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Mihaka v Police - [1981] 1 NZLR 54

High Court Wellington
15 October; 17 December 1980
Hardie Boys J

Practice -- Hearing -- Right of audience -- "McKenzie" friend claimed right to represent defendant as a Maori agent before District Court -- Meaning of "Maori agent" in s 17(2) of the Law Practitioners Act 1955 -- Extent of the right of a litigant in person to the assistance of a "friend in Court" discussed.

A defendant, Prince, had elected trial by jury on two charges of wilful damage. At the taking of depositions before Justices of the Peace Mihaka claimed the right to represent Prince as her Maori agent. The Justices refused to recognise Mihaka's claim. He insisted on pressing it, and was charged under s 3D of the Police Offences Act 1927 with disorderly behaviour. He appealed to the High Court against conviction.

Held:

1 There was ample evidence to warrant a finding that Mihaka behaved in a disorderly manner and the appeal must fail whether the appellant was right or wrong in his claim to a right of audience on Prince's behalf (see p 57 line 3).

2 The reference to a "Maori agent" in s 17(2) of the Law Practitioners Act 1955 is a reference to a person who appears, subject to the approval of the Maori Land Court, before that Court in accordance with the authority conferred by s 58 of the Maori Affairs Act 1953. That Act does not, and cannot, give him authority to appear in any other Court. A Maori appearing before a District Court is in the same position as a Pakeha. He may be represented by a solicitor or counsel of his choice. He may have a friend to assist him but the friend may not act as an advocate. Unless the Court permits, the friend may act only within the limits stated in Collier v Hicks (1831) 2 B & Ad 663; 109 ER 1290. He has no right to any other additional representation. Whilst the Judge or Justice has a discretion to allow more than that, provided he exercises it in a proper manner and in the interests of justice, his decision cannot be challenged (see p 60 line 1).

McKenzie v McKenzie [1970] 3 All ER 1034; [1971] P 33 referred to.

Other cases mentioned in judgment

Burton v Power [1940] NZLR 305.

Cash (Re T R), ex parte Utiku Potaka (1880) OB & F 82.

Melser v Police [1967] NZLR 437.

Messiter v Police [1980] 1 NZLR 586.

O'Connor v Police [1972] NZLR 379.

O'Toole v Scott [1965] AC 939; [1965] 2 WLR 1160; [1965] 2 All ER 240.

R v Burton [1941] NZLR 519.

Note:

Note Refer 13 Abridgement 893.

Appeal

This was an appeal against conviction.

The appellant in person.

C H Toogood for the respondent.

Cur adv vult

HARDIE BOYS J.

Mr Mihaka appeals against his conviction on a charge under s 3D of the Police Offences Act 1927 that on 27 March 1980 he behaved in a disorderly manner in a public place, namely the No 3 courtroom of the Wellington Magistrate's Court.

Miss Diane Prince appeared on that day in that courtroom for the taking of depositions concerning a charge or charges brought against her in respect of which she had elected trial by jury. Justices of the Peace presided. When the case was called, the appellant came into Court with Miss Prince and sought recognition from the Bench of his right to represent her as a Maori agent.

The appellant had made similar claims in the past. Whilst none of them had been admitted, some of the Magistrates or District Judges concerned had permitted the appellant to assist the particular accused to a greater or lesser extent. In order to assist Justices of the Peace should they be confronted with such a claim, the Chief District Judge had prepared a memorandum. The Justices in the present case read the memorandum to the appellant. It was in these terms:

