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IN THE COURT OF APPEAL OF NEW ZEALAND

THE QUEEN v. BARRY JOHN NEILSEN

Coram: North P.
Turner J.
Richmond J.

Hearing: 7 December 1970

Counsel: MacLaren for Appellant
Larsen for Crown

Judgment: 16 December 1970

JUDGMENT OF THE COURT DELIVERED BY NORTH P.

On 6 October 1970 the appellant stood his trial in the Supreme Court at Auckland before Henry J. and a jury on an indictment containing 3 counts. These were: (i) that on or about 22 July 1970 at Auckland he did commit burglary at the premises of Foley Car Sales Limited situated at 81 New North Road, Auckland; (ii) in the alternative, that he did unlawfully enter the abovementioned premises with intent to commit a crime therein; (iii) that on 22 July 1970 he did wilfully set fire to a building, namely the premises of Foley Car Sales Limited. In respect of the first two counts he was charged jointly with one Daniel James Barry. Barry was found not guilty on both counts (i) and (ii). The appellant was acquitted on count (iii), but was found guilty on count (i), and was sentenced to 3 years' imprisonment. No verdict was taken, as between the Crown and the appellant, on count (ii), which had of course been presented as an alternative to count (i). The appellant now appeals against both his conviction and his sentence.

The relevant facts appear to be these: at about 8.40 p.m. on 22 July 1970, Mr Geoffrey Tegg a Lecturer at the University of Auckland, happened to be passing the

premises of Foley Car Sales Limited when he heard the sound of an explosion which appeared to him to come from the rear of these premises. The explosion was followed almost immediately by a fire and in a short time the building was ablaze. Mr Tegg said that when this happening occurred, he saw a man run out of the front of the building and get into a car which was parked outside the building. He said that he observed a man in the driver's seat and the man who came from the building got into the passenger's seat. Apparently Mr Tegg's suspicions were aroused by what he saw for he wrote down the number of the car on a piece of paper which was produced at the trial. That same evening the Police were able to trace the owner of the car who proved to be the appellant's co-accused, Daniel James Barry.

The Crown called a number of witnesses including Mr David Foley, the Proprietor and Director of Foley Car Sales Limited, who said that the premises which were burnt out were part of his business premises which his company had purchased earlier this year. He said that on 22 July the burnt building was used for storage of parts required for motor vehicle repairs; in addition, at the time of the fire there were two old cars in the building, both of which were in need of repairs. Mr Foley said that when he left the premises at about 4 p.m. the building was locked, but he agreed that certain employees and two other persons had keys which would give them access to the premises. Mr Foley said that he did not know either of the two accused, Barry or Neilsen.

Shortly after 2 a.m. on the following morning, a party of detectives went to a house in Grey Lynn where the

appellant was found asleep in bed. He was awakened and was questioned by Detective Matthews who asked him where he had been that night. He replied that he had been drinking in the Kings Arms Hotel with others until he was "hustled out" by the landlord's wife shortly before 10 p.m.. He was asked to accompany the detective to the Police Station where he was cautioned and further questioned. He said that after meeting a friend in the Occidental Hotel he went on to the Kings Arms Hotel with some of his friends, including Daniel Barry, and that he stayed there until closing time and had not been in New North Road that evening. Nevertheless he was arrested and charged with wilfully setting fire to the premises of Foley Car Sales Limited on New North Road, and with the further charge that on the same day he did break and enter these premises. According to the detective, the appellant when charged said that he did not wish to say anything in reply until he had seen his solicitor. He invited the detective to see him again after he had discussed the matter with his solicitor. This the detective said he did, when the appellant told him that he would like to explain what happened on the night of Wednesday 22 July. He said that he was supposed to have called on Foley Car Sales Limited during the afternoon of Wednesday 22 July to pick up some car parts which were to be used at his place of employment the following day. He said that he was employed at George Leslie Motors but had been so busy that he had not had a chance to call during the afternoon to uplift these parts. He said that while in the Kings Arms Hotel he decided to go and collect the parts and he went there in a car driven by Dan Barry. He said that on arrival at the premises he walked down an alleyway on the left hand side

of the building and had entered through a back door; he said that the back door was closed but he merely reached up, turned the handle, pushed the door and walked in; he said that when he was inside the building he could not find an electric light switch and stumbled around among some car parts in the dark and had kicked over what he thought was a 4 gallon tin. He said he lit a match to see where he was and in the light of the match he noticed the front door; he said that he dropped the match and started walking towards the front door and when he was halfway there he smelt burning and looked around and saw a fire. He said that he ran to the door, opened it, ran out to the car and leapt in. At the request of the appellant the detective again saw him on the following day at Mount Eden Prison. The detective said that on this occasion the appellant assured him that he had definitely entered Foley Car Sales Limited by the back door and had not at any time gone upstairs. He said he had struck at least 4 matches while he was on the premises and that while he was moving towards the door and was trying to open it, the whole place went up in flames and he was engulfed in them. He now said that he had been given permission to go to the premises to view two cars, but the detective said he declined to name the person who had given him permission.

The appellant's employer, Mr Leslie was called by the Crown. He denied that he had given the appellant authority to go to Foley Car Sales Limited at 81 New North Road and in particular said he had given him no authority to go to the premises to uplift car parts.

