IN THE COURT OF APPEAL OF NEW ZEALAND

CA381/07
[2007] NZCA 583

THE QUEEN

v

BRENDEN JOHN MARSHALL

Hearing: 17 October 2007

Court: O'Regan, Chisholm and Potter JJ

Counsel: C W J Stevenson for Appellant
M F Laracy and R C Major for Crown

Judgment: 17 December 2007 at 11 am

JUDGMENT OF THE COURT

The appeal against conviction is dismissed.

REASONS OF THE COURT

(Given by Chisholm J)

Introduction

[1] After a valuable sculpture had been stolen and a reward for its return had been offered, Mr Marshall contacted the owners (through a newspaper editor) about facilitating its return. In due course a reward was paid and the sculpture was returned. Subsequently the appellant was charged with, and convicted of, blackmail and receiving stolen goods (the sculpture). He was sentenced to community work.

[2] In this appeal against conviction Mr Marshall alleges that the trial Judge, Simon France J, misdirected the jury about the essence of the defence case on each count, both legally and factually. He also alleges that the prosecutor improperly opened and closed to the jury about Mr Marshall's alleged evasion of the police and that the absence of any direction from the trial Judge gave rise to a real risk that a miscarriage of justice has occurred.

Background

[3] During the night of 6 October 2005 a large bronze sculpture valued at $250,000 was stolen from the front garden of a restaurant at Waikanae beach. After informing the police about the theft the owners, Margaret Mouat and Gavin Bradley, contacted various media outlets and indicated their willingness to pay a reward. Reward posters were also distributed. The owners had a reward of $6,000 in mind.

[4] Shortly after the sculpture went missing the Kapiti Observer newspaper ran a story about the theft. When its editor, Diane Joyce, arrived at work on 18 October 2005 she found a telephone message for her to ring "Brenden" at a given telephone number. Ms Joyce spoke to Brenden (Mr Marshall) who indicated that although he had not stolen the sculpture, he knew who had it, and he could help to get it back. At that time Ms Joyce did not take the matter seriously.

[5] Later the same day Mr Marshall rang back and said that he had pictures of the sculpture. Arrangements were made for him to meet with Ms Joyce. When they met the appellant showed Ms Joyce cam-recorded photographs of the sculpture. Again

Mr Marshall was insistent that he had not stolen it and he agreed to meet with the owners of the sculpture.

[6] At a meeting between Mr Marshall and the owners of the sculpture Mr Marshall reiterated that he had not been involved in the "burglary". It was agreed that the owners would pay $6,000 on the basis that Mr Marshall would organise the return of the sculpture. Although Mr Marshall stipulated that the police were not to be involved, he said that he would be happy to talk to them after the exchange had taken place.

[7] As arranged, the owners withdrew $6,000 in cash and went to the offices of the Kapiti Observer. They were accompanied by a business associate, Christopher Cameron. According to Ms Joyce's evidence the appellant then called her by telephone:

> He said it wasn't good news. The people who had the statue now wanted $10,000, that it wasn't him it was them, but he wouldn't get any more out of it, and that if they didn't get the $10,000 the statue would be chopped up.

Ms Joyce's evidence was that the appellant did not say what he was expecting to get out of it but "the inference was about $2,000". Under cross-examination she accepted that Mr Marshall had made it clear that he wanted to prevent the sculpture being damaged. She denied that the figure of $10,000 was suggested by her and said that she had not mentioned any figure.

[8] Reluctantly the owners decided to pay the extra $4,000 and withdrew that amount. Arrangements were made for Mr Cameron, together with the office manager of the newspaper, Tony Young, to meet Mr Marshall. As soon as Mr Cameron and Mr Young set off Ms Joyce contacted the police.