> "From time to time you will be met with the situation where a person appearing on his or her own behalf desires to have some other person assist him or her in the presentation of their case. The position of such other person has been settled by law and it has been held that no person has by law a right to act as an advocate on the trial of an information before Justices of the Peace without their permission. Lord Tenterden CJ has said in the case Collier v Hicks (1831) 2 B & Ad 663:
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> > 'This was undoubtedly an open Court and the public had a right to be present as in other Courts but whether any persons and who shall be allowed to take part in the proceedings must depend on the discretion of the Magistrates who like other Judges must have the power to regulate the proceedings of their own Courts.'
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> Parke J in the same case stated:
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> > 'No person has a right to act as an advocate without the leave of the Court which must of necessity have the power to regulate its own proceedings in all cases where they are not already regulated by ancient usage. In the Superior Courts by ancient usage persons of a particular class are allowed to practise as advocates and they could not lawfully be prevented; but Justices of the Peace who are not bound by such usage may exercise their discretion whether they will allow any and what persons to act as advocates before them.'
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> In brief the situation is that subject to usage or statutory provisions Courts may exercise a discretion whether they will allow any and what persons to act as advocates before them. Qualified barristers and solicitors have by usage become entitled to practise as advocates and could not lawfully be prevented from doing so. An unqualified person may act in a purely ministerial capacity eg where a friend assists a litigant in person without attempting to act as his solicitor. In the case McKenzie v McKenzie [1970] 3 All ER 1034 it has been held that:
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> *[1981] 1 NZLR 54 page 56*
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> > 'Any person whether he be a professional man or not may attend as a friend of either party, may take notes, may quietly make suggestions and give advice.'
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> In my view this would permit an unqualified person acting as a friend of a litigant to
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> "(a) Sit beside him in Court

(b) To take notes

(c) To quietly make suggestions to the litigant and give advice

(d) To propose questions and submissions to the litigant who may put the same

(e) Should the litigant be a dumb person then to put the questions on the litigant's behalf

(f) The friend should not be permitted to address the Court by way of making submissions or asking questions."

The appellant was not satisfied with this. According to the evidence of two police officers who were called by the prosecution, he insisted on pressing his claim upon the Justices, ignoring their requests that he be seated and silent, and at times shouting them down as they attempted to address him and to get the hearing under way. Some of the remarks made were in bad taste, if not rude and insulting but there was some dispute as to whether they emanated from the appellant or from Miss Prince. The police prosecutor, Sergeant Carmichael, became concerned that continuation of the appellant's behaviour would result in a breach of the peace. His conduct was making it impossible for the case to proceed, and began to cause a stir amongst various supporters in the public gallery, (the Court then being open to the public) and two of them had to be removed.

After some twenty minutes, during which the Justices had retired at least once to consult, the appellant was finally arrested by Sergeant Wood. He too had become concerned about the response of the public gallery to the appellant's performance. The appellant was arrested for disorderly behaviour although apparently he had earlier on several occasions invited arrest for contempt (s 206 of the Summary Proceedings Act 1957). He was indignant that his invitation was not accepted, particularly when a police officer somewhat indelicately indicated the reason for the choice of charge.

Although a charge under s 206 of the Summary Proceedings Act would clearly have been open on the evidence, that did not prevent the police acting, and laying a charge, under another section. The question I have to consider is whether the District Judge was wrong in convicting on the charge that was laid, in the light of the evidence led on it. The basic facts were not really in dispute. The appellant was more concerned in his defence, and at the hearing of this appeal, with other matters than the proof of the charge itself.

There have been a number of cases in New Zealand in which s 3D of the Police Offences Act has been considered. I collected many of them in my judgment in Messiter v Police now reported at [1980] 1 NZLR 586. The leading authority is the decision of the Court of Appeal in Melser v Police [1967] NZLR 437, which was summarised by Richmond J in O'Connor v Police [1972] NZLR 379,381, as holding that the Court "has to apply an objective test to the conduct in question, and determine as a matter of time, place and circumstances whether it was of a kind likely to cause serious annoyance or disturbance to some persons or person present".

The District Judge did not refer to the test which he had to apply to the evidence in order to find the charge established. He made it clear that he was not basing his decision on a finding of exactly what the accused said to the Justices, because he felt in reasonable doubt about that. He went on to say this:

> "I find on the totality of the evidence and in particular in the evidence which Mr Mihaka himself called, namely the evidence of the two Justices of the Peace, that
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> *[1981] 1 NZLR 54 page 57*
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> his conduct on that occasion was disorderly within the meaning of that word in s 3D of the Police Offences Act 1927."

