IN THE COURT OF APPEAL OF NEW ZEALAND CA397/90

19/4

LOW PRIORITY

557

THE QUEEN

v

ANDREW JAMES NICHOLSON

Coram: Richardson J
Casey J
Thorp J

Hearing: 25 March 1991

Counsel: G.A. Rea & B.D. Vanderkolk for Crown
H.B. Rennie & G. Paine for Appellant

Judgment: 16 April 1991

JUDGMENT OF THE COURT DELIVERED BY THORP J

Nature of Proceedings

On 16 October 1990 the applicant, Andrew James Nicholson, was found guilty:

1. Of three charges of manslaughter, in that while in control of an aircraft, Piper Tomahawk Regn. ZK-EVA, which in the absence of care might endanger human life, he failed to perform his legal duty to use reasonable care to avoid such danger, and thereby caused the death of three named persons, contrary to s. 156 Crimes Act 1961: and
2. Of one charge that, while the pilot of the same aircraft, he operated it in such a manner as to cause unnecessary danger to other persons, in breach of s.24 Civil Aviation Act 1964.

On each of the convictions for manslaughter he was fined $1,500 and sentenced to 100 hours community service. On the breach of the Civil Aviation Act he was fined $500 and disqualified from holding or obtaining a pilot's licence for a period of 12 months.

He seeks leave to appeal against conviction on the grounds:

1. That all the convictions were against the weight of evidence:
2. Of wrongful admission of evidence: and
3. Of misdirections in respect of the s. 24 charge.

He also seeks leave to appeal against that portion of the sentence imposed for the breach of s. 24 which disqualified him from holding a pilot's license.

Background Facts

All four charges arise out of a mid-air collision which occurred shortly after 5pm on the 30 July 1989, at Aokautere near Palmerston North, between two Piper Tomahawk aircraft owned by the Manawatu District Aero Club .

The applicant was then the Chief Instructor of the club and was piloting an aircraft which had the identifying letters EVA. With him as a passenger was a member of the club named Paul Wendon.

The second aircraft, which had the identifying letters EQM, was piloted by a Mr Michael Lamb, a flying instructor at the Club. He had with him as a passenger a young woman named Angela Bos.

Messrs Nicholson and Lamb had for some time been considering reintroducing formation flying as one of the club's activities, using Piper Tomahawk planes for that

purpose. They had spoken to a more senior pilot with experience in formation flying about this project, and on one or more previous occasions had carried out exercises to develop skills in formation flying. It was common ground that such flying requires those participating to determine in advance the height, course and speed at which the leading aircraft will fly, and that the other aircraft should take up pre-arranged positions in relation to the leader when it has attained the set course and speed.

While there was a contest between the Crown and the defence as to the nature of the intended exercise, there certainly was some arrangement between the two that they would engage in some form of joint flying activity involving bringing their planes into close proximity to each other in the air.

They left the aerodrome a few minutes apart, Mr Lamb leaving first in EQM with the intention that his would be the lead aircraft and that he would be joined by the applicant in EVA.

The two aircraft re-established contact about 5 minutes' flying time to the east of the air field and at an altitude of about 3,000ft.

After a brief exchange by radio between the two pilots EVA moved in alongside EQM, and there was immediate contact between the nose cone and propeller of EVA and the rear aspect of the left wing of EQM. This caused a lead balance weight attached to its left aileron to be dislodged and fly backwards through the windscreen of EVA, hitting Mr Wendon in the head and causing him fatal injuries.

EQM continued in controlled flight for a short period, but became unstable, and crashed, killing both occupants. EVA was only slightly damaged in the collision

and was able to complete the return flight to the aerodrome. After EVA landed the applicant talked to numbers of persons at the aerodrome. He was clearly under stress, and they spoke of him theorising about what had happened and not giving a clear account of events.

At 7.15pm, he was interviewed by the Police and completed a three page statement in which he endeavoured to describe the events leading up to the collision and its cause. In this he said that earlier that day he had been instructing, but that in the middle of the afternoon he spoke to Lamb and they had agreed to go out flying together later that afternoon. He said they had discussed "for about a minute" what they would do and what formations would be carried out. He endeavoured to reach his wife on the telephone to invite her to fly with him. Having failed to do so he saw Mr Wendon and invited him to "Come up for a 'hoon'", to which he received the reply "Sure". He described the weather conditions as "good" for visibility and "perfect" for flying.

