IN THE COURT OF APPEAL OF NEW ZEALAND C.A.220/86

LOW PRIORITY

1741

THE QUEEN

v.

NICHOLAS

Coram: McMullin J (Presiding)
Somers J
Casey J

Hearing: 14 November 1986

Counsel: C P Browne for Crown
J C D More for Appellant

Judgment: 14 November 1986

Reasons: 18 November 1986

REASONS FOR JUDGMENT OF THE COURT DELIVERED BY CASEY J

On 14 November 1986 we heard an application by Mr Nicholas for leave to appeal against his conviction in the District Court at Invercargill on 8 July 1986 on a charge of possession of cannabis for supply. He was sentenced to 12 months imprisonment. We granted leave and allowed the appeal, quashing the conviction and sentence and ordering a new trial.

The charge arose out of an incident at a Tuatapere hotel in the early evening of Tuesday, 26 November 1985. A customs officer said he observed some people in the bar who were joined about 5.35 pm by a man wearing red overalls whom he identified as the accused. He watched him and another man leave the premises and go across the road to a car, with the later carrying a blue bag which had been under the

table. At the car he saw the accused open the driver's door and reach inside while the other man went to the back, and the boot was then opened. Articles were removed and placed in the bag although he could not identify them and the couple returned to the bar, with the other man carrying the bag which he placed under the table. The accused then left the hotel and drove off in the car and after a time estimated between 5 and 15 minutes the officer saw him return to the bar in different clothes. He sat at the table and appeared to slide an object across to the other man from beneath his jacket, and that was also put into the bag below. After that the officer left and notified the local constable.

The latter gave evidence of searching a man Naylor who was standing beside a car and in which he discovered a bag under the front seat containing cannabis deals. He also searched another person present and learned his name was Russell Bradshaw, an alias of the accused. He let him keep a considerable sum of money found on him after hearing his explanation that it was wages from two pay periods. The car was taken to the police station and traces of cannabis were found in a bag in the boot.

Initially there appears to have been some confusion in the constable's mind between the names Russell and Ricky Bradshaw, being respectively those by which the accused and his brother were known. At the time he appears to have been

more interested in Naylor and his female companion. When the accused was interviewed by a detective the following day he denied having anything to do with the episode and said the first time he was at the hotel was around 6 pm when he turned up in his ordinary clothes. He did not possess red overalls. He gave alibi evidence that over the relevant times he was collecting his pay from the oil exploration firm he worked for, and he was supported by other witnesses.

Naylor also gave evidence that he had borrowed the accused's car for the day and had parked it outside the hotel about 4.30 pm. He had been dealt with on a charge of possession of cannabis for supply as a result of the incident. He said that while in the hotel he was joined by another person about 5.20 pm and they went out to the car where he picked up a bag of cannabis and brought it back. He said he was only going to give the other person a cannabis smoke but declined to name him, merely describing him as dressed in red overalls. He said the accused came in later dressed in different clothes to pick up the car; he drove away and returned later. Afterwards they both went to the car intending to drive somewhere else for the evening. It was then that the police constable arrived and found the cannabis which he had previously put in the vehicle. He said the man in the overalls involved with him earier was not the accused, who knew nothing about the cannabis.

Mr More advanced a number of grounds of appeal on his behalf. The first - that the verdict was unreasonable and could not be supported by the evidence - is plainly untenable and was not pursued. The second related to misdirection by the trial Judge when, after emphasising that the case depended on the customs officer's identification evidence, he indicated that it would boil down to whether or not they believed him, but if they had any doubts about his evidence they would acquit. In isolation the reference to belief only could be criticised as leaving the jury under the impression that the reliability of his evidence was not so important. However, the Judge gave a very careful summing-up and in its overall context this extract could not possibly have misled them.

As Mr More acknowledged, the substantial ground of appeal was that new evidence had become available from the applicant's brother and a supporting witness to the effect that the brother was the man who accompanied Naylor to the car when the cannabis was brought back to the hotel. There was an affidavit from him to this effect, in which he said he was a member of the drilling crew who wore red overalls issued by his employer and he had come into the hotel about 5 pm to repay a debt of $20 to the publican's wife from his wages received that day. After doing so he joined Naylor who asked him if he wanted a cannabis cigarette; he went with him to the car which he helped to open and confirmed there were bags of cannabis in the boot, which Naylor took

back with him. He said that he did not wish to pass on this information at any earlier time "as I did not wish to be accused of any activity that I was not a party to." A supporting affidavit was tendered from the publican's wife confirming that a person in the latter part of 1985 repaid a loan some time after 5 pm; she identified him from a photograph exhibited and recalled that she had seen him wearing red overalls, although she cannot be certain that he had them on that night.

Mr Brown conceded that this additional evidence would be relevant but submitted that it lacked cogency and could not have left the jury in any doubt of the applicant's guilt. We cannot agree. Although the circumstances in which it was tendered and its nature may well arouse suspicions, it is not inconsistent with the tenor of the evidence given by Naylor and the customs officer, and the existence of two men - one in overalls and one in ordinary clothes - might fit more comfortably with the latter's rather vague evidence of the short time lapse between the accused leaving the bar in overalls and coming back in normal clothes. If the evidence outlined in these two affidavits had been given, the jury might well have been left in a state of reasonable doubt.

The critical question was whether this evidence was available to be given at the trial. It is hard to believe that the accused, who lived and worked in the same small community as his brother, did not know of or find out about

the latter's activities that evening. There is no affidavit from him. Nor did the brother say to whom he had disclosed this information or when. Mr Browne added that on his story he had nothing to fear from a prosecution, because his only interest was to smoke a cannabis cigarette if it had been offered. Nevertheless, a reluctance to become involved - even in these circumstances - may be understandable. Then there is the obvious criticism that the accused has simply taken a gamble, waiting to see whether the alibi evidence would succeed, knowing that if he were convicted he could call on his brother. Overall, however, it is very likely that Naylor's refusal to disclose the identity of the other man affected the credibility of all the defence evidence.

Some of these problems were addressed by Mr More in a rather unorthodox fashion in the course of his submissions. He told us that he had interviewed the brother before the trial but was unable to obtain any information or support from him. Consequently he could not call him. He also added that there is a resemblance between them and gave us to understand it was the brother's photograph which was annexed to the affidavit by the publican's wife. This is hardly an acceptable way of advancing a case for the admission of fresh evidence, but the overriding consideration is the interest of justice.

We express no view on the new evidence that can now be introduced beyond saying that it could be believed by a jury and could lead to an acquittal. We concluded that the only proper course was to allow the appeal and order a new trial, but we emphasise that the case had special features making this course desirable, in spite of the deficiencies we have noted.

M.J. Casey J.

Solicitors: Crown Solicitor, Invercargill for Crown

Scholefield Craigie Crockroft & Lloyd, Invercargill, for Appellant