IN THE SUPREME COURT OF NEW ZEALAND

SC 72/2005
[2008] NZSC 39

JASON JOHN CUMMING

v

THE QUEEN

Hearing:	19 October 2006 and 28 February 2008
Court:	Elias CJ, Blanchard, Tipping, Anderson and Gault JJ
Counsel:	R M Lithgow QC and N Levy for Appellant J C Pike and M D Downs for Crown R E Harrison QC Amicus Curiae (on 28 February 2008)
Judgment:	15 May 2008

JUDGMENT OF THE COURT

A **The appeal is allowed.**

B **The convictions are set aside.**

C **A new trial is ordered.**

REASONS

(Given by Anderson J)

[1] In November 2002 Mr Cumming was tried, without counsel, and convicted of serious crimes. At various times before his trial began counsel had represented him. Some he dismissed; others decided they could not continue to act in view of allegations he had made against them. The Court appointed one of the latter, Mr S J Shamy, as amicus curiae to assist at the trial — notwithstanding this, Mr Cumming defended himself in a way that was extremely aberrant and self-damaging. An appeal to the Court of Appeal was dismissed. The information considered by this Court, including reports it caused to be obtained from expert psychiatrists, has satisfied us that throughout his trial Mr Cumming was severely mentally disordered. The issue on this appeal is whether Mr Cumming's convictions ought to be quashed on the grounds that a miscarriage of justice has been occasioned by his mental condition.

[2] In about August 2001 the complainant, a woman in her late teens, met Mr Cumming and began spending nights at his home. According to her, Mr Cumming acted in a very controlling and sexually demanding way. She said that he would keep the doors and windows locked and accuse her of talking to neighbours through the walls and of knocking him out at night with nunchukku[1] so that she could escape and have sex with others. She left him at one point, but returned to his home some weeks later in order to leave him a message. He persuaded her to stay and after a few days, she said, he again mistreated her. He would not let her out of his sight even when she used the lavatory. He kept the doors locked and stapled up the windows. She said he padlocked her to the bed at night and although they sometimes went out to the shops he kept her under his power and control. Eventually she managed to escape. During the time she was with him he allegedly committed numerous sexual violations and assaults on her, leading to representative counts of sexual violation by rape and unlawful sexual connection and other offences against the person including detaining with intent to have sexual intercourse. Having been convicted on all eight counts in the indictment Mr Cumming was sentenced to preventive detention.

[3] The way Mr Cumming conducted his defence greatly troubled the jury. After final addresses and before the summing up they sent a note to the Judge in these terms:

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[1] A Japanese weapon consisting of two hardwood rods linked with a cord.

> Sir,
>
> How come this is a fair trial? At least some of us are seriously troubled to be asked to make decisions from such a lop-sided presentation, especially given the high stakes.

[4] The Judge responded to the note when summing up. In essence, he directed the jury that the appellant had a right to defend himself; that he had had lawyers on legal aid acting for him at an earlier stage; that the Court had appointed an amicus to assist; that they had to decide the case on the evidence and arguments they had heard in Court; that they could not compensate for what they considered inadequacies in Mr Cumming's representation of himself when reaching verdicts; and that if the trial was unfair that would be a matter for the Court of Appeal to consider.

[5] The impression Mr Cumming must have conveyed to the jury can be discerned from a very experienced Court reporter's article in *The Press* newspaper, which contained the following observations:[2]

> [O]nce the trial started, his behaviour settled as though he knew it was his only chance. But he would keep asking the same questions a few minutes apart, even when told by Justice Panckhurst to move on. It was apparently not that he could not remember, but that he did not take any notice of the answers he had already been given. Direct questions from Justice Panckhurst were met with paper shuffling and long silences. The questions often had to be repeated, sometimes loudly.

[6] A separate article, published the same day, made these observations:[3]

> [The complainant] told what happened without embellishments, and her story stayed basically unshaken. Cumming kept repeating questions, covering old ground, until told by Justice Panckhurst to move on. The result was that the jury heard the victim's story not once, but three or four times. There were long pauses while he thought of questions, and shuffled papers. The trial judge's frustrations showed only once in the courtroom. Late on the fourth day, he whacked the bench in front of him and told Cumming to ask a particular question instead of wasting time. That was the day the jury's views began to emerge. By then, some of them were laughing openly at the accused's questions, which were digging his own hole deeper every hour. His own evidence on day six of the trial met the same reaction. He got to tell his story then. He just does not understand how strange it sounds.