The portion of his statement which described the events immediately before the collision read:

> "When I picked up Mike he was in a steep turn crossing in front about 400 or more feet away from me. I transmitted 'Tack Tack Tack' and he acknowledged my communication replying that was unfair. By 'Tack Tack Tack' I meant I am shooting at you. This is a common jargon for pilots. I did reply 'Yes lets do it' or something like that. Yes I know.
>
> He evaded that by rolling off to the left and down and then up again. I moved left as I was approaching him rapidly and to keep him on my right as discussed. It was the intention to fly side by side in formation.
>
> We were both moving towards each other and it was here that the problem arose. It was here and analysing it later it should have been only one moving to the other and not both moving to close in on each other."

In the last portion of the statement he said he believed the accident happened:

> "because of an error in judgment on both our parts by closing in too quick."

The following day Mr Zotov, an Inspector of Air Accidents, attended the crash sight and examined the wreckage of EQM. He proceeded to make a preliminary analysis of the evidence, including the alignment of the remaining portions of EQM with the damaged aircraft EVA, in an attempt to ascertain the cause of the collision.

On 5 September 1989 a Detective Sergeant Cross re-interviewed the applicant, who was cautioned and asked a considerable number of prepared questions in the presence of his solicitor, Mr Paine. A number of those questions were not answered by the applicant, on the express advice of Mr Paine. At the end of that interview the applicant was charged with the offences on which he stood trial.

At the time of the deposition hearing in December 1989 Civil Aviation Administration had not completed its investigation into the accident or reached any final conclusions as to its causes. At the trial Mr Zotov appeared under subpoena and advised that CAA had not been able to take matters much further because of a considerable increase in fatal accidents. He described the investigation as being "at a very early stage", and said that his findings to that date might well change if further work were carried out, indeed that he would expect some change.

He expressed the provisional view that EVA had approached EQM from slightly above at a higher speed than the forward aircraft, but was unwilling to express a firm view as to their relative positions at the time of the collision or the speed of either aircraft at that time. The furthest he would go was to express the view that EVA had

closed on the plane from behind "in something like the same attitude".

Under cross-examination he accepted that it was possible that EQM might have decelerated as EVA approached, by reason of engine failure or a temporary loss of fuel, and equally that EQM might have changed course as EVA was approaching and for that reason have been responsible for the collision.

The applicant gave evidence on his own behalf.

He described his 13 years' essentially incident free flying experience and his progress from student pilot in 1973 until he became a full time instructor at the Manawatu Aero Club in 1988, and in 1989 obtained a more senior rating which enabled him to become Chief Flying Instructor to the Club. As well as holding his commercial pilot's licence for fixed wing aircraft he had a further licence as a "Commercial pilot - free balloon." As at July 1989 he had approximately 835 hours of flying experience with fixed wing aircraft and 200 hours with balloons.

In response to the suggestion made by the Crown that the use of the terms "hoon" and "tack tack tack" indicated that he and Lamb were not simply interested in practising formation flying but intended to and did indeed engage in some kind of skylarking or mock combat flying, the applicant explained that the first term was simply an expression used at the Club to indicate a flight, and that he had used the second in a jocular way as a means of establishing communication. In any event, the words in his view would mean "I have shot you down", indicating the end of a dog fight, not the start. He firmly denied that he had undertaken any manoeuvre or intended to undertake any form of mock fighting or dog fighting.

Although the applicant did not challenge the accuracy of the record of the statement he had given to the Police on the evening of 30 July, he claimed it had been obtained by pressure and while he was still under stress. He said that after calmer consideration he believed he had made reasonable preparations for the exercise and that he had taken appropriate steps to avoid unnecessary danger.

In his oral evidence he did relate a materially different version of events from that contained in his written statement. In particular he contended that he had not moved in to "dock" (or take up position in close formation) alongside Mr Lamb until the latter was flying level and on a steady course, and that his final communication, "Let's do it", or words to such effect, was not transmitted until that state of affairs existed. He said that from that point he approached at a similar altitude to EQM, easing his aircraft gently to the right to get into position. He did not claim to be able to identify the cause of the collision.

The other principal witness for the defence was Mr P.M. Rhodes, who had long experience with the New Zealand, Malaysian and Australian air forces, and had done work as an Air Accident Investigator for the Airline Pilots' Association and for governmental agencies in this country and elsewhere.

He agreed with Mr Zotov that the investigations to that time did not establish the cause of the collision.