The evidence of the Justices was to the effect that the appellant's behaviour was disruptive of the proceedings, annoying to them, and inciting to the spectators. In my opinion, there was ample evidence to warrant a finding that the appellant behaved in a disorderly manner.

That that was so, was not seriously disputed by the appellant before me. In a courteous, pleasant and intelligent manner, far more in keeping with and likely to encourage sympathy for the cause he professes to promote than was his behaviour in front of the Justices, he developed the argument that he had a right to represent Miss Prince, and that he could not be guilty of the offence charged by asserting that right in good faith.

If that were the law, we would have fewer martyrs, and would be the poorer for it. Whilst the law zealously protects a man's beliefs, it equally zealously protects the right of his neighbour not to have them foisted upon him in an offensive or disorderly way. A citizen's right to argue his cause has its limits. He is not entitled to go on oblivious to all and everyone else. That truth is rather poignantly illustrated by the prosecutions of one who can be truly described as a martyr, reported in Burton v Power [1940] NZLR 305 and R v Burton [1941] NZLR

519.

The appellant had the right to make his submissions to the Justices; but he had a corresponding duty to behave with decorum and to accept their ruling. The decisions of the Courts may of course be criticised and commented on. But when they are challenged in the Courts they must be challenged in a manner appropriate to the occasion, and not by verbal violence which prevents the conduct of the Court's business.

The appeal must therefore fail whether the appellant was right or wrong in his claim to a right of audience on Miss Prince's behalf. However, that claim is of importance, and as the appellant took some pains to develop it before me, I owe it to him to deal with it as best I can.

Our early colonisers had to determine the kind of legal and other institutions most suitable for the mixed race society which was obviously going to develop. They chose the Westminster mode of parliamentary democracy and the common law. For many the choice was obvious because these were all they knew. For the more enlightened, they were also the best they knew. The decision having been made, it became necessary not only to persuade the Maori to accept and trust the new institutions, but also to ensure that the trust when gained was not betrayed. It would be foolish to pretend that the process was immediately successful in either respect -- or that even now the ideal has been fully achieved. The frailty of the mortals who give life to the institutions is no less than that of those whose affairs are regulated by them. However, the greatly heightened awareness of the Maori way which the Pakeha community has achieved in recent years, the dedication of many lawyers working through the various legal aid and assistance agencies and a variety of other developments ensure, I believe, that generally speaking the Maori can appear before the Courts without being at a disadvantage because of his race, his language or his culture. (Whether the remedies made available to the Courts for dealing with those who offend are adequate and appropriate is another matter.) It is against this background that the appellant's claim to a right to represent members of his race in Court must be considered.

There are three aspects to the right to representation and assistance in Court. They are correctly summarised in the Memorandum of the Chief District Court Judge. There is first the area of statutory right. In New Zealand s 37 of the Summary Proceedings Act 1957 gives every defendant in criminal proceedings in a District Court the right to representation by a barrister or solicitor of this Court. That is a right to an advocate. Then there is the right recognised at common law. This is

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twofold. There is the right of audience established by usage, which applies to qualified legal practitioners. This again is a right to an advocate. Then there is the right to have a "friend" in Court. This latter right was clearly stated by Lord Tenterden CJ in Collier v Hicks (1831) 2 B & Ad 663; 109 ER 1290, and reaffirmed in McKenzie v McKenzie [1970] 3 All ER 1034; [1971] P 33. The quotation set out in the Chief District Court Judge's memorandum, which appears to be from the latter, is in fact from the former, and it would be helpful to set it out a little more fully, for it makes clear the fact that the right to a friend is not the right to an advocate:

> "Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions, and give advice; but no one can demand to take part in the proceedings as an advocate, contrary to the regulations of the court as settled by the discretion of the justices."