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[2] Clarkson, "His World: A Dark and Dangerous Place", *The Press* (Christchurch), 15 November 2002, A11.

[3] "Jury Impressed by Victim's Story", *The Press* (Christchurch), 15 November 2002, A11.

[7] To assist this Court, Mr Shamy has filed an affidavit in which he expresses concern about Mr Cumming's ability to conduct his defence. Mr Cumming was unable to communicate adequately with Mr Shamy to receive advice for the purposes of his defence and seemed to Mr Shamy to be either of low intelligence or suffering from a mental disorder. He seemed unable to differentiate between issues that had substance and those which did not. It is Mr Shamy's view that in the initial stage of the trial the jury appeared to regard Mr Cumming's behaviour as almost deliberately humorous, but that over time they appeared to realise that the behaviour was not deliberate and that in fact Mr Cumming had serious limitations in conducting his own defence. Mr Shamy has deposed that Mr Cumming struggled to deliver his closing address, that he had an unusual and distracting manner of delivery, and that he spent considerable time shuffling through his papers in silence.

[8] The tenor of Mr Cumming's performance is indicated further by a schedule of exchanges between the Judge and Mr Cumming, both in chambers and in the courtroom, which counsel for both the Crown and Mr Cumming prepared for the purposes of the Court of Appeal hearing. It is unnecessary to advert to their detail, it being sufficient to note that they exacerbate concerns about Mr Cumming's mental state.

Mental disorder in connection with an accused's trial

[9] At the time of Mr Cumming's arrest and trial the statutory provisions relating to the trial of mentally disordered persons were found in Part 7 of the Criminal Justice Act 1985. That provided a procedure for a judicial determination as to whether a defendant was "under disability", a term defined in s 108:

> **108 Interpretation**
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> (1) For the purposes of this Part of the Act, a person is under disability if, because of the extent to which that person is mentally disordered, that person is unable—
>
> (a) To plead, or
>
> (b) To understand the nature or purpose of the proceedings; or
>
> (c) To communicate adequately with counsel for the purposes of conducting a defence.

[10] Section 111 provided that in any case where a defendant charged with an offence punishable by imprisonment appeared to be under a disability, and the Judge was satisfied on the evidence of two medical practitioners that the defendant was mentally disordered, the Judge should, after giving the prosecution and the defendant an opportunity to be heard and to call evidence on the matter, determine whether the defendant was under a disability. If the Judge was satisfied that the defendant was under a disability, the Judge had to direct a finding to that effect to be recorded. On such a finding the Judge was then required by s 115(1), although subject to subs (2), to make an order that the person be detained in a hospital as a special patient under the Mental Health Compulsory Assessment and Treatment Act 1992. Subsection (2) provided that having regard to all the circumstances of the case, and if the court was satisfied after hearing medical evidence that it would be safe in the interests of the public to do so, the court might, instead of making a "special patient" order, do one of the following:

> (a) Make an order that the person be detained in a hospital as a patient; or
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> (b) Make an order for the person's immediate release; or
>
> (c) If the person were liable to be detained under any full time custodial sentence, decide not to make any order under s 115.

[11] The statutory procedure in respect of mentally disordered defendants was changed by the Criminal Procedure (Mentally Impaired Persons) Act 2003, Part 2, subpart 1 of which deals with persons who are or may be "unfit to stand trial", a term which is defined in s 4:

> **Unfit to stand trial,** in relation to a defendant, —
>
> (a) means a defendant who is unable, due to mental impairment, to conduct a defence or to instruct counsel to do so; and
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> (b) includes a defendant who, due to mental impairment, is unable —
>
> (i) to plead:
>
> (ii) to adequately understand the nature or purpose or possible consequences of the proceedings:
>
> (iii) to communicate adequately with counsel for the purposes of conducting a defence.

[12] The present statutory regime, under the 2003 Act, prohibits a court from making a finding of unfitness to stand trial unless it is satisfied, on the balance of probabilities, that the evidence against the defendant is sufficient to establish that the defendant caused the act or omission that forms the basis of the offence with which the defendant is charged.[4] The regime also stipulates a procedure for that to be ascertained.[5] If the Court is so satisfied, it must then undertake the process of determining whether the defendant is mentally impaired and, if so, find whether or not the defendant is unfit to stand trial.[6] Under that process, the Court must receive the evidence of two health assessors[7] and if satisfied on such evidence that the defendant is mentally impaired must record a finding to that effect. After giving the parties an opportunity to be heard and to present evidence on the issue, the court must find whether or not the defendant is unfit. Subpart 3 of the Act stipulates the process of inquiry and determination for dealing with a defendant who has been found unfit to stand trial. This may involve detention in a hospital as a "special patient" or in a secure facility as a "special care recipient" under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003.[8] Lesser alternative orders are set out in s 25 of the Act.

