CRIMINAL LAW

Offences against the person

Clark v. *R.* [1971] N.Z.L.R. 589, concerned the conviction of the appellant for murder. The first ground of appeal was that the Judge had wrongly directed the jury that as a matter of law there was no evidence that could properly amount to provocation. The Court of Appeal, applying *R.* v. *McGregor* [1962] N.Z.L.R. 1069 and *R.* v. *Anderson* [1965] N.Z.L.R. 29, upheld the Judge's ruling (this part is not reported).

The second ground of appeal was that the Judge erred in declining to tell the jury that even if the intent to kill was proved and provocation was not a defence, the jury had a right to return a manslaughter verdict.

It was argued for the appellant that it was the "constitutional right" of the jury to return a verdict of manslaughter rather than murder, if they wished. This, it was argued, would be the case even if there was no evidence of provocation to justify a reduction of the charge from murder to manslaughter. The Court referred to *R.* v. *Gammage* (1969) 44 A.L.J.R. 37, in which previous authorities were considered by the High Court of Australia and where it was held that a jury, in returning its verdict on a charge of murder, if satisfied that all the necessary elements of a murder charge have been proved, may not properly return a verdict of manslaughter.

North P. in following *R.* v. *Malcolm* [1951] N.Z.L.R. 470 held that where the evidence proves murder or nothing, the judge is entitled to tell the jury that they cannot with propriety find a verdict of manslaughter, once they are satisfied that the evidence supports a murder charge and there is no evidence that justifies the verdict being reduced to manslaughter.

Downey v. *R.* [1971] N.Z.L.R. 97 settled speculation as to the true construction of s.167(d) of the Crimes Act 1961, which provides that culpable homicide is murder,

> If the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.

The appellant said that at the time of the commission of the alleged offence he had believed that the deceased had been taking liberties with him as he slept. In a fit of rage the accused set fire to some newspapers and placed them near the sleeping man—"to teach him a lesson". At his trial he was found guilty of murder under the provisions of s.167(d). The Court of Appeal however were of the opinion that the unlawful purpose under s.167(d) must be something other than personal injury to the victim. Paragraph (d) could only relate to injuries effected in pursuit of some other unlawful object, because if assault were allowed as an "unlawful object", it would be difficult to see how the concluding words of the section could have any meaning ("though he may have intended that his object should be effected without hurting anyone"). Where the prosecution is relying on an unlawful object which is the personal injury of the victim, then it must proceed under paras. (a) or (b) of this section. In the circumstances of this case the trial Judge's misdirection on this point was seen as giving rise to a strong possibility of a miscarriage of justice.

The Court also said that when the defence of provocation was raised, if the jury upon a review of all the evidence is left in reasonable doubt whether the act was unintentional or unprovoked, the prisoner is entitled to be acquitted of manslaughter. The Court substituted a verdict of manslaughter.

Civil Liberties

Kinney v. *Police* [1971] N.Z.L.R. 924 involved a charge of disorderly behaviour under s.3D of the Police Offences Act, 1927. The appellant in this case had waded into a duckpond in the Napier Botanical Gardens after a rock festival. The Magistrate apparently accepted that certain people would be offended by the behaviour of the appellant because of the presence of goldfish in the pool.

On appeal, Woodhouse J. said that "disorderly behaviour" must be something more than unmannerly, before it can be the basis of a conviction in the terms of s.3D of the Police Offences Act, 1927. He went on to say that, in his opinion the section

> . . . certainly is not designed to enable the police to discipline every irregular or inconvenient, or exhibitionist activity or to put a criminal sanction on overexuberant behaviour, even when it might be possible to discern a few conventional hands raised in protest or surprise. (*ibid.*, 926).

In *Duffield* v. *Police* [1971] N.Z.L.R. 381, the appellant had walked on to the middle of a fairway during a golf match. He was carrying placards relating to South Africa's racial policy. He was repeatedly asked to leave but refused. In consequence he was charged with trespass to land, resisting a constable in the execution of his duty and assaulting a constable in the execution of his duty. It was agreed that if the charge of wilful trespass was upheld, so must the others.

It was assumed by the Court in the accused's favour that he had a ticket, as the evidence was inconclusive on this point. Macarthur J. discussed the authorities as to the extent that a licence to enter land could be revoked where a contract is in existence, and he expressed the opinion that the Magistrate may have been wrong in holding the licence in favour of the appellant to be revocable without reference to the terms of the contract between them. He felt however that it was not necessary for him to express a concluded opinion upon this point. Assuming the appellant had a ticket, then there was a contract between the golf club and him whereby he became a licensee. There are implied conditions in such a contract and reference was made to *Winter Garden Theatre (London) Ltd.* v. *Millenium Productions Ltd.* [1948] A.C. 173, where it was said that a "well behaved" licensee is entitled to remain on the premises for the duration of the event that he has paid money to witness. Macarthur J. examined the evidence and came to the conclusion that the appellant wasn't "well behaved" and thus there was a breach of the implied conditions of his licence. The appellant then became a wilful trespasser and was therefore held to have been rightly convicted.

Mens Rea *in Drug Offences*

Police v. *Takashi Onishi* (1971) 13 M.C.D. 175. This decision arose from a charge of possessing the seeds of a prohibited plant (cannabis sativa).

