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Criminal Law Bulletin 001 : June 2009 Rowan Butler

Prosecutorial Misconduct

Recently the Supreme Court released the decision of *R v Stewart* [2009] NZSC 53. In this decision the SC unanimously found that the conduct of the prosecutor caused a substantial miscarriage of justice. The decision is noteworthy for the following reasons:

1. It is a further reminder that the appellate courts will scrutinise a prosecutor's conduct.
2. However, when the appellate courts will quash a conviction, following misconduct, is not clear. In assessing misconduct, the appellate Courts engage in a value judgment.
3. It is interesting that the SC substituted its value judgment for the CA's, particularly when no point of legal principle was involved.

The Facts

Mr Stewart was a butcher. However, in 1992 he began to receive weekly compensation from ACC. To support his claim, Mr Stewart submitted medical certificates to the effect he could not work. The Crown's case was that Mr Stewart could work. Accordingly, each certificate formed the basis of a separate count. There were 59 counts in the indictment. Mr Stewart was acquitted on the first 25, but convicted on the remainder.

Essentially, the Crown witnesses said they saw Mr Stewart working. The defence called medical evidence, including a consultant psychiatrist, Dr Davis. Dr Davis gave evidence that Mr Stewart suffered from chronic pain disorder which caused him to exaggerate pain in order to be believed. Interestingly, Dr Davis' report was considered by the Crown's expert. The Crown's expert essentially accepted Dr Davis' report as "a pretty good, sound report".

Despite the view of the Crown's expert, when the prosecutor closed, he made the following

remarks:

"What did you make of the psychiatrist that the accused hired just before the trial and paid to try and get a defence to these charges? What did you make of Dr Davis' psychobabble?...You may well think that Dr Davis was a malingerer's dream who seemed to be able to come up with an explanation for everything the accused did...Is this just another one of those ...modern disorders let loose on the world by the medical profession which means that no one's responsible for any of their own actions anymore?"

To compound matters, the prosecutor also submitted that the accused had reason to lie. The prosecutor said Mr Stewart had motive to hire a psychiatrist and try to "get himself off".

There were two central complaints on appeal, namely:

1. The prosecutor's comments about Dr Davis' evidence; and
2. The prosecutor's submission about Mr Stewart having a motive to lie.

Court of Appeal

In relation to both complaints the CA accepted that the prosecutor's conduct was inappropriate. The CA said that "Counsel went distinctly too far" and was even "insulting" of Dr Davis. However, the Court stopped short of accepting that there was a miscarriage of justice.

Perhaps what makes the Supreme Court's decision in this case so interesting is not only the Supreme Court reversing the CA's value judgment, but doing so in almost all respects.



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Supreme Court Decision

At paragraphs [19] to [22] of its decision the SC set out something of a review of Commonwealth authorities dealing with the duties of a prosecutor. Those decisions and comments will be well known. In summary, a prosecutor should not strive for a conviction; engage in inflammatory rhetoric or demeaning commentary. The SC said, on the present facts “it would be difficult to imagine a more obvious breach of a prosecutor’s obligations”. By accusing Dr Davis of accepting payment in an attempt to establish a defence, and speaking “psychobabble” the prosecuting Counsel was plainly appealing to prejudice through emotive and inflammatory language. The fact that the Crown’s own expert did not challenge Dr Davis’ evidence was an important factor for the SC.

It is difficult to find, in the SC’s decision, a clear or governing principal about what will amount to prosecutorial misconduct or how a Court might determine such cases. However, the SC concluded as a result of the prosecutor’s conduct, the trial was unfair (s25 (a), Bill of Rights). The SC quashed the convictions.

Conclusion

It is hardly surprising that the prosecutor’s remarks were criticised. However, what remains uncertain is how the Courts will approach cases of this sort and what the result might be. Especially in light of the completely different results reached by the CA and the SC. You might say, “you know misconduct when you see it”, but judging by the decisions here, can we be so certain whether a Court will agree on the result which follows?

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