[9] In due course Mr Cameron and Mr Young met Mr Marshall and another person, Benjamin Way (who later stood trial with Mr Marshall on charges of receiving the sculpture and being an accessory after the fact to blackmail). After Mr Marshall and Mr Way had removed the sculpture from a white van and had wiped fingerprints from it, Mr Cameron handed over the $10,000 in cash. According

to Mr Cameron's evidence, Mr Marshall said that he was "acting as a broker and that he simply wanted the exchange to happen as quickly and cleanly as possible".

[10] By the time the police arrived the white van had disappeared. However, later that afternoon the van was stopped and its only occupant, Mr Way, was arrested.

[11] Of his own accord Mr Marshall went to the Otaki police station on 28 May 2006 and told the police that he had a couple of matters that he wanted to sort out. Following enquiries he was asked by Constable Pike if he would like to make a statement about the theft of the sculpture or the reward. Constable Pike's evidence was that the appellant replied:

> I don't really want to talk about it Pikey. I haven't done anything wrong. I came across some guys who hid it and they said they were going to cut it up for scrap. It was too good for that so I called that chick at the newspaper and arranged to return it for a reward. I never said I was going to destroy or damage it. If she said I said that she is lying.

Thereupon the appellant was arrested.

[12] When the matter came to trial Mr Marshall faced two counts. Count one, the blackmail count, alleged that the appellant:

> … on or about the 18th day of October 2005 … did threaten by implication to cause serious damage to property, namely a bronze … sculpture, with intent to cause [the owners] to act in accordance with his will and to obtain a benefit, namely $4,000.

Count two, the receiving count, alleged that the appellant, together with Mr Way, had received the sculpture between 6 and 18 October 2005 knowing it to have been stolen.

[13] At trial evidence was given by the two owners of the sculpture, Ms Joyce, Mr Cameron and five police officers. The person who sold the van to Mr Marshall also gave evidence that he had sold the van to Mr Marshall on 14 October 2005 for $400 and that following sale it had been registered in the name of Mr Marshall's mother. No defence evidence was called.

[14] There were problems with the recording of the summing-up. Given that situation it was necessary for Simon France J to recreate parts of his summing-up from memory, those parts having been identified by him. Counsel did not take any issue with the Judge's recreation.

Alleged Misdirections On Blackmail Count

[15] The blackmail count relied on s 237(1) of the Crimes Act 1961. For present purposes the relevant provisions of that section are:

> **237 Blackmail**
>
> (1) Every one commits blackmail who threatens, expressly or by implication … to cause serious damage to property … with intent—
>
> (a) to cause the person to whom the threat is made to act in accordance with the will of the person making the threat; and
>
> (b) to obtain any benefit or to cause loss to any other person.
>
> (2) Every one who acts in the manner described in subsection (1) is guilty of blackmail, even though that person believes that he or she is entitled to the benefit or to cause the loss, unless the making of the threat is, in the circumstances, a reasonable and proper means for effecting his or her purpose.
>
> …

A possible statutory defence arising from the underlined parts of subs (2) lies at the heart of the alleged misdirections on the blackmail count.

[16] We will begin by outlining the Crown and defence cases and the Judge's directions. Then we will consider the alleged misdirections and determine whether the allegations have been made out.

Crown And Defence Cases

[17] It was the Crown's case that Mr Marshall threatened to cause serious damage to the sculpture with intent to cause the owners to act in accordance with his will and thereby obtain a benefit, namely, $4,000. The Crown alleged that Mr Marshall was a "middle man" who had aligned himself with the blackmail threat in order to secure

his share of the $4,000. On the Crown's case he was the active agent of the blackmailers, rather than the owners, and was accordingly not an "innocent broker".

[18] The defence case was that Mr Marshall did not have any criminal intent. He was merely a "middle man" passing on threats from the thieves about what would become of the sculpture if it was not returned. Indeed, the figure of $10,000 had not even been suggested by Mr Marshall, but by Ms Joyce (this contention was based on evidence from Mr Cameron that Ms Joyce had told him that she had suggested that figure).