[13] A formal finding, pursuant to the statutory procedures, of unfitness to plead or unfitness to stand trial has significant consequences, and involves a prescriptive regime of inquiry. On a general appeal, this Court is not empowered to make a formal finding to either of those effects. Indeed, a formal finding can be made only between the commencement of criminal proceedings and the conclusion of all the evidence at trial.[9] But that does not prevent this Court from inquiring into, and deciding whether, by reason of a mental disorder from which a defendant was suffering at the time of trial, there has been a miscarriage of justice for the purposes of s 385(1)(c) of the Crimes Act 1961. The legislative schemes exemplify the relevance of mental health disorders to the question of trial, and indicate criteria to which this

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4 Section 9.
5 Sections 10—12.
6 Section 14.
7 "Health assessor" is defined in s 4 as a "practising psychiatrist who is registered as a medical practitioner; or a psychologist; or a specialist assessor under the Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003".
8 Section 24(2).
9 Section 7(1) of the 2003 Act. Under s 110(3) of the 1985 Act a finding of disability could not be made after the opening of the case for the defence.

Court should have regard in a case such as this. The schemes are a recognition by Parliament that it is not right to put someone on trial when mental disorder would make the trial unfair.

Mr Cumming's mental disorder

[14] This Court has had the opportunity to consider several reports about Mr Cumming from psychiatrists and psychologists. As indicated earlier in this judgment, they include some very informative opinions obtained for the present appeal which the Court of Appeal did not have the benefit of considering. The sequence begins with a report prepared by a clinical psychologist, Mr Craig Sawyers, on 1 August 2000. He concluded that Mr Cumming was functioning at an extremely low range of intellectual ability. On 22 August 2000 a consultant psychiatrist, Mr David Stephenson, expressed the opinion that Mr Cumming probably had Attention Deficit Hyperactivity Disorder (ADHD), had antisocial personality traits and mild intellectual retardation. Occasional monitoring over the following year led to reports of the same diagnosis.

[15] The events giving rise to the charges under present consideration occurred in October 2001. On 14 November 2001 Dr Peter Miller, a consultant psychiatrist for the Canterbury District Health Board, reported to the District Court at Christchurch. He expressed the opinion that although Mr Cumming had a reported history of intellectual handicap and ADHD, he was not himself convinced of those diagnoses. Dr Miller thought that Mr Cumming fulfilled all the criteria for Antisocial Personality Disorder, and suspected he had a below average intelligence but probably not one that would place him in the intellectually handicapped region. He concluded that Mr Cumming was not under disability and did not have any psychiatric defence to the charges.

[16] On 5 July 2002 Dr Miller again wrote to the District Court to inform it that questions had been raised about Mr Cumming's fitness to plead. He requested the Court to order a report under s 121(2)(b)(ii) of the Criminal Justice Act 1985. That was because Mr Cumming had been admitted to Te Whare Manaaki Forensic Unit, while on remand. The behaviour which led to his admission was persecutory ideation

towards his lawyers and prison staff. In the meantime Mr Cumming had been committed to the High Court for trial. Chisholm J considered the request and on 8 July 2002 he ordered a report. Dr Miller responded on 15 July. His report again expressed the opinion that Mr Cumming was fit to plead and did not have a psychiatric defence.

[17] Dr Miller concluded his report with the opinion that Mr Cumming displayed features of a severe Personality Disorder with antisocial narcissistic and paranoid features for which no treatment was available. He warned that it was likely that Mr Cumming might prove disruptive in court throughout his trial as a consequence of his personality characteristics. In view of that Panckhurst J would, of course, have attributed Mr Cumming's behaviour in Court to a condition which would just have to be accepted and dealt with, rather than to a mental disorder bearing on Mr Cumming's fitness to be tried at all.

