposes as anonymous. But for that evidence, the Crown case must have failed.

[5] It was said initially that the lunch happened on 9 June 2010, the day on which two cheques, each for $25,000, were drawn. It was Mr Dotcom's evidence that he thought the cheques were written on the same day as the lunch. Wylie J found that he became more sure about that during cross-examination.[2] His evidence was supported by Mr Tempero and Mr Dotcom's accountant, a Mr McKavanagh.

[6] It was common ground that Mr Banks's wife, Amanda Banks, was at the lunch. She gave evidence, by reference to her employment records, that she was at work in Remuera on 9 June and had a half hour for lunch. If so, she could not possibly have attended lunch at Coatesville that day. She said that she did attend a

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2 *R v Banks* [2014] NZHC 1244, [2014] 3 NZLR 256 [High Court judgment] at [104].

lunch at the Dotcom mansion, but it was held on 5 June. Mr Banks' communications advisor, Scott Campbell, also gave evidence for the defence. He deposed by reference to his diary that Mr Banks had electoral commitments on 9 June. They included a lunch at Otahuhu.

[7] This evidence was not challenged by the Crown in cross-examination of either witness, and the Judge accepted it. He found that the lunch was held on 5 June.[3]

[8] As recorded in our first judgment, Wylie J rejected Mrs Banks's evidence that the lunch was attended by two American businessmen and there were no discussions at the lunch about donations.[4] Stung by these findings, Mrs Banks tracked down the two American businessmen, Jeffery Karnes and David Schaeffer, who had attended the lunch on 5 June. They swore affidavits deposing that donations were not discussed at the lunch.

[9] The affidavits having been served on the Crown, a barrister, Rowan Butler, was instructed to interview Mr Dotcom about them. It is evident that the Crown had it in mind that Mr Dotcom might be asked to swear an affidavit in reply: the memorandum explains that Mr Butler's purpose was to discuss Mr Dotcom's "potential evidence". The interview was conducted on 29 September 2014. Mr Dotcom's counsel, Paul Davison QC, was present.

[10] Mr Butler reported by memorandum of the same day to Crown counsel, Mr Dacre QC. He advised that Mr Dotcom now accepted that the Americans' evidence was correct. Specifically, electoral donations were not discussed at the lunch on 5 June. That lunch was held to discuss a new Pacific cable and, Mr Butler recorded, "it would have been odd, and out of context, for electoral donations to have been discussed." However, Mr Dotcom was adamant that there was a second lunch at Coatesville on 9 June, attended by Mr and Mrs Banks, at which donations were discussed and the cheques written. He reverted, in short, to his original account

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3 High Court judgment, above n 2, at [106].
4 At [108].

that the lunch was held on the same day that he signed the cheques. Mr Butler summarised Mr Dotcom's account as follows:

> Mr Dotcom maintains that there was a separate meeting on the 9th, with Mona, Mr Tempero, Mr Hutchinson, the Banks' and, intermittently, his butler. It was at this meeting, also a lunch, where the donations were discussed and made by cheque.

[11] As Mr Butler pointed out in his memorandum, this account was inconsistent with the trial Judge's findings. Mr Butler nonetheless expressed the opinion that an affidavit in reply was unnecessary, given that Wylie J accepted the essential aspects of Mr Dotcom's evidence. He sought instructions about whether to prepare an affidavit.

[12] Mr Dotcom was not asked to swear an affidavit in reply. When the appeal was argued a month later, on 29 October 2014, we were not told that Mr Dotcom accepted the Americans' evidence about the lunch on 5 June and now maintained that the relevant lunch was held on 9 June. Mr Dacre accepted during argument that for purposes of the appeal we should treat the Americans' evidence as reliable. However, he opposed its admission, maintaining that it was not fresh and would not have had a material bearing on the outcome. Counsel submitted that political donations would have had no significance for the two Americans and they had no particular reason, four years on, to recall a discussion about them. It was implicit in this submission that the Crown now accepted that the discussion happened on 5 June.

[13] In our judgment of 28 November we found that the new evidence was reliable and very material.[5] It lent support to Mrs Banks's evidence, which the Judge rejected partly because he was not persuaded that American businessmen had attended the lunch. Mrs Banks had said that their presence was one reason why donations would not have been discussed at lunch. Had she been vindicated on this point, serious doubt must have been cast on the evidence of the Crown witnesses who claim to have participated in or heard the discussion. Her evidence supported the defence case, which was that Mr Banks and Mr Dotcom had held a private and quite different discussion about donations in a conservatory or loggia off the dining

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5 Appeal judgment, above n 1, at [28], [33]–[34].

room. The appeal was allowed accordingly. The Crown sought a retrial, and we took the orthodox course of ordering one.

