Henderson v R [1999] NTCCA 12

PARTIES:	LEONARD DAVID HENDERSON
	v
	THE QUEEN
TITLE OF COURT:	COURT OF CRIMINAL APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	CA1 of 1999
DELIVERED:	12 February 1999
HEARING DATES:	10 February 1999
JUDGMENT OF:	RILEY J

REPRESENTATION:

Counsel:

Applicant:	In person
Respondent:	M. Carey

Solicitors:

Applicant:	-
Respondent:	Office of the Director of Public Prosecutions

Judgment category classification:	C
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ril99001

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Henderson v R [1999] NTCCA 12
No. CA1 of 1999

BETWEEN:

LEONARD DAVID HENDERSON
Appellant

AND:

THE QUEEN
Respondent

CORAM: RILEY J

REASONS FOR DECISION

(Delivered 12 February 1999)

[1] Leonard David Henderson has made application for leave to appeal pursuant to s410 of the *Criminal Code Act*. The matter came before me for determination pursuant to s429 of that Act.

[2] Mr Henderson, who was not represented by counsel, informed me that he wished to obtain leave to appeal against both his conviction and the sentence imposed upon him. He informed me that he had the benefit of some discussion with an officer of the Northern Territory Legal Aid Commission, and had obtained some advice in respect of the application.

[3] In his handwritten affidavit in support of his application for leave to appeal, Mr Henderson identified a number of concerns which, in summary form, complain that counsel who represented him at his trial failed to follow instructions and failed to adequately challenge some of the evidence. This complaint was repeated in the submissions made by Mr Henderson when he appeared before me. I note that counsel who is very experienced in the field of criminal law represented Mr Henderson at his trial.

[4] In determining whether or not leave to appeal should be granted, my function is to consider whether the applicant has at least an arguable case, *Rostron* (1991) 1 NTLR 191 at 196. In addition there may be cases where, in the interests of justice, the granting of leave to appeal is required even in the absence of some specific error. It is not appropriate to circumscribe the discretion to be exercised, *Matovksy* (1989) 15 NSWLR 720 at 723.

[5] An appeal based upon matters concerning the conduct of counsel in the course of a trial was discussed by the Court of Criminal Appeal, New South Wales, in *Ranko Ignjatic* (1993) 68 A Crim R 333. In that case Hunt CJ at CL said (p336):

> "The sole ground of appeal in relation to the appellant's conviction is that a miscarriage of justice had occurred as a result of the incompetence or negligence of his counsel and solicitor at the trial, in four specified respects to which I will refer shortly. The law to be applied by this Court in such a situation was recently stated in *Birks* (1990) 19 NSWLR 677 at 683-685; 48 A Crim R 385 at 390-392. As a general rule an accused person is bound by the way in which the trial is conducted on his behalf, regardless of whether his instructions were carried out, and a conviction will not be set aside because decisions by his legal representatives as to the conduct of the

> trial were made without or contrary to instructions or because those decisions involved errors of judgment or even negligence. Counsel have a wide discretion as to the manner in which proceedings are conducted. Decisions as to which witnesses should or should not be called, what questions should or should not be asked, which lines of argument should be pursued, which points should be abandoned and which of two or more inconsistent defences should be raised are all matters within the discretion of counsel, and they frequently involve difficult problems of judgment, including judgment as to the best tactics to be adopted. Neither disobedience of instructions nor even incompetence is sufficient of itself to attract appellate intervention. It is only when the error made was of such a nature in the circumstances of the case as to have led to a miscarriage of justice that this Court will interfere. … The issue to be determined is whether the error made by counsel was of such a nature in the circumstances of the case as to have led to a miscarriage of justice. Not every error by counsel will have that consequence."

[6] Later in the judgment (p338) his Honour went on to say:

> "It is for the appellant to persuade this Court that a miscarriage of justice did in fact occur in order to succeed upon this ground, and it is for him to provide the evidence upon which such a conclusion could fairly be based. It is not sufficient that the appellant may have merely lost a chance to raise various issues which were not raised at the trial. There was no miscarriage of justice unless it can be shown that there was at least a substantial chance that the appellant would have succeeded in relation to those issues."

[7] In the present circumstances Mr Henderson need only demonstrate that he has an arguable case that errors of counsel occurred and that they were of such a nature as to have led to a miscarriage of justice.

