IN THE COURT OF APPEAL OF NEW ZEALAND

CA428/2014
[2014] NZCA 575

BETWEEN	JOHN ARCHIBALD BANKS Appellant
AND	THE QUEEN Respondent

Hearing:	29 October 2014
Court:	Ellen France P, Wild and Miller JJ
Counsel:	DPH Jones QC and K Venning for Appellant P E Dacre QC and A R Van Echten for Respondent
Judgment:	28 November 2014 at 11.30 am

JUDGMENT OF THE COURT

A The application to adduce the evidence of Messrs Schaeffer and Karnes is granted.

B The application to adduce evidence of Mr Dotcom's driving conviction is declined.

C The appeal is allowed.

D The conviction is set aside and a new trial ordered.

REASONS OF THE COURT

(Given by Miller J)

Introduction

[1] John Banks stood for the Auckland mayoralty in the local body election held on 9 October 2010. He lost. Nearly two months later, on 9 December 2010, and by now the holder of no public office, he signed the return of electoral expenses and donations that the Local Electoral Act 2001 required of him.

[2] The return had to disclose any electoral donation of more than $1,000 made by a single donor.[1] The donor's name and address had to be disclosed too, unless the donor made the donation anonymously. A donation was anonymous if made in such a way that the candidate did not know who made it. Mr Banks's return categorised as anonymous two donations, each of $25,000, that were made on 14 June 2010.

[3] It is an offence to transmit a return of expenses knowing it to be false in any material particular.[2] The Crown charged that Mr Banks knew the return was false because he knew the identity of the single donor who made the two donations.[3] The donor was Kim Dotcom.

[4] Mr Banks denied knowing that the donations had been made at all, still less that they were categorised as anonymous in the return. His knowledge of these things was the central issue at his trial before a Judge alone in the High Court at Auckland, at which he was found guilty.[4]

[5] The proof of knowledge was not straightforward. Mr Dotcom made the two donations using consecutive cheques drawn on the account of his company Megastuff Ltd, and a member of his staff banked them without recording the depositor's name on the deposit slips. Mr Banks's campaign staff would have identified Megastuff as the donor had they seen the cheques, but they did not, and the campaign's bank statements did not identify the donor. So far as Mr Banks's campaign staff were concerned, then, the two donations were genuinely anonymous.

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1 Local Electoral Act 2001, s 109. We refer here to the legislation as it stood at the time the return was transmitted. It has since been amended extensively.

2 Local Electoral Act, s 134.

3 He was also charged in relation to another donation made by SkyCity, but was found not guilty.

4 *R v Banks* [2014] NZHC 1244, [2014] 3 NZLR 256 [High Court conviction decision]. He was sentenced to two months community detention and 100 hours community work: *R v Banks* [2014] NZHC 1807.

Mr Banks himself never saw the campaign's bank statements. The evidence further established that he did not read the return; it was prepared for him by his campaign treasurer Lance Hutchison, who deposed that Mr Banks signed it without reading or discussing the donations section. The Crown accordingly had to prove that Mr Banks engineered the donations and the return so that his staff would remain in ignorance and he himself could falsely profess it.

[6] So it was that the Crown case came to rest on evidence that the donations were made immediately following a memorable lunch at which Mr Banks asked Mr Dotcom to split a proposed donation of $50,000 into two of $25,000 apiece to ensure Mr Dotcom's anonymity.

[7] The lunch was held at the Dotcom mansion at Coatesville, Auckland. It is common ground that present were the three principal Crown witnesses at trial – Mr Dotcom, his wife Mona Dotcom, and an employee of Mr Dotcom, Wayne Tempero – and Mr Banks and his wife Amanda Banks. Mr Tempero did not eat with the others but was in attendance.

[8] There consensus ends. The three Crown witnesses said the lunch was held on 9 June 2010. Mrs Banks – the only defence witness to give evidence about the lunch – said it was held on 5 June. The three Crown witnesses said that no one else was at the lunch. Mrs Banks said that two American businessmen, guests of Mr Dotcom, were also there; she could not recall their names. The three Crown witnesses said that Mr Dotcom offered at the lunch table to donate $50,000 and Mr Banks responded by asking him to make two donations of $25,000 apiece so they could remain anonymous. Mrs Banks said there was no such conversation, though she believed her husband discussed donations privately with Mr Dotcom after lunch, while Mrs Dotcom was showing her around the property.