It was his evidence which, with Mr Zotov's, provided the basis for the contention put by the defence at the trial, and developed in this Court, that the evidence -

> "identified four possible explanations for the collision of the aircraft:
> 1. Negligence by the accused;
> 2. Change of course by the other aircraft

bringing it into collision with the accused's aircraft;

3. An error of judgment by the accused while flying with all reasonable care; and
4. Loss of power or failure of the engine of the other aircraft causing it to slow and come into collision with the following aircraft."

Conviction Appeal

First Ground of Appeal - Verdict unreasonable and not supported by the evidence

This ground of appeal was based on the near agreement of the two expert witnesses, Mr Zotov and Mr Rhodes, that none of the four "possible explanations" just previously listed was capable of being eliminated from the possible causes of the collision on the state of evidence at the time of trial.

In addition Mr Rennie placed significance on the comment made by the trial judge on the issue of causation in the following paragraph from his Reasons for Sentencing:

> "The Crown case was presented on the basis that it was as much a lack of preparation, or briefing for the flight, as the manner of flying the aircraft which caused the accident. It was open to the jury to conclude that it was there that the breach of the duty of care lay. They may well have done so. I say that because for myself I found it difficult to form any concluded view as to what exactly did happen in the air which caused the accident."

From that basis Mr Rennie argued that:

> "For the Jury to find these charges proved beyond reasonable doubt, it had to discard or disregard three of the possible explanations and find the fourth explanation proven beyond reasonable doubt."

In our view that submission mis-states the correct legal position. As the jury were told, it was not necessary

for the prosecution to prove that the sole cause of the collision was breach of obligation by the accused, provided a breach was proven and that it was a cause of the accident or collision. The direction the jury received accorded with the decision of this Court in R v McKinnon [1982] NZLR 31 and those cases which have followed that it is sufficient if the action of the accused is "an operating and substantial" cause of death.

It was of course open to the defence to press upon the jury the uncertainties involved in the incomplete investigation of the accident: and clearly that was done.

But there was, in our view, evidence available to the jury, particularly the applicant's initial statement to the police, which if accepted would have justified a finding that in the applicant's manner of preparing for the proposed exercise and establishing contact with and moving to take up position in close proximity to the lead plane there was a failure to exercise reasonable care which had continuing causal significance up to the point of the collision.

For that reason we reject the initial and principal argument against conviction.

Second Ground of Appeal - Wrongful Admission of Evidence

A second ground of appeal introduced by leave at the hearing without objection from the Crown was that the evidence of the interview conducted by Sergeant Cross was inadmissible, for the reasons considered in R v Halligan [1973] 2 NZLR 158, and was prejudicial to the defence.

By agreement of counsel at the trial Sergeant Cross read to the jury his record of his interview of the applicant on 5 September, during which numbers of prepared questions were not answered by the applicant by reason of

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advice received by him from Mr Paine not to do so.

No doubt, for the reasons discussed in R v Halligan, it would have been better had the evidence of the Detective Sergeant been limited to reporting those portions of the interview which resulted in information being obtained. However, not only was this material put in by consent, the questions were by and large of a neutral nature. That circumstance, together with the fact that any refusals to answer were plainly the result of advice from his solicitor, must have reduced any prejudice which might have resulted from the admission of this material to a truly insignificant level. We were also informed that in the end no reliance was placed on this interview by the Crown in its final address.

We do not believe there is any substance in the complaint now made.

Third Ground of Appeal - Claimed Misdirection on Charge of Breach of s.24 Civil Aviation Act 1964

The complaints against the summing up on this count were:

1. That it failed to deal with the meaning of the word "unnecessary":
2. That it failed to state the test in Civil Aviation Department v McKenzie [1983] NZLR 78, and in particular the requirement "to show the circumstances creating the unnecessary danger":
3. That it failed to explain that the word "operate" was limited to "events while the aircraft was in the air and being operated (meaning flown) by the accused": and
4. That it failed to distinguish between the level of knowledge and intent required for proof of charges under s.24 and that required on charges of manslaughter: this ground being linked to the proposition that the fact

that the jury had recommended leniency in relation to the manslaughter charges only indicated that it misunderstood the relevant tests.

We do not consider that the term "unnecessary" required any expansion or explanation. It is a simple term and spoke for itself.

