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16 Paragraphs

R v WEI TANG - BC200705004

Supreme Court of Victoria -- Supreme Court of Victoria -- Court of Appeal
Maxwell P, Buchanan and Eames JJA

178 of 2006

29 June 2007

[2007] VSCA 144

CRIMINAL LAW -- Appeal -- Orders following judgment in [2007] VSCA 134 -- Consequence of allowing appeal against conviction -- Whether interests of justice require the order of a retrial or an acquittal -- Consequence of conclusion that it was open to a reasonable jury to have convicted the appellant on the counts on the presentment -- Consideration of appellant having already faced two trials -- Consideration of seriousness of offences charged -- Convictions quashed and re-trial ordered.

Maxwell P.

[1] I will ask Eames JA to deliver the first judgment.

Eames JA.

[2] The Court delivered judgment in this appeal two days ago, allowing the appeal upon upholding one of the grounds: a complaint that the learned trial judge misdirected the jury as to the elements of the offences. The Court did not then make an order as to the further disposition of the case, because counsel for the appellant sought the opportunity to make submissions on that question once he had the opportunity to read the reasons for judgment. There was no opposition by senior counsel for the respondent to that course being adopted.

[3] Mr Shirrefs for the appellant has now submitted that rather than order a new trial on the counts on the presentment, the Court ought instead enter verdicts of acquittal pursuant to s 568(2) of the Crimes Act 1958.

[4] The Court has a very broad discretion as to whether to order a re-trial or direct acquittal: see *R v De'Zilwa* .[1] The question is what the interests of justice require: see *DPP (Nauru) v Fowler*,[2] where the court introduced a two-stage test. The decision not to order a re-trial ought be exercised with caution and only in exceptional circumstances: see *R v ALH*.[3] Once the appellate court has rejected the argument that a verdict was unreasonable and could not be supported by the evidence, the proper course would ordinarily be to order a re-trial: see *Dyers v R* .[4] Ordinarily in those circumstances, the decision whether there ought be a re-trial is a matter that should be left to the discretion of prosecutorial authorities.[5] The range of factors that might be weighed in considering such an application is not limited.[6] In *Dyers*, Kirby J set out a wide range of matters that had in the past been taken into account by courts, or which might be taken into account in deciding the question,[7] and Mr Shirrefs submitted that many of those and other factors were

relevant in this case.

[5] In support of his contention that the Court ought enter verdicts of acquittal and not order a re-trial, Mr Shirrefs made the following points:

> First, the events giving rise to the charges occurred between August 2002 and May 2003. The long delay in resolving the matter, he submitted, renders it unfair in itself for the appellant to undergo a further trial. Substantial delay might in an appropriate case be decisive: see *Parker v R* .[8]
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> Secondly, he submitted that this was the second lengthy trial which the appellant had undergone, the first resulting in a hung jury. That caused an additional financial and emotional burden for the appellant.[9] In particular, counsel pointed to the fact that the appellant was not eligible for indemnity certificates under the Appeal Costs Act 1998 with respect to the two failed trials or to the appeal. In addition, she also lost her business.
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> Thirdly, the appellant has been in custody since 9 June 2006, a substantial period, he submitted, given that she had no prior convictions.
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> Fourthly, the appropriate charges in this case, he submitted, would have been debt bondage, which carried a maximum of 12 months' imprisonment, but Parliament had not legislated to create that offence at the time of the events giving rise to this prosecution. In the result, the appellant was placed on trial for slavery offences, which offences carried a maximum penalty of 25 years' imprisonment, and the jury had no alternative counts to consider. Were she to be sent for re-trial, the appellant would once again be charged solely with slavery offences, the debt bondage offence not being available.
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> Fifthly, Mr Shirrefs submitted that the Crown may amend its case on a re-trial, having regard to the decision of the Court as to the elements of the offence. That, he submitted, would be unfair to the appellant. He cited *Parker v R* .[10] The Crown, he submitted, should not be permitted to make a new case which was not made at the first trial, although counsel did not submit that any change in the Crown's case would be as significant as that contemplated in *King v R* .[11]