Events since judgment

[14] Mr Butler's memorandum was disclosed to the defence on 27 February 2015, presumably on the basis that it was, at least arguably, a witness statement for purposes of s 13 of the Criminal Disclosure Act 2008. That led to the present application. As noted earlier, Mr Banks has also moved in the High Court for a discharge under s 347 of the Crimes Act. That application is pending. It will be heard not by Wylie J but by the assigned trial Judge, Gilbert J.

[15] We were given to understand that the Crown has now served a signed statement of Mr Dotcom which is consistent with his original account that he signed the cheques at a lunch on 9 June. We were advised that he is now unsure if Mrs Banks was present.

Disposition of successful conviction appeals

[16] The appeal was brought under s 385 of the Crimes Act, which provides that this Court must allow an appeal if satisfied that there was a miscarriage of justice and goes on to specify what must happen in that case:

> (2) Subject to the special provisions of this Part, the Court of Appeal … must, if it allows a [conviction] appeal… quash the conviction and in its discretion direct a judgment and verdict of acquittal to be entered, or direct a new trial, or make such other order as justice requires.

It will be seen that the decision to order a retrial, or to direct a verdict of acquittal, is discretionary. The question is what justice requires in the particular case.

[17] In *R v Samuels*, this Court explained that it had not sought to evolve hard-and-fast rules about exercise of this discretion.[6] Rather, it had followed the "flexible" approach recommended in *Reid v R*, a decision of the Privy Council on

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[6] *R v Samuels* [1985] 1 NZLR 350 (CA) at 356. For more recent authority to the same effect, see *R v E (CA308/06)* [2007] NZCA 404, [2008] 3 NZLR 145 at [146]–[148].

appeal from the Court of Appeal of Jamaica.[7] The Jamaican legislation was in similar terms to s 385(2). Their Lordships held that although the principal verb (in the Jamaican legislation, "shall"; in New Zealand's, "must") was mandatory, the interests of justice might require balancing a "whole variety" of factors, not all of them confined to the interests of the defendant and the prosecution in the particular case.[8]

[18] *Reid* was an identification case in which, the appellate courts agreed, the jury verdict was unreasonable having regard to the unsatisfactory state of the evidence at trial. The Privy Council held that a retrial ought not to have been ordered, because to do so was to give the Crown a chance to fill the gaps that the first trial had revealed in its case.[9] Their Lordships acknowledged the public interest in bringing the guilty to justice. That consideration would prevail where an appeal had succeeded from some error of the trial judge. But another consideration was the principle that it was for the prosecution to make out its case at trial. It would conflict with this basic principle "if a new trial were to be ordered in cases where at the original trial the evidence which the prosecution had chosen to adduce was insufficient to justify a conviction by any reasonable jury which had been properly directed."[10] In such a case a retrial should not be ordered, save in exceptional circumstances, for to do so would be to give the prosecution a second chance to make out its case.[11]

> It is not in the interests of justice as administered under the common law system of criminal procedure that the prosecution should be given another chance to cure evidential deficiencies in its case against the defendant.

[19] Their Lordships observed that cases of this sort lay at one end of a spectrum. At the other lay those cases in which the evidence was so strong that any reasonable jury would have convicted. In those cases the proper course was to apply the proviso, dismissing the appeal.[12] Between these extremes, many considerations might bear on the decision:[13]

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7 *Reid v R* [1980] AC 343, [1979] 2 WLR 221 (PC) at 349–351.
8 At 346.
9 At 348.
10 At 348.
11 At 349–350.
12 Section 14(1) of the Jamaican legislation (Judicature (Appellate Jurisdiction) Act (Jam)) was materially the same as the proviso to s 385(1) of the Crimes Act.
13 At 350.

> In cases which fall between these two extremes there may be many factors deserving of consideration, some operating against and some in favour of the exercise of the power. The seriousness or otherwise of the offence must always be a relevant factor: so may its prevalence; and where the previous trial was prolonged and complex, the expense and the length of time for which the court and jury would be involved in a fresh hearing may also be relevant considerations. So too is the consideration that any criminal trial is to some extent an ordeal for the defendant, which the defendant ought not to be condemned to undergo for a second time through no fault of his own unless the interests of justice require that he should do so. The length of time that will have elapsed between the offence and the new trial if one be ordered may vary in importance from case to case, though having regard to the onus of proof which lies upon the prosecution lapse of time may tend to operate to its disadvantage rather than to that of the defendant. Nevertheless there may be cases where evidence which tended to support the defence at the first trial would not be available at the new trial and, if this were so, it would be a powerful factor against ordering a new trial.

[20] Their Lordships added, finally, that it is sometimes right to order a new trial even where an appellate court thinks an acquittal is more likely than not. That is so because it is generally in the interests of justice that the defendant's guilt should be decided by a jury.[14]

[21] This Court routinely orders a retrial where a conviction appeal has been allowed in reliance upon new evidence, meaning evidence that the jury did not hear. That course of action allows the new evidence to be tested, along with all other relevant evidence, by the trial court.[15] But even in a new evidence case the decision is discretionary.