[9] Mrs Banks's account was consistent with what Mr Banks had said to the police, to the effect that he had discussed donations privately with Mr Dotcom in a loggia or conservatory adjoining the dining room. His account was that he did not ask Mr Dotcom to contribute anonymously; rather, he explained, as he always did, that donors could make donations in that way if they wanted. Nor did he suggest

that a larger donation be paid as two sums of $25,000; rather, he told Mr Dotcom that he was seeking 10 donations of $25,000 apiece from major donors but Mr Dotcom could make an additional donation with "other entities" if he wished. Nor did he secure a commitment; rather, he left deposit slips with Mr Tempero in the hope that Mr Dotcom would deliver on his assurances of support.

[10] The Crown ran into difficulty at trial when the defence established incontrovertibly that the lunch was indeed held on 5 June. The date mattered because the cheques were drawn on 9 June and Mr Dotcom was adamant that he had given Mr Banks a firm commitment at the lunch and evidenced it by having the cheques prepared and signed immediately afterward. Proof that the lunch was held on 5 June did not emerge until the defence disclosed its hand at the close of the Crown case, leaving something of an evidential vacuum about the intervening period.

[11] In his reasons for verdict Wylie J examined the evidence closely.[5] He identified weaknesses in the Crown case, rejecting parts of it. But the weight of evidence favoured the prosecution. The three principal Crown witnesses were clear, consistent and credible about what was said, where it was said, and who heard it said. He accepted their account. He rejected Mrs Banks's evidence that the two unidentified Americans were present, pointing by way of confirmation of her unreliability to her acknowledgement that although she heard no discussion about donations she knew both that Mr Banks was seeking one from Mr Dotcom and that he gave Mr Tempero some deposit slips as they left, which was consistent with there having been some sort of discussion. He found support for the Crown's account in the fact that two cheques were drawn. There was also evidence of subsequent conduct from which the Judge inferred that Mr Banks knew donations had been made.[6]

[12] Central to Mr Banks's appeal is affidavit evidence from two American businessmen, tracked down since trial, who say they were at the lunch and political

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5 We observe that review of the reasoning process in appeals from judge-alone decisions may afford benefit to the appellant: see *R v Slavich* [2009] NZCA 188. We express no view on that discussion given the manner in which this appeal has been determined.

6 See below at [38]–[41].

donations were not discussed there. Mr Banks also contends that the verdict was unreasonable.

The offence

[13] The Local Electoral Act requires that within 55 days after an election every candidate must transmit to the electoral officer a return in the prescribed form setting out the name and address of each person who made an electoral donation to the candidate and the amount of each electoral donation.[7] A donation may be made anonymously, in which case the return need only state the amount and record that the donation was made by an anonymous person. At the time the legislation provided that a donation was anonymous if it was "made in such a way that the candidate concerned does not know who made the donation".[8]

[14] An electoral donation was defined relevantly as a donation of more than $1,000 made to the candidate, or to anyone on the candidate's behalf, for the candidate's use in the election campaign.[9] The Act set (and still sets) no upper limit on electoral donations, anonymous or otherwise. Accordingly, there was no legal requirement that Mr Dotcom limit an anonymous donation to $25,000.

[15] Mr Banks was charged under s 134(1) of the Act.[10] It provided that every candidate commits an offence who transmits a return of electoral expenses "knowing that it is false in any material particular". The candidate was liable on conviction on indictment to imprisonment for a term not exceeding two years or a fine not exceeding $10,000. We observe that s 134(2) created a separate summary offence of transmitting a return of electoral expenses that was false in any material particular unless the candidate proved that he or she had no intention to misstate or conceal the facts and took all reasonable steps to ensure the information was accurate.