The argument for the applicant on this point was that "on the direction as given the jury may well have thought that if formation flying was itself dangerous, then that was a basis for conviction." That hypothesis in our view cannot stand with the advice given to the jury in the section of the summing up which considered s.24 that -

> "If, by some untoward event, he is put in a situation which creates risk or danger for other persons without fault on his part he would not be guilty of an offence under this section:" and
>
> "The fault does not necessary involve deliberate misconduct or an intention to operate in a manner inconsistent with proper standards of piloting. Fault may consist of falling below the standard of care and skill of a reasonably prudent and skilful pilot. If by acting in that way he causes unnecessary danger to a passenger or occupants of other aeroplanes he would be guilty of an offence under this section."

Those passages made it clear to the jury that there must be a falling below the standard of care and skill of a reasonably prudent and skilful pilot, and that the danger inherent in flying was not a sufficient basis for conviction.

The second criticism, that the Court did not follow the formula of CAD v McKenzie, is in our view a particularly difficult argument for the applicant in this case.

It is the case that the judge left the onus of all aspects of intention wholly with the Crown, not only in

relation to the manslaughter charges, where that was undoubtedly the only proper direction, but also in relation to s.24, this Court in CAD v McKenzie having concluded that once the basic actions and their causation of danger were established, the onus of proving absence of fault fell back on the defence. Far from the judge's directions operating to the disadvantage of the applicant, in our view they were plainly more favourable than a direction in terms of CAD v McKenzie.

The third complaint proceeded from the basis that the term "operate" relates solely to the flying of aircraft. In argument Mr Rennie accepted that it must extend at least to operations on the ground such as taxiing and parking of aircraft, but still contended that such matters as pre-flight briefings did not constitute part of the "operation" of an aircraft in terms of s.24.

We do not agree that any such restricted construction need be placed on that term. There is nothing in the context of the section which so requires. Its common and ordinary meaning of "manage" or "control" seems to us both available and appropriate. Thus, if a pilot left his plane for a short time, intending to return, but left it in a condition which permitted it to run away and injure third persons, the fact that he was not then directly in physical control of the machine would not in our view necessarily prevent him from being said to "operate" it.

However it is not necessary to attempt any final definition of the term in order to determine the present objection. In our view, even if the term "operate" be given the restricted meaning for which Mr Rennie contends, a failure to hold appropriate pre-flight briefings to settle the terms of proposed formation flying must, in our view, be a matter properly to be considered in determining whether the participants were carrying out those exercises in a

manner likely to cause unnecessary danger.

Neither the Civil Aviation Act, 1964, nor the regulations under that Act deal at any length with formation flying, but Regulation 89 of the Civil Aviation Regulations, 1953, does require pilots engaged in formation flying to do so by pre-arrangement between the pilots in command. It would be absurd to exclude from the consideration of the issue whether or not a particular pilot had unnecessarily caused danger the question whether or not he had made such a pre-arrangement with the others with whom he intended to engage in formation flying.

It was accordingly entirely appropriate that the jury should have been permitted to consider the evidence relating to pre-trial briefings. In our view this criticism also is without foundation.

The fourth criticism arose from the contention that the limitation of the recommendation of mercy to the manslaughter verdicts indicated some misunderstanding on the part of the jury of the degree of fault involved in the two different types of charges, the particular submission being that it indicated -

> "a belief on the part of the jury that the manslaughter charges involved a higher degree of fault."

While we do not think it is possible to do much more than speculate about the reason for the form of the recommendation for leniency, it seems more likely to represent a belief that charges involving the causation of death would be regarded more seriously than those charging the dangerous operation of aircraft.

All in all we do not see any basis upon which the manner in which intention was dealt with in the summing up can in any real sense be considered unfavourable to the

applicant.

It follows that the applications for leave to appeal against conviction are declined, and those appeals dismissed.

Sentence Appeal

There were two distinct arguments against the imposition of the disqualification.

The first was that s.24 Civil Aviation Act 1964 was ineffective in that it failed to provide for the situation where, as in this case, a pilot holds more than one licence.

The second was that, contrary to the view taken by the trial judge, there were "special reasons relating to the offence" why disqualification should not have been imposed.

The relevant passage of s.24 the Civil Aviation Act 1964 provides that if the pilot of an aircraft is convicted of a breach of s.24(1) -

> "The Court shall order him to be disqualified from holding or obtaining a pilot licence for such periods, being not less than 12 months, as the Court thinks fit, unless the Court for special reasons relating to the offence thinks fit to order otherwise."

The 1964 Act has now been replaced by the Civil Aviation Act 1990. This does not require mandatory disqualification, but provides for loss of licence to be considered on the facts of each case.