[6] In response, counsel for the respondent submitted that it was an appropriate case for re-trial. Counsel submitted that the Court had rejected the contention that the evidence was incapable of supporting convictions and, as earlier noted, submitted that that would ordinarily mean that a re-trial was appropriate. As to this, see also *R v Tadic*.[12] Counsel submitted that the nature of the alleged offences is extremely serious and ought to be prosecuted; that a failure to prosecute the matter is likely to send an inappropriate message to persons engaged in the sex slave trade, and that no good reason has been shown for departing from what is the usual order, namely, that there be a re-trial in such circumstances.

[7] In *R v Thomas* (No 3)[13] the Court of Appeal discussed the relevant principles as follows:

> [25] As Callaway JA stated in *R v ALH*:[14]
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> 'There is no doubt that s 568(2) of the Crimes Act 1958 does confer the discretion that counsel invoked, ie to direct a judgment and verdict of acquittal even where it has not been held that the evidence was insufficient to sustain a conviction. It is, however, to be exercised with caution and only in exceptional circumstances.'
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> [26] Earlier, in *Tadic*,[15] his Honour described the giving of a direction for a new trial as 'the ordinary course' to be followed where an appeal against conviction was successful, pointing out that its adoption --
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> > avoids a judicial determination otherwise than on trial by jury in circumstances where it has not been held that the evidence adduced at trial required an acquittal.[16]
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> [27] In *Fowler*,[17] the Court stated, when dealing with this aspect, that --

> ... the public interest in the proper administration of justice must be considered as well as the interest of the individual accused.

> There is an important principle underlying these observations. An appellate court must be careful not to usurp the functions of the properly constituted prosecutorial authorities which are entrusted with responsibilities and discretions to act in the public interest in the initiation and conduct of criminal prosecutions. Nor should an appellate court lightly set to one side the system of trial by jury in a case in which there is evidence capable of supporting a conviction. Intervention is justified, however, to ensure the subjection of an individual to the continued operation of the criminal justice system is not itself a source of oppression or unfairness.

[8] Applying those principles to the present case, I note first that the Court concluded that it was open to a reasonable jury to have convicted the appellant on the counts on the presentment. Mr Shirrefs submitted that the test as stated in *Fowler* was not whether the evidence was capable of supporting a conviction but whether it had sufficient cogency to justify a conviction. In my view, the finding of the Court in this case amounted to a finding that embraced the conclusion that the evidence in the case had sufficient cogency to justify a conviction. If it be that that is a different and higher burden which is imposed in the decision of the High Court in *Fowler*,[18] then in my view, in this case, both standards would be met. Whether there is indeed a difference, either in emphasis or substance, in the statement of the two tests need not be decided in this case. It is, however, relevant to note that, in so far as it was submitted that the difference amounts to the requirement of an assessment as to the credibility of the evidence, it must be noted that in this case the jury must have accepted the credibility of the complainants in this case by virtue of the finding of guilt that they made.

[9] The finding by the Court as to the cogency of the evidence would ordinarily dictate that a new trial should be ordered. Nonetheless, the Court must consider whether there are any grounds for concluding that it would be unjust to order a new trial.[19] McHugh J in *Longman v R* ,[20] held that where a re-trial would be attended by substantial expense and psychological trauma for the accused person, and that person had already served a substantial portion of the sentence, it may be arguable that the interests of justice did not require a re-trial, but his Honour in that case nonetheless held that that was a matter for the prosecutorial authorities to decide. Similarly, in *Crofts v R* ,[21] where there had been substantial delay of up to six years between the offences and the complaint, and where the appellant had served more than half of the non-parole period, the Court nonetheless left the question of a re-trial for the exercise of the discretion of the appropriate prosecutorial officer.