[22] In general, the same approach is taken in judge-alone cases. There have been cases in which a retrial was not ordered, but the usual reason is that the defendant has served all or a substantial part of his sentence.[16] However, judge-alone cases differ in one important respect: because this Court has the benefit of reasons, it is better placed to evaluate the verdict.[17] That is why we were satisfied that the new evidence must have made a difference, had it been before Wylie J. The Court may equally be in a better position in a judge-alone case to decide whether the evidence was insufficient for a reasonable and properly directed jury to convict, were a retrial

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14 At 350, citing from the Full Court of Hong Kong's judgment in *Ng Yuk-kin v The Crown* (1955) 39 HKLR 49 (SC) at 60.

15 *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [119].

16 *Watchorn v R* [2014] NZCA 493; *Din v R* [2014] NZCA 316.

17 *Watchorn v R*, above n 16, at [49].

to be ordered, or whether the retrial would afford the Crown an unfair opportunity to improve upon its case.

The Court's recall jurisdiction

[23] This Court possesses an implied jurisdiction to recall judgments delivered in its criminal jurisdiction, where it must act to prevent a miscarriage of justice that has resulted from some serious error of process.[18] The jurisdiction is reserved for exceptional cases.[19] The Court is careful not to undermine the principle of finality, and it will not act where an alternative remedy is reasonably available to the applicant.[20] The Court has made it clear that it will not allow applicants to use the recall jurisdiction to relitigate matters that have been closed,[21] but as Mr Jones pointed out, the present application is not of that kind.

Was there a substantial error of process?

[24] The Crown denies that there has been any error of process. Its stance is that counsel was right not to disclose the Butler memorandum to us, because it fell into the category of preparatory material, or communications among Crown counsel about the appeal. Mr Heron QC, who appeared to argue the present application, pointed out that Mr Dotcom was not a witness in the appeal proceedings. It was submitted that his comments had no bearing on the freshness, credibility and cogency of the new evidence.

[25] We take a different view. We do not need to decide whether the Butler memorandum was a witness statement as defined, or whether s 13(6) of the Criminal Disclosure Act required that it be disclosed as a statement of a witness at the trial that was the subject of the appeal. We hold rather that the Crown could not both withhold the memorandum and resist the appeal in the manner that it did. The effect was to mislead the Court.

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18 *R v Smith* [2003] 3 NZLR 617 (CA) at [36].
19 *Wong v R* [2011] NZCA 563 at [13].
20 *R v Smith,* above n 18, at [36]; and *R v Palmer* CA334/03, 6 October 2004 at [25].
21 *Faloon v Commissioner of Inland Revenue* [2010] NZCA 242 at [2].

[26] The Butler memorandum placed the Crown in a difficult position. In our opinion, it meant that the Crown could not reasonably resist admission of the new evidence. The Crown certainly could not invite us to discount the new evidence on the basis that it lacked cogency because Messrs Karnes and Schaeffer might not have been present when donations were discussed, or might have had no reason to recall such discussion. Yet it did resist admission, and on those grounds, although we accept that these were not the only reasons given; counsel also suggested that the evidence apart from the lunch conversation was enough to sustain the conviction. It is no answer to this to say that the memorandum had not been signed by Mr Dotcom. It records a considered account, given in the presence of counsel and for the express purpose of establishing what Mr Dotcom might say in a reply affidavit. If the Crown felt it necessary to confirm what he would say in evidence, steps should have been taken to get a statement signed.

[27] It is important to bear in mind that it was by no means certain that the appeal would succeed. Only in hindsight does that result seem obvious. The new evidence was not fresh, and it was not lightly admitted. Had we rejected it on the grounds that it lacked cogency or the defence could have called it at trial, the appeal would have failed.

[28] We are satisfied that there has been a serious error of process. It is, we accept, attributable to an error of judgment rather than misconduct. Counsel evidently considered that the Judge's findings did not depend on the evidence about what was said at the lunch on 5 June and believed that the Crown's obligations to the Court were met by the concession that the evidence of Messrs Schaeffer and Karnes could be considered reliable.

Has the process error resulted in a miscarriage of justice?

[29] The answer to this question turns on whether we would have ordered a retrial had we known of the Butler memorandum. If we would have done so, Mr Banks cannot point to a miscarriage resulting from the Crown's error in the conduct of the appeal.