[16] It was not in dispute at trial that Mr Banks was a candidate, that he transmitted the return, and that the return would be materially false if it included the

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7 Local Electoral Act, s 109.

8 Section 5(1). The legislation has now been amended; under s 103A a donation is now anonymous only if it is made in such a way that the candidate does not know the donor's identity and could not reasonably be expected to know.

9 Section 104, which has since been repealed and replaced by s 103A of the current Act.

10 The section has since been repealed and replaced by s 112D of the current Act.

two sums of $25,000 and attributed them to an anonymous person whose identity he actually knew. He put the Crown to proof of knowledge, contending not only that he never knew the donations had been made, or made anonymously, but also that, having lost the election, he had no reason to care if donors were named and was content to rely on Mr Hutchison's assurance that the return was in order.

[17] Accordingly, the Crown had to prove that Mr Banks knew Mr Dotcom had made the donations, that he knew they had been made in a manner which was ostensibly anonymous, and that he knew the return was false. His knowledge fell to be assessed when he signed the return on 9 December 2010, which was the last day for transmission to the electoral officer.[11]

[18] Counsel debated whether the offence demands actual knowledge. Nothing turns on this; Wylie J held that wilful blindness will do, but there was little room for it on the facts.[12] He found that Mr Banks actually knew the return included the supposedly anonymous donations and "engineered" matters in an attempt to ensure he could not be accused of actual knowledge. We address the topic only because there is to be a retrial.

[19] Wylie J examined the authorities, referring notably to *R v Crooks*[13] and *R v Martin*[14] for the proposition that knowledge will be attributed to a defendant who consciously chooses not to inquire because he knows the truth, or because he suspects the truth and fears that inquiry would confirm it.[15] As this Court put it in *Martin*, the moral fault in the latter case lies in the deliberate failure to inquire when the defendant knows there is reason for inquiry.[16]

[20] The only reason that Mr Jones QC could advance (at first instance; he did not develop the point before us) for requiring actual knowledge is that because s 134(2) provided for an offence of strict liability subject to an affirmative defence, s 134(1) must be taken to require actual knowledge. We agree with Wylie J that the

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11 The election result was announced on 14 October 2010.
12 High Court conviction decision, above n 4, at [48].
13 *R v Crooks* [1981] 2 NZLR 53 (CA).
14 *R v Martin* [2007] NZCA 386.
15 At [42]–[43].
16 At [10].

conclusion does not follow from the premise.[17] We agree too that the decision in *R v Mortimer*,[18] upon which Mr Jones relied, can be seen as particular to its statutory context.[19] Wylie J took an orthodox view of the law, and we consider that view was correct in this setting.

The new evidence

[21] Mrs Banks was stung by the Judge's opinion of her reliability. She became quite obsessed, as she puts it, with identifying the two Americans. She recalled that a trans-Pacific communications cable had been discussed at the lunch and scoured news articles on the topic, eventually finding one which mentioned that Mr Dotcom had endorsed such a project and was trying to organise a group of investors to fund it. The article stated that he had flown the head of a company called Cogent to New Zealand to meet with him. That took her to a United States company called Cogent Communications. Its website named key personnel one of whom, the Chief Executive David Schaeffer, she recognised as one of her lunch companions. The other, she soon learned, was Jeffery Karnes, who was at the time the Chief Revenue Officer and Vice President for Global Sales at Cogent.

[22] Messrs Schaeffer and Karnes were approached by legal representatives and they have now sworn affidavits. They depose that in June 2010 they travelled to New Zealand to meet Mr Dotcom. They spent the day at the Dotcom mansion and shared lunch at the main dining table with the then mayor of Auckland, John Banks, and his wife.

[23] Mr Karnes says that Mona Dotcom attended, but only briefly, and that another person, Mathias Ortmann, was also at the lunch. He adds that a number of people from a company called Carpathia were also present. Mr Schaeffer says that Mathias Ortmann and Finn Batato were also at the lunch and that a Dotcom staff member, presumably Mr Tempero, sat nearby.

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17 High Court conviction decision, above n 4, at [46].
18 *Mortimer v Commissioner of Inland Revenue* (2002) 20 NZTC 17,797 (HC).
19 High Court conviction decision, above n 4, at [46(b)].