[8] The central issue in the trial of Mr Henderson was whether or not he was present at the time that a gold chain or necklace was stolen from Eric Heydeman, and when violence was used upon Mr Heydeman in order to

obtain that property. A further issue was the nature of the involvement of Mr Henderson in the sale of the necklace.

[9] The Crown case included the positive identification of Mr Henderson by Ms Prisk and by Mr McLeod. That identification received some support from the evidence of the victim Mr Heydeman. There was a clear conflict in the evidence. On the one hand, Mr Henderson gave evidence to the effect that he was not present at the time of the offence, and further that, although he was present at the pawn shop, he took no part in the sale of the necklace. On the other hand the evidence of Mr McLeod and Ms Prisk was to the effect that he was present at the relevant time and he did take part in the disposal of the necklace.

[10] Mr Henderson gave evidence in which he admitted he had spent part of the evening and the morning prior to the offence in the company of Mr Heydeman, Ms Nea Prisk and Mr Adam McLeod. He said they were at the Victoria Hotel until "closing time, 12 o'clock". They then went to a takeaway food shop and then to Beachcomber's Nightclub, where they remained until "3-4 o'clock". He said when they left those premises they walked to the door as a group. He then went home to obtain more alcohol and he was to rejoin the others later. Mr Henderson denies any involvement in the attack on Mr Heydeman and, if his version of events be accepted, it would seem this occurred whilst he was absent from the others. It is common ground that Ms Prisk, Mr McLeod and Mr Henderson were together later in the morning. Mr Henderson agreed to his having been at the

premises of Star Moneylenders that morning with Ms Prisk and Mr McLeod, but denied being involved in the sale of the stolen necklace.

[11] Nea Elizabeth Prisk gave evidence that she had been with Adam McLeod and Leon Henderson that night and the following morning. She met Leon Henderson for the first time that night. She said the four persons, being herself, Adam McLeod, Leon Henderson and "the American person" left Beachcomber's Nightclub together. The "American guy" was "tagging behind" and "Leon had fallen behind" when she heard a thud. Shortly thereafter Leon joined them and he had "the gold chain" in his hand. They then departed. Later she went to the pawnshop with Adam and Leon. She identified Leon Henderson in the court room. Ms Prisk was cross-examined by counsel for Mr Henderson. In particular she was cross-examined about Mr Henderson leaving to get alcohol and his absence at the relevant time. The effect of Mr Henderson's version of events was put to her and denied by her.

[12] Adam Troy McLeod gave evidence. At the time of the offence he had known Leon Henderson for about a week. He gave evidence that prior to the offence occurring Leon Henderson and he agreed to rob the American tourist. He said the four persons left the Nightclub together. Ms Prisk was walking ahead, Mr Henderson and the American were together and Mr McLeod was a short distance behind. He said "I just heard this big almighty clunk and I seen the American fellow go down and he's hit the ground." Mr Henderson was "crouching over the American fellow".

Mr McLeod also gave evidence that Mr Henderson was present at the time the necklace was sold and received part of the sale price. Mr McLeod continued to see Mr Henderson after the offence as they shared an interest in football. Mr McLeod was cross-examined and the effect of Mr Henderson's version of events was put to him and was denied by him.

[13] Mr Heydeman was called to give evidence. He did not directly identify Mr Henderson but gave evidence that he was with the three people with whom he had spent the evening at the time he was attacked. His version of events is therefore contrary to that of Mr Henderson. He was also cross-examined on relevant issues.

[14] I have read the transcript of the evidence, I have listened to the submissions of Mr Henderson, I have read his affidavit and his typed submission. On the basis of this material I can identify no failure on the part of counsel to properly present the defence of Mr Henderson. It is for Mr Henderson to identify any basis which may arguably exist to demonstrate that a miscarriage of justice occurred. I am unable to see any basis upon which a Court of Criminal Appeal could hold that a miscarriage of justice occurred as a consequence of the matters of which Mr Henderson complains. As the matter was formulated before me, I am unable to see that Mr Henderson has an arguable case and I decline to grant leave to appeal against conviction.

[15] In relation to the appeal against sentence, Mr Henderson complained that there was a disparity between the sentence imposed upon him and that

imposed upon Mr McLeod. The explanation for that disparity is spelled out by his Honour the Chief Justice in his sentencing remarks of 24 December 1998 at pp4-6. I took Mr Henderson to those remarks and he was unable to suggest any error in the approach adopted by his Honour. To my mind the approach of his Honour does not reveal any error, and I decline to grant leave to appeal against sentence.

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