The last words of this quotation refer to the third aspect of representation and assistance in Court. Subject to the requirements of statute and of the common law, every judicial officer has the right to regulate the proceedings of his own Court. Thus he may allow an accused person a greater measure of assistance or representation than the law requires of him. But that is a matter for him to determine. He will no doubt wish to exercise his discretion in the manner indicated by Lord Pearson, delivering the judgment of their Lordships in O'Toole v Scott [1965] 2 WLR 1160, 1170; [1965] 2 All ER 240, 247:

> "It can be exercised either on general grounds common to many cases or on special grounds arising in a particular case. Its exercise should not be confined to cases where there is a strict necessity; it should be regarded as proper for a magistrate to exercise the discretion in order to secure or promote convenience and expedition and efficiency in the administration of justice."

The right of the Judge or other judicial officer to regulate the proceedings of his Court is an essential attribute of judicial independence, itself one of the cornerstones of our liberty. The denial of recognition to other than suitably qualified persons should not be regarded as protection of any privilege or monopoly. It surely gives effect to the fact that an unqualified and inexperienced person may do more harm than good to the person he assists: if only because of his ignorance of the law which may support that person's cause. In this age of complexity in the law and specialisation in its practice, this reason is perhaps more cogent than it has ever been.

The right of audience in the Courts thus arises in part from statute and in part from common law but not from the

legislation dealing with the legal profession, now the Law Practitioners Act 1955. That Act regulates the conduct and discipline of the profession and its dealings with the public. It does not regulate the conduct of the Courts or the conduct of the profession in the Courts.

It is in the proviso to s 17(2) of the Law Practitioners Act that the appellant finds the foundation for his argument that he had a right to represent Miss Prince. The first two subsections of s 17 read as follows:

> "(1) Every person commits an offence against this section who, not being duly enrolled as a solicitor under this Act, acts as a solicitor, or holds himself out as being qualified to act as a solicitor, or takes or uses any name, title, addition, or description implying or likely to lead any person to believe that he is qualified to act as a solicitor.
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> (2) Every person commits an offence against this section who, not being duly enrolled as a solicitor under this Act, carries on business as a solicitors' agent, or in any way advertises or holds himself out as a solicitors' agent:
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> $nbsp; Provided that it shall not be an offence under this subsection for a person to
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> *[1981] 1 NZLR 54 page 59*
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> carry on business as a Maori agent or to advertise or hold himself out as a Maori agent."

The proviso to subs (2) does not purport to authorise a Maori agent to appear in Court. All it does is exempt him from the prohibition contained in the earlier part of the subsection. There is another reference to a Maori agent in s 57 of the Law Practitioners Act (which deals with the taxation of a solicitor's costs when he acts as a Maori agent and was no doubt enacted to deal with the argument raised by the solicitor in Re T R Cash, ex parte Utiku Potaka (1880) OB & F 82), but neither in that Act nor in any other Act so far as I am aware is the term defined. However, its meaning can I think be found by referring to the history of the Maori land legislation.

To deal with the very sensitive and difficult issues relating to Maori land, a series of Native Land Acts were passed in the 1860s and 1870s and a Native Land Court was set up. The Native Land Court was of a distinctive character, as is shown by s 44 of the Native Land Act 1873, which provided:

> "The examination of witnesses and the investigation of title shall be carried on by the presiding Judge without the intervention of any counsel or other agent: Provided that it shall be competent for the claimants to select one of themselves to act as their spokesman to conduct the case in their behalf."

The Court was thus to be more an inquisitorial Court than a normal adversary Court. The Judge was to conduct the inquiry, not the parties or their legal representatives.

That approach was modified by s 3 of the Native Land Act Amendment Act 1878 which stated:

> "Notwithstanding anything contained in the Native Land Act 1873, the Native Land Court, or the presiding Judge at any sitting thereof, may from time to time allow counsel or agent to appear for either party in a case, and to conduct such case on behalf of such party."