[19] In relation to the statutory defence under s 237(2) the defence case was that the onus rested on the Crown to exclude the possibility that Mr Marshall was entitled to cause the owners to pay the extra $4,000 because the making of the threat was in the circumstances a reasonable and proper means of effecting his purpose of having the statue returned.

The Summing-Up

[20] Simon France J provided the jury with written material about the matters that the Crown would have to prove before they could return a guilty verdict on the blackmail count:

> **Part A**
>
> First, the Crown must prove beyond reasonable doubt that:
>
> 1) a threat was made to seriously damage the statue;
>
> 2) that threat was intended to overbear the will of the owners of the statue and make them pay an extra $4,000.
>
> If you are satisfied as to these elements, go to Part B. If not, acquit.
>
> **Part B**
>
> Second, in order for Mr Marshall to be guilty in relation to that threat, one of these alternatives must be proved. You need not be agreed on which of the alternatives is proved, but you must each agree that one of the two is proved, or equally you must be unanimous that you have a reasonable doubt about both of them.

Option 1

When Mr Marshall communicated the threat, he was speaking for himself as well as the thieves. In other words he was working with those who had possession of the statue to get the extra $4,000.

Option 2

Mr Marshall was not himself making the threat. However, by communicating the threat he helped or encouraged the blackmailers and that is what he intended to do. By communicating the threat he intended to help the blackmailers achieve their goal of obtaining the money.

We understand that at trial defence counsel (not Mr Stevenson) did not take any issue with this material which was supplemented by oral directions.

[21] In his oral directions the Judge explained that there were two ways that a threat conveyed by Mr Marshall could render him guilty of blackmail. First, if Mr Marshall himself was actually making the threat and was not neutrally passing it on. Second, if he was just passing it on, but when he did so he was knowingly and intentionally helping the blackmailers to achieve their goal of getting the money.

[22] By way of example of the second possibility the Judge referred to the role of Ms Joyce, the newspaper editor, who simply passed on the threats to the owners with the intention of helping them recover the statue. He said that the Crown had to satisfy the jury beyond reasonable doubt that that was not also Mr Marshall's state of mind and that if they thought that there was a reasonable possibility that Mr Marshall was just passing on the threat he was entitled to be acquitted; they had to be satisfied beyond reasonable doubt that he was doing more than that, and was offering intentional help or encouragement

[23] Then the Judge turned to the s 237(2) defence. He told the jury that it is a defence to a charge of blackmail if an accused person can show that he or she believed he or she was entitled to the goods being demanded and the jury considers that the threat that was made to obtain those goods was a reasonable and proper threat to make. He said the issue was whether the person who is making the threat (that is, the thieves if the jury considered they were the persons making the threat, or Mr Marshall if they considered he was involved in making the threat) first, believed

that they had entitlement to the extra $4,000 and, second, in the jury's assessment threatening to destroy the statue was a reasonable and proper way to obtain that $4,000.

[24] Simon France J then indicated that this was an area where he would give his view of the facts. He said to the jury that it seemed to him this was not a point that would trouble them greatly and that it was difficult to see how Mr Marshall could consider he had an entitlement to the $4,000 or that it was reasonable and proper to threaten to destroy the sculpture.

Alleged Misdirections

[25] Mr Stevenson claimed that Simon France J had not put the s 237(2) defence to the jury and had in fact "positively instructed the jury that the defence was unavailable". He argued that there were two ways this statutory defence could become available: first, where the accused believes that he is entitled to make a threat *to obtain a benefit* and the making of the threat is a reasonable and proper means in all the circumstances; alternatively, where the accused believes that he is entitled to make a threat *to cause some loss* and the making of the threat is a reasonable and proper means in all the circumstances.

[26] Counsel emphasised that the defence case was: Mr Marshall was merely passing on a communication that the thieves were intending to destroy the sculpture but would desist if they could collect a reward; Mr Marshall did not have any criminal intent; and the figure of $10,000 had been suggested by Ms Joyce.