[24] Although they differ somewhat in their recollections of who was present, the two men agree that they were seated at one side of Mr Dotcom and Mr and Mrs Banks were seated at the other. They would have heard had Mr Dotcom offered a $50,000 donation to Mr Banks's campaign. They say firmly that there was no discussion at the table about the mayoral campaign or donations.

[25] An appellant may not adduce new evidence as of right on appeal. The Court screens new evidence for credibility, freshness and implications for verdict. The evidence must affect the safety of the conviction, such that its exclusion risks a miscarriage of justice.[20]

[26] Messrs Schaeffer and Karnes were not cross-examined before us. Mr Dacre QC suggested that they had no reason to remember talk of political donations, but they are unequivocal about it in their affidavits, and he conceded that for present purposes their evidence must be accounted reliable.

[27] Mr Jones sought to persuade us that the new evidence was fresh. To that end Mrs Banks was called before us for cross-examination on her affidavit. She frankly acknowledged that she could have made the same inquiries before trial but did not think it necessary. She said that "I didn't think I would not be believed." Before trial she had told Mr Banks's solicitors what she knew of the two Americans, including the discussion about the trans-Pacific cable. It seems obvious that the importance of the evidence was not adequately appreciated by Mr and Mrs Banks or their legal advisors, perhaps because they assumed too readily that the Crown witnesses could be discredited. There is no evidence that any substantive inquiries were made. The evidence is not fresh.

[28] However, the evidence is nonetheless admissible if its impact on the safety of the conviction is such that its exclusion risks a miscarriage of justice.[21] This is such a case. The evidence appears credible and cogent. For reasons which we will shortly explain, we are satisfied that, if accepted at trial, it likely would have

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[20] *Lundy v R* [2013] UKPC 28, [2014] 2 NZLR 273 at [120]. See also *R v Bain* [2004] 1 NZLR 638 (CA) at [18]–[27]; *Bain v R* [2007] UKPC 33, (2007) 23 CRNZ 71 at [34]; *Fairburn v R* [2010] NZSC 159, [2011] 2 NZLR 63 at [25].

[21] *Lundy v R*, above n 19, at [120].

changed the outcome. We have admitted the evidence of Messrs Schaeffer and Karnes for purposes of the appeal.

[29] Mr Jones also sought to adduce another new item of evidence, a driving conviction of Mr Dotcom's. It appears that Mr Dotcom entered New Zealand in September 2009 under the name Kim Schmitz. He was still using that name when, some time later, he was charged with and convicted of driving at a speed which was or might have been dangerous.

[30] Before the trial Mr Banks's lawyers obtained disclosure from Immigration New Zealand, including convictions which Mr Dotcom had disclosed when seeking visitor's permits and residency. Mr Dotcom has several convictions in other jurisdictions for offences of dishonesty; he admits having misused credit cards online for personal gain as a teenager, and insider trading. The defence made much of these convictions at trial, without success.

[31] However, it appears that Mr Dotcom did not disclose to immigration officials his conviction entered in New Zealand under the name Kim Schmitz. It came to light not long before trial. Mr Dacre was nonetheless prepared to concede that evidence of the conviction and non-disclosure is fresh.

[32] We are not prepared to admit it, however. We accept that the evidence is cogent so far as it goes; we do not understand the conviction to be in dispute, and we will assume for purpose of argument that Mr Dotcom may have done wrong by not disclosing it to immigration officials. But it does not go nearly far enough to compel admission in the interests of justice. It is relevant only to veracity, and it adds very little to the overseas convictions which were in evidence.

New trial

[33] We can explain briefly why we are satisfied that the evidence of Messrs Schaeffer and Karnes, if accepted, might well have led a trier of fact to conclude that the Crown had failed to prove Mr Banks's knowledge of the anonymous donations to the requisite standard.