Shortly after, in s 63 of the Native Land Court Act 1880, the wording was altered in the following manner:

> "It shall not be lawful for any person to appear or be assisted in Court by counsel or agent, unless the assent of the Court or a Judge thereof is first obtained, and the Court may at any stage of the proceedings withdraw such assent."

Section 63 of the 1880 Act was repeated in similar terms in s 65 of the consolidating Act of 1886, and again in briefer form in s 20 of the consolidating Act of 1894. In the consolidating Act of 1909 the form was slightly altered (s 23), and it is that form that appeared in s 26 of the 1931 Act and was carried through into s 58 of the Maori Affairs Act 1953. The section now reads:

> "Any party or other person entitled to appear in any proceedings in the Court may appear either personally or, with the leave of the Court, by a barrister or solicitor of the [High] Court or any other agent or representative.
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> "Any such leave may be given on such terms as the Court thinks fit, and may at any time be withdrawn."

Thus the inquisitorial system set up in the 1870s survives today. The Court has a discretion to allow a case to be conducted in an adversary form if it so chooses.

The significance of the historical development of the Maori Land Court for present purposes is that from the time

that the Court was entrusted with a discretion to allow counsel to represent the parties during the hearing, the legislature also allowed an "agent" to appear in a similar capacity to that of "counsel".

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Thus the reference to a Maori agent in s 17 of the Law Practitioners Act is in my opinion a reference to a person who appears, subject to the approval of the Maori Land Court, before that Court in accordance with the authority conferred by s 58 of the Maori Affairs Act. Such authority as he has is conferred only by that Act. That Act does not, and cannot, give him authority to appear in any other Court.

A Maori appearing before a District Court or this Court is thus in the same position as a Pakeha. He has no additional rights, any more than the reverse is the case. He may be represented by a solicitor or counsel of his choice who may act as his advocate and speak for him. He may have a friend to assist him but the friend may not act as an advocate. Unless the Court permits, he may act only within the limits stated in Collier v Hicks (1831) 2 B & Ad 663; 109 ER 1290. He has no right to any other or additional representation. Whilst the Judge or Justice has a discretion to allow more than that, provided he exercises it in a proper manner and in the interests of justice, his decision cannot be challenged.

The conclusion to the memorandum prepared by the Chief District Court Judge sets out in paras (a) to (d) the extent of the right of a litigant to the assistance of a "friend in Court". Paragraph (e) adds an example of a circumstance in which the discretion should properly be exercised. Whilst para (f) is no doubt practical advice of a general kind, it should not be read -- and I am sure was not intended to be read -- as imposing a limitation on the discretion which Justices have to permit the friend to take a more active part if in the circumstances of the case they think that appropriate. Such circumstances would, I apprehend, be unusual.

Thus in the present case the Justices were acting quite properly in declining to allow the appellant to do more than the memorandum suggested.

The appeal is therefore dismissed.Appeal dismissed.

Solicitor for the respondent: Crown Solicitor (Wellington)

Editor's note: Mr Mihaka sought leave to appeal against conviction for disorderly behaviour, and, having been refused leave in the High Court, applied to the Court of Appeal for special leave. On 17 June 1981 the Court of Appeal (CA 26/81) in a judgment of the Court delivered by McMullin J, refused his application for special leave holding that, as there was ample evidence to justify the conviction on the charge of disorderly behaviour, no point of law arose. Miss Prince was found guilty after trial on two counts of wilful damage laid under s 298(4) of the Crimes Act 1961. She sought leave to appeal against conviction on the ground that she had been denied representation at the trial by counsel of her choice, Mr Mihaka. She contended that Mr Mihaka could act as a Maori agent and as such he had the right of audience in the High Court. On 17 June 1981 the Court of Appeal (CA 12/81) in a judgment of the Court delivered by Davison CJ, refused her application for leave to appeal holding that there could be no doubt that Miss Prince was rightly convicted on the evidence before the Court, and that this was not "the appropriate time to deal at length with the rights of a Maori agent except to say that, whatever they may be, they are limited to activities concerned with the Maori Land Court. A Maori agent as such has no right of audience in the High Court."