[27] Mr Stevenson contended that the Judge's "stern direction" that the defence submission was untenable missed the essence of the defence case which was described in this way:

> … it was reasonable for the appellant to communicate the threat, since he believed he was entitled *to cause the loss* (payment of the reward) as a result of the reward having been earlier offered, to effect his purpose of seeing the statue returned and not reduced to scrap metal.

He submitted that if the jury did find a further $4,000 had been demanded and the appellant was intending, by communicating that demand, to see that the thieves got the money, then the jury should have also been able to consider whether it was reasonable to pass on the threat the sculpture would be destroyed without further payment, not as an entitlement to the appellant, but as a recognised loss to the owners paying the reward.

[28] An alternative scenario giving rise to the statutory defence was also raised by Mr Stevenson. He submitted that Mr Marshall believed that he was entitled to a benefit (payment of a commission) and communication of the threat was a reasonable and proper means of achieving his purpose of seeing the deal was completed so that he could collect his commission. In support of this scenario Mr Stevenson relies on Ms Joyce's evidence already discussed at [7].

Our Conclusions

[29] Given the underlying suggestion that the essence of the defence case was not put to the jury, it is appropriate to begin by considering whether Mr Marshall's defence that he was merely a middle man without any criminal intent was put to the jury by the Judge. We are satisfied that the combined effect of the Judge's written and oral directions was to fairly and accurately put this defence to the jury.

[30] In his written directions Simon France J expressly considered the situation where, rather than making the threat himself, Mr Marshall was simply passing on the threat (option 2): see [20] above. With reference to intention the Judge made it clear that it was necessary for the Crown to prove that Mr Marshall "intended to help the blackmailers achieve their goal of obtaining the money". We do not accept Mr Stevenson's criticism that the third sentence undermined the second sentence. In our view the two sentences are harmonious and accurately summarise the required state of mind before there could be a guilty verdict.

[31] Further guidance, in terms that the jury would have easily understood, was provided by the Judge's oral directions. He reminded the jury about Ms Joyce's evidence to the effect that she was just passing on "the deal" and explained to them

that the Crown had to satisfy them beyond reasonable doubt "that this was not also Mr Marshall's state of mind". The Judge went on to say that if the jury thought there was a reasonable possibility that Mr Marshall was just passing on the information in the same sense as Ms Joyce had described, then Mr Marshall was entitled to acquittal. And he repeated that they had to "be satisfied beyond reasonable doubt that he was doing more than that and was offering intentional help or encouragement".

[32] We consider those directions were comprehensive and appropriate and that the jury was well placed to consider Mr Marshall's primary defence. Obviously they rejected it.

[33] Now we turn to the alleged misdirections in relation to the statutory defence. Plainly the bald allegation that the trial Judge failed to put the statutory defence to the jury is unsustainable. The Judge made specific reference to the statutory defence and accurately paraphrased the relevant parts of s 237(2) for the jury. The real issue is whether Simon France J went far enough and, in particular, whether he should have put the "cause the loss" and "commission" scenarios to the jury.

[34] We consider that any additional direction along the lines advocated by Mr Stevenson in relation to the "cause the loss" scenario would have unnecessarily confused the jury. Given the indictment the critical issue was whether there was a threat to seriously damage the sculpture with intent to obtain an extra $4,000. Regardless of whether Mr Marshall believed that he was entitled to the benefit or to cause the loss, the key issue in terms of s 237(2) was whether *the making of the threat* was, in the circumstances, a reasonable and proper means for effecting Mr Marshall's purpose. That issue was squarely before the jury. When it comes to determining that issue the difference between the payment of the $4,000 as a "benefit" to the recipients or a "loss" to the owners is purely semantic.