The appellant gave evidence on his trial. He said that when he was in the hotel bar he was standing near Mr Foley and overheard a conversation between Mr Foley and others who were with him, in the course of which he claimed that he heard Mr Foley telling a person who he described as a "foreign chap" about the two cars he had in his garage, one of which was a re-possessed and the other a trade-in; Mr Foley said that he wanted to get rid of them and they were going very cheap. The appellant said that he had no discussion with Mr Foley himself, who he knew only by sight, but he later talked to "the foreign man" and he claimed that this man told him he could have a look at the two cars and he went to the premises for that purpose with his co-accused, Dan Barry.

The learned Judge in summing-up the case to the jury said:

> "Now in the present case the crimes that may be considered by you upon which there is evidence and which you may infer were in this man's mind at the time - I am only making these observations to you telling you what is open to you. Of course it is for you, and you alone can say whether you find any one of them. They are three in number, in my opinion. First, that he intended to set fire to the place; secondly, that he intended to steal something from the place, or, thirdly, that without intending to set fire to the place, he intended to do some damage to the building or its contents. Well those, so it seems to me, are the three and only three possibilities open here, and it is for you to consider each one of those and to come to your own conclusion about them. The mere fact that I mention them of course, does not necessarily mean they are there at all. They are there for your consideration."

In this Court, Mr MacLaren counsel for the appellant, dealt in turn with the 7 grounds of appeal against conviction mentioned in the Notice of Appeal, all of which related to alleged defects in the summing-up. In fairness to Mr MacLaren, it is right that we should mention that he drew the Notice of Appeal without having before him a copy of the learned Judge's summing-up. In result it became perfectly plain as his argument proceeded, that there was no substance in any of these complaints with the possible exception of one. This ground was very inadequately expressed in the Notice of Appeal but what it amounted to was this: Mr MacLaren contended that the Crown throughout the trial at no stage had contended that the appellant had broken and entered the premises with intent to commit any other crime than arson. Accordingly in his submission, the learned Judge was not entitled to tell the jury that it was open to them on the evidence to find that the appellant when he entered the premises, may have intended to steal something from the premises. He submitted that the appellant had been prejudiced by the way the learned Judge summed-up, and moreover counsel had lost the opportunity in his final address of submitting to the jury that if they were of the view that the appellant was not guilty of arson, they should not convict him of burglary on the ground that he had entered the premises with the intent to commit some other crime.

Mr Larsen in reply said that he found himself in the difficulty that as he was not present at the trial he was unable to answer the complaint made by Mr MacLaren as to the way the prosecution was conducted at the appellant's trial in Auckland. In the circumstances we thought that

the interests of justice required us to reserve our decision and ask Mr Larsen in the meantime to get in touch with Mr Baragwanath who appeared for the Crown, and inquire whether he agreed with the complaint made by Mr MacLaren. This has now been done and we have been informed that Mr Baragwanath said that he had not opened the case exclusively on the basis of arson being the crime intended, although in his final address he thinks he concentrated on arson without specifically mentioning theft. We think then there must have been some mistake on the part of Mr MacLaren as to the course of the trial. No doubt the crime of arson was placed in the forefront of the Crown's case, but we find it quite impossible to think that the experienced, learned trial Judge would have summed-up as he did unless he was of opinion that it was open to the jury to find the appellant guilty of entering the premises with the intention of stealing anything worthwhile he found there. Moreover, we notice that when the appellant gave evidence he said that he had told the detective that he had good reason for going to Foley Car Sales Limited adding, "I didn't go with any criminal intent."

All in all then, we are far from satisfied that there is any substance in this remaining ground of appeal. The way the indictment has been expressed indicates to us that the Crown did not intend to pin its case exclusively on the contention that the appellant had broken into the premises with the intention of committing arson, see The King v. O'Meara 1943 N.Z.L.R. 328. Moreover the varying accounts given by the appellant to the detective certainly in our opinion, laid the foundation for the conclusion reached by the jury that at least it had been established

that he entered the premises with the intention of stealing anything worthwhile he found there, even although the jury were not satisfied that the starting of the fire may not have been accidental. Accordingly we dismiss the appeal against conviction.

As to sentence, for the reasons given by Henry J. we consider the sentence was a proper one and the appeal against sentence is also dismissed.

Solicitor for the Appellant: Messrs Finlay, Shieff, Angland and MacLaren, Auckland

Solicitor for the Crown: Crown Solicitor, Wellington

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THE QUEEN

v

BARRY JOHN NEILSEN

MEMORANDUM OF COUNSEL FOR THE CROWN

Counsel was requested to furnish this Memorandum as to the way in which the Crown case was presented at trial. Unfortunately it has not been possible for counsel to speak to Mr. Baragwanath who prosecuted but it is understood:

1. That the case was not opened exclusively on the basis of arson being the crime intended
2. That Mr. Baragwanath thinks he specifically mentioned theft as an alternative to arson as the crime intended but unfortunately he has no note available of what he said
3. That is his final address again of which there is no note Mr. Baragwanath thinks he concentrated on arson without specifically mentioning theft but not excluding theft

There is some support for Mr. Baragwanath's recollection that theft was presented as an alternative to arson in the opening of Mr. Williams for the other accused who criticised the Crown for not confining themselves to arson but of putting burglary on a wider basis than that.

DATED at Wellington this 11th day of December 1970

Crown Solicitor