[30] The Crown case on appeal had two limbs. The first was that it did not matter when the lunch was held, because the conviction was justified by other circumstantial and direct evidence. We rejected that submission in the particular circumstances of the case, holding that but for the lunch the inference would not have been available that Mr Banks had the Dotcom donations in mind when he signed the return, without reading it, six months later.[22]

[31] The second limb was that the lunch was indeed held on 5 June and the discussion attributed to Mr Dotcom and Mr Banks was held there. As noted, it was suggested that Messrs Karnes and Schaeffer had no reason to recall such a discussion, or might not have overheard it. It was not part of the Crown case on appeal that the lunch was held on 9 June.

[32] As noted earlier, we ordered a retrial for the orthodox reason that the evidence of Messrs Karnes and Schaeffer had not been tested and should be assessed by the trial Court along with the other evidence. We understood that the Crown would maintain at the retrial that donations were discussed at the 5 June lunch.

[33] Mr Heron was not in a position to explain the Crown's current theory of the case. He did advise that it remains possible that the Crown will maintain that the discussion about donations was held at the lunch on 5 June. The view we take is that in light of the Butler memorandum, no reasonable fact finder could now reach that conclusion. That must be so whether or not Messrs Karnes and Schaeffer were called at the retrial. The memorandum records a considered admission by Mr Dotcom that Mrs Banks was correct when she said that the two Americans were present and donations were not discussed on that occasion.

[34] As noted, Mr Dotcom reverted in his interview with Mr Butler to his original account that the donations discussion was held at a lunch at Coatesville on 9 June, attended by Mr and Mrs Banks, but the defence evidence at trial was that Mr and Mrs Banks could not have attended a lunch at Coatesville that day. The Crown did not challenge the defence evidence and the trial Judge accepted it. Mr Heron could not tell us what the Crown's answer now is to the defence evidence.

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[22] Appeal judgment, above n 1, at [34] and [41].

Apparently the Crown witnesses other than Mr Dotcom have yet to be re-briefed. We do not think that matters, however. In circumstances where the evidence at trial positively excluded 9 June, and the trial Judge made a finding to that effect, it would not be right to give the Crown a second chance to make out its case. This is a clearer case than *R v E (CA308/06)*, in which this Court refused a retrial on that ground.[23] Having regard to the way in which the defence evidence was handled at trial, it is analogous to *R v Douglas*, in which this Court held it would not be right to allow the Crown a retrial at which it would pursue a conviction on grounds it had previously abandoned or disclaimed.[24]

[35] We were advised from the bar that it may now be suggested that there were other meetings between Mr Dotcom and Mr Banks, and that Mrs Banks may not have attended the meeting at which donations were discussed. Mr Dotcom may suggest that he met Mr Banks on 9 June, presumably not at lunch, and Mrs Banks was not present. As Mr Jones pointed out, the evidence at trial traversed the history of contact between the two men. It established that they met on four occasions, one of which was at a lunch held in June 2010 at Coatesville, at which Mrs Banks was present.[25] It was not suggested that the discussions might have been held at any of the other three meetings, or on any other occasion. So this would be an entirely new account, inconsistent not only with the evidence at trial but also with the Butler memorandum. It too would allow the Crown to improve upon its case.

[36] As to other considerations, we accept that a retrial would be costly and burdensome for the defence, but that is offset by the need to ensure that electoral law is complied with and by the inherent seriousness of the particular breach alleged. We have disapproved of the Crown's approach to disclosure before us, but that consideration does not justify refusing a retrial in the circumstances.[26] These other considerations are neutral.

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23 *R v E (CA308/06)*, above n 6, at [179]. See also *T (CA683/2012) v R* [2013] NZCA 212 at [39].

24 *R v Douglas* [1963] NZLR 1 (CA) at 4.

25 The evidence was that they met first in April 2010, when Mr Banks flew by helicopter to Coatesville, again at the June lunch, and subsequently at a New Year's Eve function and again at a birthday celebration in January 2011.

26 Compare *R v Ruscoe* (1997) 14 CRNZ 669 (CA) at 676.

[37] For these reasons we are satisfied that had we known of the Butler memorandum we would not have ordered a retrial. The Crown's omission to tell us about it has occasioned a miscarriage of justice.

Has Mr Banks an alternative remedy?

[38] As noted, Mr Banks has moved in the High Court for a discharge under s 347 of the Crimes Act. The Crown submits that s 347 supplies a reasonable alternative remedy.

[39] We accept that the High Court might discharge Mr Banks for insufficiency of evidence. But the High Court's decision will be made by reference to the evidence to be led at the retrial, complete with any improvements the Crown has been able to make to its case with benefit of a second opportunity. We have held that it is not appropriate to afford the Crown that opportunity. For that reason the s 347 application is not an adequate remedy in the particular circumstances of this case.

Result

[40] The application is granted. We recall our judgment of 29 October 2014 and cancel the retrial order. We direct that a verdict of acquittal be entered.

Solicitors:
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Crown Law Office, Wellington for the Respondent