[35] The "commission" argument is also without merit. Apart from anything else, it is entirely lacking in any evidential foundation. Notwithstanding Mr Stevenson's reliance on passages of Ms Joyce's evidence, we cannot find anything in her evidence or, for that matter, in any of the other evidence, that is

capable of providing a foundation for the argument. And even if there had been an evidential foundation we cannot understand how the description of the payment as "commission" could have altered the substance of the matter. If the "commission" tag is supposed to somehow convey a lack of criminal intent then, as already discussed at [29] – [31], that aspect was adequately traversed in the summing-up.

[36] Finally, we turn to the allegation that the Judge positively instructed the jury that the statutory defence was unavailable. Simon France J made it clear in both his opening address and his summing-up that it was the jury's responsibility to decide all questions of fact. He also told them in his summing-up that if he appeared to indicate any view of the evidence that did not accord with the jury's view, then they should disregard what he said because they decided the facts.

[37] In *R v Guild* CA219/04 11 October 2004 this Court commented at [84]:

> It is elementary that a Judge is entitled to express a view on the facts and even express it in strong terms, provided it is made clear to the jury that it is to decide the issues of fact. What is said must be advice, and not a direction. And, a comment must be kept within proper bounds so that a Judge should not (for instance) make sarcastic or extravagant comments on the evidence. Further, a Judge is not entitled to comment in such a way as to make the summing up as a whole unbalanced.

We agree with Ms Laracy that rather than instructing the jury that the defence was unavailable, the Judge was simply expressing his view that it was not a credible proposition. In our opinion the Judge's expression of view was within the parameters explained in *Guild.*

[38] It follows that we have not been persuaded that the Judge misdirected the jury on the blackmail count.

Alleged Misdirections On Receiving Count

[39] Again we will briefly consider the Crown and defence cases and the summing-up before addressing the allegation that the Judge misdirected the jury on this count.

Crown And Defence Cases

[40] As already mentioned, it was the Crown case that when he received the sculpture Mr Marshall was the active agent of the blackmailers, rather than the owners, and was thus not an "innocent broker".

[41] The defence case was that when he took possession of the sculpture Mr Marshall had the consent of the owners to act as a "middle man" and he merely took possession to facilitate its return to the owners and collection of the reward. Thus in terms of *R v Crooks* [1981] 2 NZLR 53 at 62 (CA) he had a "lawful or honest intent" or, to put it another way, he lacked any dishonest intent.

Judge's Summing-Up

[42] Simon France J provided written directions as to the elements to be proved by the Crown:

> 1) the accused took possession of the sculpture which was stolen;
>
> 2) at the time of taking possession, he knew that the sculpture had been stolen;
>
> 3) the accused, when taking possession, did not intend to return the goods unconditionally.

Again we understand that trial counsel did not take any exception to those directions or, indeed, to the oral directions.

[43] In his oral directions the Judge noted that Mr Marshall had put in issue that at the time of taking possession he had the consent of the owners, or was acting as their agent. Simon France J directed the jury that the Crown had to prove beyond reasonable doubt that when Mr Marshall took possession it was not with the owner's consent. The Judge then went on to explain that consent had to be a genuine consent freely given and that the Crown had to disprove this. He explained that the issue was not what the accused believed, rather it was whether when Mr Marshall took possession of the sculpture it could be said that he did so with the owners' consent freely given.

[44] With reference to the third element – the accused's state of mind – the Judge explained that the law provides a defence if the intention was to return goods back to the owners "unconditionally". Having emphasised that the critical time was the time at which possession was taken, the Judge directed the jury that they must acquit if they were not sure whether Mr Marshall intended to take the sculpture back to the owners "regardless of the money". He emphasised that the Crown had to disprove this intention beyond reasonable doubt.