[34] Based on Wylie J's reasons, we have no doubt that he would have considered the new evidence very important. As we have already explained, the Crown relied for proof of knowledge on what was said at the lunch. Had Messrs Schaeffer and Karnes been called, the Judge may have rejected the evidence of the three principal Crown witnesses about the discussion between Messrs Banks and Dotcom. We note too that some of the evidence on which the Judge relied to discount Mrs Banks's evidence was neutral; for example, it was not in dispute that Mr Banks spoke to Mr Dotcom about donations at the mansion.

[35] At the risk of labouring the obvious, we are not suggesting that the evidence of the Crown witnesses was in fact unreliable or untruthful. The trial court will establish where the truth lies. Our decision establishes only that the new evidence is apparently reliable and, if accepted, plainly capable of changing the outcome.

[36] Mr Dacre did not dispute that the new evidence might have changed the Judge's findings about the lunch. He pointed rather to other evidence which tended to show that Mr Banks knew donations had been made.

[37] That evidence does not persuade us that the conviction is safe. The Judge regarded the evidence about the lunch as fundamental to the Crown case. The remaining evidence he examined for its corroborative value. We agree with that approach. The supporting evidence is not sufficient in itself to sustain the conviction.

[38] The best of the supporting evidence came from Gregory Towers, a solicitor who represented Mr Dotcom after he was arrested on 20 January 2012 on unrelated matters and refused bail. On Mr Dotcom's instructions, Mr Towers contacted Mr Banks to seek assistance. Mr Banks was by then the Member of Parliament for Epsom. Mr Dotcom's immediate concern was that he was experiencing back pain in Mt Eden prison and needed someone to get the prison authorities to supply better bedding. Mr Towers spoke to Mr Banks on 8 February 2012. His file note appeared to record that while Mr Banks "wishes to publicly support", such support "may backfire on Kim" "(eg if it b/comes known about election support etc)."

[39] However, the relationship of the quoted words to one another was unclear – the bracketed words appear to have been added to the note later in the conversation – and Mr Towers could not elaborate on what "election support" meant. It might refer to the donations, but there was evidence that Mr Dotcom had offered other forms of support, such as help with internet support and social media and an invitation to Mr Banks to attend a fireworks display. The defence suggested that the note might have referred to the 2011 general election, in which Mr Banks became a Member of Parliament.

[40] Wylie J concluded that the note could only refer to the two donations and the 2010 mayoral campaign.[22] He discounted suggestions that it may have referenced any other form of election support, noting that internet support and social media proposals had not proceeded. There is force in this point; there was little reason for Mr Banks to be concerned about election support that had come to nothing, and social events like the fireworks display were already in the public arena. We note too that the Judge found Mr Towers an unimpeachable witness. It remains the case, however, that Mr Towers could not elaborate on his file note, which is open to several interpretations.

[41] The balance of the supporting evidence depends on the three principal Crown witnesses. Messrs Dotcom and Tempero each gave evidence that they had subsequently spoken by telephone to Mr Banks, who had acknowledged receipt of the donations and thanked them. Mrs Dotcom said she was present during Mr Dotcom's phone call; she confirmed his account. This was unequivocal evidence of Mr Banks's knowledge, and the Judge accepted it. But of course that evidence would have to be re-evaluated if the trial court were to reject the evidence of the same three witnesses about the lunch. We note that if Mr Hutchison's evidence was correct, Mr Banks could not have known that the donations had been received; he was never told about individual donations.

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[22] High Court conviction decision, above n 4, at [128].

Verdict not unreasonable, based on evidence at trial

[42] Mr Banks also contends that the Judge's verdict was unreasonable. A retrial would be averted if this ground of appeal were to succeed. When evaluating it the new, as yet untested, evidence must be put to one side.

[43] The conclusions reached by Wylie J support the verdict he reached. Mr Jones's submissions focused primarily on credibility matters and contended for different conclusions about them. We hold that the Judge's conclusions were open on the evidence at trial; that being so, the verdict was not unreasonable. Given that there is to be a retrial we do not think it appropriate to comment further.

Decision

[44] The appeal is allowed. The conviction is set aside. We order a new trial.

Solicitors:
Parlane Law, Auckland for Appellant
Crown Law Office, Wellington for Respondent