However it was not contended that this was a case in which the penal provisions of the revoked statute were limited by related provisions in the revoking statute, and the only significance of the change in the statutory code is that it calls for consideration under the second part of the

argument, that relating to special reasons.

The scheme for the licensing of pilots under the Civil Aviation Act 1964 and Regulations provides for numbers of different classes of licences to be issued to pilots. Thus the licences held by the applicant at the time of his conviction were:

(i) A licence under Regulation 228(b) - "Private pilot - aeroplane":

(ii) A licence under Regulation 228(c) - "Commercial pilot - aeroplane": and

(iii) A licence under Regulation 228(j) - "Commercial pilot - free balloon".

That scheme is sufficiently distinct from that governing the licensing of drivers of motor vehicles to make decisions on the licensing provisions of the Transport Acts of little assistance. This is particularly the case because of the provision in the latter Acts whereby one licence is issued for different kinds of vehicle or activity, and the provisions for partial suspensions and the grant of limited licences. Neither arrangement has any equivalent in the Civil Aviation Acts and regulations.

It cannot be the case that the provision for disqualification of s.24 is defective simply because it does not recognise or make provision for dealing with different licences in different ways, as such a construction would require a total disregard of legislative intention. The only question is whether there is any alternative to reading the phrase "a pilot licence" as "any pilot licence", the construction which Mr Rea asked us to place upon it.

Mr Rennie did not suggest any alternative interpretation short of treating the section as so ambiguous that it was "defective", (by which he must have meant "ineffective",) in the case of any pilot who had more than

one licence. That construction would so dramatically disregard apparent legislative intention and produce such fortuitous results that we are unable to accept it.

We turn next to consider the various claims made on behalf of the applicant that the facts did indeed show "special reasons relating to the offence."

The first was the repeal of s. 24 after the date of the offence but before the date of sentencing, that circumstance itself being claimed to be a "special reason". In our view a special reason relating to an offence must of necessity be a circumstance existing at or about the time of the offence, not some matter which first occurs months, perhaps years later. Nor do we comprehend that a statute which deals generally with the legality of certain types of activity cannot be a special reason relating to a particular offence. For both reasons we do not consider that the enactment of the 1990 legislation could be so classified.

The second claim relates back to the fact that a pilot may hold three or four separate licences, the same circumstance which was put forward to justify the claim that the section was "defective". Once again we do not see how a legislative provision can possibly be classified as a special reason relating to a particular offence.

The third contention was that the offence:

> " was in relation to a very specialised flying technique confined to a private arrangement between individual pilots: i.e. formation flying. This is a fact special to the offence. It would be wrong to suspend a pilot's licence or licences where no type of flying of that type is involved."

In our view that submission misconceives the significance of the breach of obligation and care involved in the present case. We agree with Mr Rea's comment that

the distinction made would justify the pilot of a 737, who had been convicted of dangerous skylarking in a small plane, having his private pilot's licence suspended but his commercial pilot's licence retained. It is not realistic to limit the significance of a finding of unnecessarily dangerous flying in the manner proposed.

The fourth suggested special reason was that the breach was not a breach of any regulation or air safety requirement. That may or may not be the case. However the fact that there are few specific requirements placed upon those who choose to engage in formation flying, plainly an activity which requires especial care, cannot convert failure to observe such care into a special reason bearing on disqualification.

The fifth claim was that the breach may have been only in part the applicant's fault. Accepting that such may have been the case, in the nature of things he could not have been found guilty unless his conduct was a substantial and continuing cause of the deaths: and if it was, a conviction on that basis would not constitute a "special reason".

The final special reason claimed was the recommendation for leniency. Since that was directed solely to the manslaughter charges, it can have no relevance in this area.

We add that, while we do not accept that the matters on which the applicant relied as constituting special reasons should be so classified, there appears to us to be considerable force in the argument put by Mr Rea that, if any consideration of special reasons were called for, those put forward would have less significance as special reasons than the fact that the conduct constituting the breach of s.24 in this case was at least a substantial cause of three

deaths.

In our view no case has been made out for disturbing the imposition of the order of disqualification.

It follows that leave to appeal against sentence also is declined, and that the appeal is dismissed.

The disqualification was suspended pending delivery of the judgment of this Court on the present applications. As they are now dismissed, the disqualification is to operate as on and from the day following delivery of this judgment, as a disqualification from obtaining or holding any pilot's licence.