[45] The Judge went on to tell the jury that it was important for them to remember two things about the third element: first, the relevant time was when Mr Marshall took possession; second, the Crown must prove beyond reasonable doubt that Mr Marshall did not intend, at that point, to give the sculpture back whether or not he got the money. He explained that the only defence under the third element was that Mr Marshall intended to return the sculpture to the owners unconditionally. The Judge said that if Mr Marshall intended to give the sculpture back and then ask for the money, that would be legitimate and would constitute an unconditional return because that is how rewards work.

Alleged Misdirections

[46] Mr Stevenson claimed that the Judge directed the jury that what Mr Marshall believed was irrelevant. He submitted the Judge had thereby wrongly applied an *objective* test.

[47] The second criticism revolves around the Judge's direction that Mr Marshall should only be acquitted if at the time of taking possession he intended to return the sculpture unconditionally. Mr Stevenson claimed that this direction unfairly constrained Mr Marshall's defence that he was merely facilitating the transaction and it was not for him (indeed, it may have been dangerous) to suggest that money need not be paid as originally agreed.

[48] Finally, and this point is closely related to the second point, on the strength of *Crooks* and *R v Matthews* [1950] 1 All ER 137 (CA) Mr Stevenson submitted that the Crown had the obligation of excluding a reasonable possibility that Mr Marshall

had an "honest belief" when he took possession of the sculpture. He said that dishonest intent lay at the heart of the crime of receiving and must be an "over arching implied ingredient of the offence".

Our Conclusions

[49] The first criticism takes Simon France J's direction about Mr Marshall's state of mind out of context. The Judge's direction, which was obviously right, was that Mr Marshall's beliefs were irrelevant to the issue of whether *the owners had consented.* While this was a factual issue to be disproved by the Crown, it was not one involving Mr Marshall's state of mind. Issues involving Mr Marshall's state of mind were addressed separately with reference to the third element. There was no misdirection.

[50] Now we turn to the second point that the Judge unfairly constrained Mr Marshall's defence that he was merely facilitating the return of the sculpture. It seems to be inherent in this argument that because Mr Marshall was merely facilitating the return of the sculpture he was not able to go behind the agreement to pay the reward and was accordingly entitled to require payment of the $4,000 before parting with the sculpture. That proposition is unsustainable.

[51] Obviously the jury rejected Mr Marshall's proposition that he took possession of the sculpture with the consent of the owners, or as their agents. Thus he took possession of a stolen item without the authority of the owners, knowing it to have been stolen. In that situation, as the Judge correctly directed, Mr Marshall was obliged to unconditionally return the sculpture to its owners and then, if he so wished, he could seek payment of the reward. Whether this was his intention when he received the sculpture was squarely before the jury, and was obviously rejected by them. Again there was no misdirection.

[52] Finally, we address the argument that the Crown should have excluded a "lawful or honest belief" on Mr Marshall's part. In *Crooks* this Court said at 62:

> … the crime of receiving stolen goods … involves, as a necessary ingredient, proof that the goods were dishonestly received. The receiver

> must have the guilty intention of appropriating such goods for the benefit of himself or of some other person. Such a question will seldom be an issue, and no direction on the point will be required unless some evidentiary foundation is laid for suggesting that the person charged may have received the stolen property with lawful or honest intent.

This echoes *Matthews* in which the Court of Appeal firmly rejected the argument that a person who has received stolen property intending at once to hand it over to the police or the true owner, is nevertheless guilty of receiving stolen property.

[53] In his summing-up Simon France J made it clear to the jury that the defence of honest intent was open to them on the facts. He also made it clear that the Crown was required to disprove honest intent beyond reasonable doubt by proving that Mr Marshall did not intend to give back the sculpture regardless of the money. It was also explained to the jury that Mr Marshall's honest or dishonest intent had nothing to do with the fact that a reward was anticipated. To the contrary, as the Judge indicated, it rested solely on whether or not Mr Marshall intended to unconditionally return the sculpture. No misdirections have been established.

