IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CRI-2014-485-26
[2014] NZHC 1457

UNDER	the Crimes Act 1961 and Summary Offences Act 1981
IN THE MATTER	of an appeal against conviction
BETWEEN	PETER DOUGLAS ZOHRAB Appellant
AND	NEW ZEALAND POLICE Respondent

Hearing: 24 June 2014

Counsel: T Ellis and S Park for Appellant
M J Ferrier for Respondent

Judgment: 26 June 2014

JUDGMENT OF GODDARD J

This judgment was delivered by me on 26 June 2014
at 3.30 pm, pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
John McCardle, Paraparaumu for Appellant
Crown Solicitors Office, Wellington

Introduction

[1] The appellant was convicted of assault and disorderly behaviour by Judge Tomkins following a defended hearing. He was sentenced to 60 hours' community work. Three grounds of appeal are advanced. First, that there was apparent or actual bias on the part of the trial Judge. Second, that the Judge failed to give sufficient weight to certain evidence. Third, that there was insufficient evidence to discharge the standard of proof.

[2] The appellant also sought a variation of the sentence of community work imposed, pursuant to ss 68 and 72 of the Sentencing Act 2002, but acknowledges that is a matter for the District Court to consider.

Facts

[3] The appellant is a self-proclaimed "Men's rights activist". On 18 October 2013, he boarded a train at Paraparaumu station and opened the window. Later, at the request of another commuter, the person sitting behind him closed the window.

[4] The named complainant, Ms Benefield, described hearing the appellant become upset that the window had been shut without his consultation. Other commuters called as witnesses during the trial said the appellant was abusive and used obscene language. Ms Benefield said that, after one particularly racist comment, she approached the appellant and "wagged" her finger at him.

[5] Her evidence was that the appellant then pushed or punched her in the chest. This caused another commuter passenger seated behind the appellant to restrain him. Both the appellant and another passenger made telephone calls to the police. Recordings of both telephone calls are in evidence before the Court.

The District Court decision

[6] During the trial, the appellant said he was punched by Ms Benefield on the chin and nose area. He denied assaulting her. The appellant also relied on an independent witness, Mr Wright, who said he thought Ms Benefield had punched the appellant's chest.

[7] In the event, the Judge preferred the evidence of the four main prosecution witnesses; namely Ms Benefield and three other commuters who were present in the carriage. The Judge considered that, despite some internal inconsistencies between their respective accounts, those witnesses had given an accurate description of what had occurred. The Judge observed that in his view the appellant "has a tendency to see conspiracies and sinister explanations in ordinary everyday and harmless events" combined with a "rigidity of views and an underlying sense of egocentric entitlement". The Judge rejected the appellant's claim that he had not struck Ms Benefield or used abusive language.[1]

[8] Photographic evidence of injuries said to be sustained by the appellant were found by the Judge to be "unhelpful and unconvincing". Both police and the appellant also described minor bleeding on the left hand side of the appellant's nose. However, the Judge was satisfied the bleeding was not the result of any assault by the complainant.[2]

[9] The Judge also disregarded the independent evidence of Mr Wright that the appellant was punched in the chest because he found it contradicted by the evidence of several other commuters and the appellant's own evidence that he was punched in the face. Also because Mr Wright had arrived after the initial argument about the window had occurred. The Judge concluded that Mr Wright had misinterpreted what he thought he saw Ms Benefield do, when she went to speak with the appellant.[3]

Submissions

[10] In relation to the first ground of appeal, Mr Ellis submitted that the Judge was influenced by his personal disapproval of views held by the appellant. In this regard and in particular, he referred to the Judge's statement that the appellant has a "rigidity of views and an underlying sense of egocentric entitlement" and to the Judge's preference for the evidence given by the prosecution witnesses, which he characterised as unfairly favourable.

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1 *New Zealand Police v Zohrab* DR Wellington CRI-2012-091-3317, 25 March 2014 at [8].
2 At [9].
3 At [10].

[11] Mr Ferrier in response suggested the Judge's statement was no more than an assessment of the appellant's credibility and was well founded on the evidence that had been given, in particular:

(a) the appellant's remark that he noted a "circle of women" on the platform of the station whose attentions seemed to be focused on a "butch lesbian"[4];

(b) the appellant's claim to have heard "a gnashing of teeth" when he said, "I may be a male but I've got rights too".[5] Also his later statement that the gnashing came from "some women sitting over there on the other side of the aisle";[6]

(c) the appellant's conclusion that, because the woman who requested that the window be closed did not consult him, she did not like him and was trying to provoke an incident;[7]

(d) the appellant's statement to police during a phone call he made whilst awaiting trial that the incident was "a female conspiracy against him".[8]

[12] In relation to the second ground of appeal Mr Ellis submitted first that the Judge had given insufficient weight to the evidence for the defence. He said the Judge should have placed more weight on the photographic evidence of the appellant's injuries and was wrong to disregard Mr Wright's evidence, whilst at the same time accepting evidence from one of the prosecution witnesses, Mr Eckett, who had only boarded the train at the same time as Mr Wright.