The argument hinged around whether the offence was one of strict

liability or one in which *mens rea* had to be proved or at least one in which, while the Crown need not prove *mens rea,* it was open to the defendant to raise a reasonable doubt as to his guilty state of mind and thus obtain an acquittal. Before deciding whether the offence under s.7 of the Narcotics Act, 1965 is one of strict liability, Nicholson S.M. said, "I find that there is a reasonable doubt that the defendant was not knowingly in possession of cannabis sativa." (*idem.*)

The learned Magistrate reviewed the authorities and referred especially to *R.* v. *Strawbridge* [1970] N.Z.L.R. 909, in which a "half-way house" was adopted—between offences where the onus is on the Crown to prove knowledge, and offences of strict liability. If, in this situation, there is some evidence that the accused believed honestly on reasonable grounds that his act was innocent, then he is entitled to be acquitted, unless the jury is satisfied beyond reasonable doubt that this was not so.

The Magistrate then set out the matters that should be aken into consideration when deciding into what category of mental element an offence should fall, referring to *Sherras* v. *De Rutzen* [1895] 1 Q.B. 918, *Lim Chin Aik* v. *R.* [1963] A.C. 160, and *Sweet* v. *Parsley* [1970] A.C. 132.

He then concluded that the offences under s.7 of the Narcotics Act, 1965 are of strict liability. He was especially influenced in his decision by the fact

> That relatively speaking the maximum penalty prescribed for this offence (3 months' imprisonment or $400 or both) is minor and the attaching stigma of conviction is correspondingly low (*op. cit.,* 177).

He also thought that strict liability would assist enforcement of the Act by putting people in possession of seeds on their guard to make sure that they weren't of a prohibited variety.

It is submitted that both these propositions are open to doubt. Firstly, even though the penalty is light, there is still much stigma attached to a drug conviction. It prevents, for instance, an individual entering certain countries. In semi-criminal offences, such as the enforcement of Traffic Regulations, Health Regulations, the imposition of strict liability has long been justified on a number of grounds. But it cannot be said that any drug offence is merely semi-criminal and Nicholson S.M. himself regarded the offence as a grave one.

Secondly, it is open to doubt that the imposition of strict liability on people in possession of seeds would assist enforcement of the Act. Many people simply would not recognise cannabis seeds.

In *Transport Dept.* v. *Taylor* [1971] N.Z.L.R. 622, the defendant had been charged with the offence of refusing to give a blood sample under s.59E of the Transport Act 1962. He claimed that due to a lung condition he was unable to inflate the breath test bag properly and thus should not be regarded as having 'failed' to perform a breath test. The Magistrate held that the defendant had not 'failed' to do something within his capabilities in the absence of specific instructions. The informant appealed.

It was held on appeal that the defendant having attempted unsuccessfully to provide a correct breath test, had failed to do so for the purposes of s.59C(1). Macarthur J. said however, that there was a statutory defence under s.59E(2)—where the taking of a specimen of blood could be prejudicial to a person's health (*ibid.,* 627). He also concluded that *mens rea* was an essential ingredient of an offence under s.59E(1) which

provides that it is an offence to refuse to give a blood sample under s.59C(1), the subsection which allows a traffic officer to ask for a blood sample if a breath test is refused. The case was remitted to the Magistrate's Court to determine whether the defendant had the necessary *mens rea.*

D. J. S. Laing

EQUITY AND THE LAW OF SUCCESSION

Testamentary Promises Act

The case of *Edwards* v. *New Zealand Insurance Co. Ltd.* [1971] N.Z.L.R. 113 is interesting in its interpretation of s.2(1) of the Testamentary Promises Amendment Act, 1961. In this case, the testator had a footwear company which his son, the claimant, had managed efficiently from 1955 to 1962, during which time the testator had vested some of the shares of the company in the claimant. In 1965 the claimant purchased the balance of the shares from the testator at a high price, contending now that the testator led him to believe that the part of the purchase price remaining owing would be forgiven by the testator in his will. The testator died in 1967 without making such provision.

In allowing the claim Speight J. held that,

> . . . if the deceased made this promise intending that it should be believed for purposes which seemed good to him, then in my view it is proper that the plaintiff should be able to make a claim based upon it even though he himself at the time had misgivings as to the promisor's bona fides (*ibid.*, 117).

This is an interesting development in the law. Seemingly a person may claim for services rendered in apparent reliance upon a promise, while not expecting the promise to be honoured in the promisor's testamentary disposition. But since the risk lies with the claimant, it is not an undesirable development.

Secondly, following the wide interpretation that the courts have given to the words "services or work" as being anything of benefit to the testator, Speight J. was able to hold here that the purchase of the shares had benefitted the testator by stabilising, if not increasing, the value of the testator's assets. This again, is a novel application of s.2(1).

Finally, in considering the quantum of the claim, the benefits which the claimant obtained by the purchase of the shares, were taken into account, following the principle laid down in *Jones* v. *Public Trustee* [1962] N.Z.L.R. 363.

Conditions in Wills

One of the problems faced by the Court of Appeal in *Re Cowley (deceased)* [1971] N.Z.L.R. 468 was the position of the doctrine of unreasonable restraint of trade in relation to conditions in testamentary dispositions. The testator had left his farm upon trust to his daughter-in-law to use, possess, and enjoy until her youngest child attained the age of 21, and then to transfer the land to her son (or sons in equal shares) "who shall at that time be actively engaged in farming".

Counsel argued that the words imposed an unreasonable restraint of trade and were therefore of no effect. Admitting that there was no