Prosecutor's Comment

[54] Mr Blake, Mr Marshall's trial counsel, swore an affidavit in which he deposed that during the Crown's opening the prosecutor, Mr Stone, told the jury that Mr Marshall had "evaded" the police for about seven months, notwithstanding that it had been agreed between counsel that no evidence would be called in relation to that allegation. Mr Blake said that he had strongly objected to the prosecutor's remark (in the absence of the jury) and that the Judge had indicated that he would deal with the issue in his summing-up.

[55] It is further deposed that in his closing address Mr Stone made a further limited reference to the topic of Mr Marshall supposedly evading the police. Mr Blake's recollection is that the second reference was less emphasised and less forceful and he cannot recall the precise words used. At that time he only objected on a "pro forma basis" because the damage had already been done, the second reference was less emphasised, and the Judge had indicated that he would deal with the issue in summing-up.

[56] In the end result the Judge did not mention the matter during his summing-up. Nor was that omission raised by defence counsel.

[57] We were informed by Ms Laracy that Mr Stone has no direct recollection of the matter. However, she made available to us a draft of Mr Stone's opening address which included this passage:

> The accused Marshall at some stage got out of the van and evaded the police for the next seven months before eventually going to the Otaki police station on a voluntary basis.

While the Crown accepts that Mr Stone referred to Mr Marshall evading the police during his opening address to the jury, its stance is that no miscarriage of justice has resulted.

[58] Having decided that it would be desirable to obtain Simon France J's recollections about the matter, we requested a report from him pursuant to r 17 of the Court of Appeal (Criminal) Rules 2001. The Judge confirmed that Mr Blake raised the issue of Mr Stone using the word "evaded" in his opening. It was his recollection that Mr Blake believed the Crown had previously agreed that it would not do so, whereas Mr Stone was adamant that no such agreement had been reached and that he was entitled to use that description.

[59] Simon France J indicated that he did not commit to addressing the matter during his summing-up because such an indication would have been premature. Indeed, he does not recall mentioning his summing-up when the matter was discussed and believes that, if he did so, it would have only been in the context that he would address the issue if he needed to. The Judge explained that he did not refer to the matter during his summing-up because the Crown had not relied upon Mr Marshall's post-event actions as a basis of its case, or as a plank in establishing dishonesty. His notes only record one matter being raised by Mr Blake after his summing-up, namely, the sufficiency of the Judge's discussion about Mr Cameron's evidence.

[60] Following receipt of the report from Simon France J we provided counsel on both sides with an opportunity to respond. For the appellant Mr Stevenson reported

that both Mr Blake and also Mr Surridge for the co-accused were adamant that the trial Judge indicated that he would deal with the matter later in the trial. But he accepted that the real issue is the implication of the trial Judge's failure to refer to the matter during summing-up rather than whether or not there was a commitment to do so. Apart from agreeing that the real issue is whether a miscarriage occurred because of the use of the word and lack of direction on it, the Crown did not wish to respond to the Judge's report.

[61] Having considered all those matters we have reached the conclusion that the absence of any reference to Mr Marshall having evaded the police during the summing-up did not give rise to a miscarriage of justice. We believe that it is highly significant that defence counsel did not raise the issue after the Judge had completed his summing-up, especially when he asked the Judge to redirect on another matter. Significantly it did not form part of the Crown's case in relation to dishonesty. Obviously by the time the jury retired to begin its deliberations the matter was not regarded as significant by the Judge or counsel.

[62] Apart from that, we do not believe that Mr Stevenson's submission that the comment was without any evidential foundation is sound. On Ms Joyce's evidence Mr Marshall said that he would be happy to talk to the police after the exchange took place. Shortly after the exchange had taken place the van that he had recently purchased and registered in his mother's name was stopped and Mr Way was arrested. It can be safely inferred that Mr Marshall must have known about these events. But he elected not to go to the police until about seven months later.

Result

[63] The appeal against conviction is dismissed.

Solicitors:
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