[18] Following the conviction of Mr Cumming the trial Judge sought reports from two health assessors, pursuant to s 88(1)(b) of the Sentencing Act, because of the prospect that Mr Cumming would be sentenced to preventive detention. The purpose of such reports is to ascertain the likelihood of the offender committing a further qualifying sexual or violent offence. Their focus is essentially prognostic rather than generally diagnostic. Nevertheless Mr Craig Prince, a Senior Clinical Psychologist, remarked upon Mr Cumming's continued persecutory focus and stated that a number of factors related to the contents of Mr Cumming's thoughts was highly suggestive of "reaching delusional proportions". Dr Phil Brinded, an Associate Professor and Clinical Director of the Canterbury District Health Board's Regional Forensic Psychiatry Service, also provided an opinion on Mr Cumming's mental state. He considered that the psychiatrists who had clinical interactions with Mr Cumming before trial had their ability to accurately assess Mr Cumming's mental state seriously compromised by his suspiciousness and fear of revealing information about himself. Dr Brinded was of the opinion that Mr Cumming was suffering from Paranoid Delusional Disorder. He thought that the previous health assessors (particularly Dr Miller) did not have available to them what Dr Brinded termed "the full extent of the disordered and delusional thinking" displayed by Mr Cumming, which had become more evident during his trial and during his interview with Dr Brinded. Dr Brinded

said that persons who appear to display elements of Paranoid Personality Disorder can, under stress, later develop clear signs and symptoms of mental illness, particularly Paranoid Delusional Disorder. The trial was, of course, an acute stressor.

[19] For the purposes of the appeal to the Court of Appeal, Mr Lithgow obtained a report from Dr Aileen Brunet, a Consultant Psychiatrist with the Otago District Health Board's Regional Forensic Service. Dr Brunet examined the trial transcript, other judicial records, clinical reports and records, and other personal information. She was of the opinion that Mr Cumming was of below average IQ and she referred to and discussed what she called Mr Cumming's "well documented history" of ADHD. She expressed the opinion that the conditions he was suffering from resulted in an incapacity to represent himself at trial. Her views were significantly expanded in a later report to Dr Harrison**,** which was one the Court of Appeal did not have the benefit of seeing.

[20] Dr Harrison was asked by this Court to accept the responsibility of amicus when it appeared at the initial hearing of this appeal that the Court required assistance in ways where Mr Lithgow's instructions presented some difficulty. We are grateful to Dr Harrison for accepting the appointment. The report he obtained from Dr Brunet was illuminating. She explained that at the time she had written to Mr Lithgow she was Mr Cumming's treating psychiatrist and had completely excluded the diagnosis of Delusional Disorder and any reference to Mr Cumming's paranoia because she was constrained by his vehement and intransigent opposition to its inclusion. She pointed out that the authors of the Court ordered reports were not so constrained. By implication, she was now herself no longer constrained, because she was not treating Mr Cumming and Dr Harrison was seeking her opinion as an appointee of this Court. Dr Brunet firmly expressed her opinion that at the time of his trial Mr Cumming was suffering from a Delusional Disorder, persecutory type. She refers to him as being "seriously and profoundly disturbed" and with supporting reasons she expresses the opinion that during his trial Mr Cumming was mentally disordered to the extent that he was unable to plead and to communicate adequately with his counsel for the purpose of conducting a defence. There is a particular irony in the position, which she expressed in these terms:

> As Mr Cumming was acting as his own counsel the impact of his mental disorder was even greater upon his functioning in court. Conducting a delusionally based defence and with obvious impairments in his ability to process information, make appropriate inquiries and respond to what was happening, Mr Cumming, as his own counsel, could be said to be unable to communicate adequately with himself. Essentially both defendant and counsel were mentally disordered in this situation.

A miscarriage of justice

[21] It is very clear to us that by reason of mental disorder Mr Cumming was under a disability or, in terms of the present legislation, unfit to stand trial. For that reason there has been a substantial miscarriage of justice. The appeal must therefore be allowed.

[22] That conclusion raises the issue whether a new trial should be ordered. Mr Lithgow strongly urged us just to quash the convictions without ordering a retrial, pointing out that Mr Cumming has already been in custody for six and a half years. However, in the event of any reconviction, Mr Cumming would be liable to the indeterminate sentence of preventive detention. This is therefore not a case where no sensible purpose would be served by an order for retrial. Whether that should occur is not, however, a matter for this Court and in any event may well be affected by any future inquiry into Mr Cumming's fitness to stand trial under the present legislative provisions.

Result

[23] In the result, the appeal is allowed, the convictions are set aside and a new trial is ordered.

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