[13] Second, Mr Ellis submitted that the Judge had paid undue regard to the prosecution witnesses' evidence. He said the evidence was inconsistent and ought not to have been relied upon given some of the witnesses knew each other prior to

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4 Notes of evidence at 53–54.
5 Notes of evidence at 56.
6 Notes of evidence at 71.
7 Notes of Evidence at 57.
8 Notes of evidence at 79.

the incident and had had ample time to discuss the situation while awaiting police at the station and had further opportunity to discuss the incident prior to giving oral evidence.

[14] In response, Mr Ferrier accepted that there were inconsistencies amongst the prosecution witnesses but said that some of the inconsistencies relied upon by the appellant were distinctions without any material differences; or related to peripheral matters. All of the inconsistencies were, he said, understandable, given that the four witnesses were giving evidence about a brief event that had escalated quickly and which took place six months prior to trial. Each of the witnesses had seen the event from a different perspective. Fundamentally, however, their evidence was consistent and provided a clear evidential foundation for the charges.[9] In contrast, the appellant's evidence was contradicted by the main thrust of the prosecution witnesses' evidence; in particular his evidence that he did not raise his voice or use insulting words, racist terms or swear.

[15] Mr Ferrier said the possibility that the witnesses influenced each others' recollections was squarely before the Judge and it was rejected by the witnesses. Ms Benefield's evidence was that she had not seen any of the other passengers since the incident and any cross-fertilisation between the witnesses could not in any event account for the divide between the competing prosecution and defence versions.

[16] In relation to Mr Wright's evidence, Mr Ferrier said the Judge had confronted that evidence and why it was not accepted. Mr Wright's evidence was highly unreliable; as in his evidence in chief he had said he clearly saw the complainant punch the appellant as hard as she could in the upper chest.[10] During cross-examination, however, he accepted that his view was obstructed by the complainant's body whilst nevertheless maintaining that he was "absolutely certain" she had punched the appellant in the chest. When it was put to him that the appellant said he was punched in the face, Mr Wright became uncertain:[11]

> A. I guess I didn't see it connect in the chest. No but –

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9 At [17]–[25].
10 Notes of evidence at 81–82.
11 Notes of evidence at 86–87.

Q. You didn't see the blow, if any, connect did you?

A. – I guess I didn't, no.

Q. The fact is, that all you saw was her hand coming forward, and you've seen that, a mistake, you've taken that to be a blow, I should say?

A. Yes and I don't believe that he would have reacted the way he did if she hadn't connected with him.

[17] The third ground of appeal was not addressed specifically but logically flowed from a combination of the first two grounds of appeal.

Approach on appeal

[18] Section 232 of the Criminal Procedure Act 2011 provides that an appeal must be allowed if in the case of a Judge-alone trial, the Judge erred in his or her assessment of the evidence to such an extent that a miscarriage of justice has occurred. Miscarriage of justice means any error, irregularity, or occurrence in or in relation to or affecting the trial that has created a real risk that the outcome of the trial was affected or has resulted in an unfair trial or a trial that was a nullity.

[19] The Court on appeal must be mindful of any disadvantage in not having seen and heard the witnesses. When dealing with an appeal against a decision where the Judge's findings were based on their assessment of the credibility of the witnesses, some deference should be given to that assessment.

Discussion

[20] Mr Ellis sought to augment the test for bias by reference to international instruments and case law. However, the test is settled law in New Zealand, and that is whether there is a real and not remote possibility that the Judge might not bring an impartial mind to the resolution of the question he or she is required to decide.[12] The Court must put itself in the shoes of a "fair-minded lay observer" who:[13]

> … is presumed to be intelligent and to view matters objectively. He or she is neither unduly sensitive or suspicious not complacent about what may

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12 *Saxmere Co Ltd v Wool Board Disestablishment Co Ltd* [2009] NZSC 72, [2010] 1 NZLR 35.

13 At [5].

> influence the judge's decision. He or she must be taken to be a non-lawyer but reasonably informed about the workings of our judicial system, as well as about the nature of the issues in the case and about the facts pertaining to the situation which is said to give rise to an appearance or apprehension of bias.

[21] I am satisfied that such an observer would not view either the assessment of the appellant by the Judge in this case, nor his preference for the evidence of the prosecution witnesses over that of the appellant and Mr Wright, as giving rise to a real possibility that he had not brought an impartial mind to the resolution of the question he was required to decide. I accept the Crown's submission that the Judge's assessment of the appellant, far from being an "exercise of pronouncing a moral … judgment", was simply an assessment of the appellant's reliability based on all of the evidence adduced at the hearing, including from the appellant himself.

[22] In relation to the second ground of appeal, I am satisfied that the Judge did not err in his assessment of the evidence for the defence and the evidence for the prosecution. His Honour had the advantage of hearing from all of the witnesses and was entitled to prefer the evidence proffered by the prosecution witnesses on the grounds put forward by Mr Ferrier. The evidence given by the appellant and Mr Wright was, on the other hand, materially inconsistent. As noted, the appellant said he was punched in the face, whereas Mr Wright's initial stance was that he was punched in the chest. He resiled from that position considerably under cross-examination. Further, the photographic evidence provided by the appellant does not support the notion that it was the result of a punch.

Conclusion

[23] The appeal against conviction is dismissed. The application for variation of sentence of community work is a matter for the District Court.

Goddard J