[10] The factors mentioned by Mr Shirrefs are indeed significant. The fact that this was a second trial means that a re-trial would be the third time the appellant had undergone the ordeal of a trial. Her anxiety concerning these charges and her financial burden has continued since her arrest on 31 May 2003. She has spent more than a year in custody. On the other hand, the offences on which she was convicted are very serious, as the sentence of ten years' imprisonment (with a non-parole period of six years) imposed upon her reflects. The period spent in prison is but a small portion of the sentence which was imposed. Furthermore, so far as we are aware, the delay between the date of the offences and the commencement of a third trial will not prejudice the ability of the appellant to advance such evidence in her defence as she wished to do. Indeed, the delay may well be beneficial to her prospects of acquittal.

[11] The fact that the alternative count of debt bondage is not available is also a significant factor, but I am not persuaded that, taken alone or together with other factors, it justifies the Court taking the decision to quash the convictions without ordering a re-trial. The Court has held that slavery convictions were open to a reasonable jury on the evidence, yet the absence of an alternative count ought not lead a properly directed jury to inappropriately convict on slavery counts where they held a reasonable doubt as those counts.

[12] I am also not persuaded that upon a re-trial the Crown would present a different case to that out of which the appeal arose. Nothing that has emerged on the appeal would be likely to produce a change in the conduct of the Crown case, save that closer attention may be directed to the question of the subjective intention of the appellant than was the case

on the first trial. That ought not produce any unfairness in the trial.

[13] Having considered the matters raised on behalf of the appellant, I am not persuaded that it would be unjust to order a re-trial. Those factors are all highly pertinent matters, however, which the Director of Public Prosecutions would inevitably take into account when deciding in the exercise of his discretion whether to prosecute a re-trial, but it is appropriate that that decision be left with him, in my opinion: this Court may not know all of the relevant public interest and other considerations which the Director might appropriately take into account when making his own decision. I am not persuaded that there would be a real risk of injustice to the appellant were this Court to order that the convictions be quashed and a re-trial be ordered.

[14] I would therefore order that the application for leave to appeal against conviction be granted, the appeal be treated as having been heard instanter and allowed, and in my view the appropriate order is that the convictions below should be quashed but that the appellant should be ordered to be re-tried.

Maxwell P.

[15] I agree.

Buchanan JA.

[16] I also agree.

Order

Application for leave to appeal against conviction granted, the appeal to be treated as having been heard instanter and allowed, and the convictions quashed but that the appellant should be ordered to be re-tried.

Counsel for the Crown: *Mr R Davis*

Counsel for the appellant: *Mr S A Shirrefs SC*

Solicitors for the Crown: *Director of Public Prosecutions (Cth)*

Solicitors for the appellant: *Slades & Parsons*

1 (2002) 5 VR 408 , 424 (Winneke P). A useful summary of the principles may be found in the article by Dr Chris Corns *"The Discretion of the Court of Appeal to Order a New Trial or Verdict of Acquittal"* (2006) 30 Crim LJ 343.

2 (1984) 154 CLR 627 , 630; *R v Nicoletti* (2006) 164 A Crim R 81 , 92 (Maxwell P).

3 (2003) 6 VR 276 , 280 (Callaway JA).

4 (2002) 210 CLR 285 , 317 (Kirby J).

5 Ibid 297 (Gaudron and Hayne JJ); 313 (Kirby J).

6 Ibid 313 (Kirby J).

7 Ibid 314-15.

8 (1997) 186 CLR 494 , 520 (Dawson, Toohey and McHugh JJ); 538 (Kirby J).

9 *Dyers v R* (2002) 210 CLR 285 , 315 (Kirby J).

10 (1997) 186 CLR 494.

11 (1986) 161 CLR 423 , 433 (Dawson J).

12 [2003] VSCA 28 [24] (Callaway JA).

13 [2006] VSCA 300.

14 (2003) 6 VR 276 , 280.

15 [2003] VSCA 28.

16 Ibid [24].

17 *DPP (Nauru) v Fowler* (1984) 154 CLR 627 , 630.

18 At 630.

19 See *King v R* (1986) 161 CLR 423.

20 (1989) 186 CLR 79 , 109 (McHugh J).

21 (1996) 186 CLR 427 , 436 , 452. See too *R v Tadic* [2003] VSCA 28 [24] (Callaway JA).