25/1

N.Z.L. Reports

Special Consideration

M.138/83

IN THE HIGH COURT OF NEW ZEALAND
PALMERSTON NORTH REGISTRY

675

(1984) 1 CRNZ 268

BETWEEN KIMURA

Appellant

AND THE POLICE

Respondent

Hearing: 24 May 1984

Counsel: T.C. Thackery for Appellant
B.D. Vanderkolk for Respondent

Judgment: 22 JUN 1984

JUDGMENT OF EICHELBAUM J

In the late evening of 5 July 1983 a neighbour noticed suspicious activity at an addresss in Churchill Avenue. Three persons alighted from a van and went to the house. Shortly afterwards the neighbour believed he saw torchlight inside. On being called, the Police discovered that the premises had been forced. One Buckley was found under a bed. Enquiries led to the subsequent arrest of the appellant and a third person named Austin.

At the hearing Miss Buckley, who had meantime pleaded guilty to burglary, no doubt was expected to implicate the other two, but did not do so. At the end of the prosecution case, the state of the evidence was as follows. Against Austin, there was a case to answer, as he had made admissions in interview with the Police. Kimura, however, had maintained that he was out of town on the night

in question. There was no evidence against him except the presence of the van, which he had admitted he owned. There was no sufficient case against him and the Judge should have acceded to the submission to that effect. However, he ruled otherwise and the hearing continued with Austin giving evidence on his own behalf. The Judge had occasion to warn him of the consequences of perjury. Shortly afterwards, Austin admitted that he had been a participant in the burglary. He also implicated Kimura.

Kimura then gave evidence, and called a witness with a view to establishing that he had been in Wellington on the night in question. Since even from the transcript, the alibi evidence appears unsatisfactory it is not surprising that the Judge rejected it. After properly directing himself as to the consequences of an accomplice's evidence, he convicted Kimura, as of course he was entitled to if satisfied that Austin's account was correct. Kimura's appeal centres on the rejection of the submission of no case, and on whether at this stage, this Court is entitled to have regard to the whole of the evidence, or just the prosecution case as it stood when the submission was made.

I need to refer first to Mr Thackery's submission that in fact the District Court Judge did not rule immediately on the application of no case. Counsel's impression, as he put it, was that the application had been reserved. If so the factual situation would have been the same as in two New Zealand decisions to be discussed later, Davies v Glover 1947 NZLR 806 and McIntosh v Police M.1721/82 Auckland Registry, judgment 11 July 1983 unreported. However, in the course of his decision the Judge is recorded as saying explicitly that at the conclusion of the prosecution case he held that there was a case to answer. The

decision was given immediately on the conclusion of the hearing, or at any rate on the same day and in the absence of any indication in the record to the contrary I propose to accept that the sequence of events was as stated by the Judge.

To identify the issue for decision it is necessary to deal with some preliminary matters :

(a) In general, when an appellate court has to decide whether there was sufficient evidence to justify a conviction, the totality of the admissible evidence given at the hearing is considered.

(b) The provisions of the Summary Proceedings Act 1957 do not detail the basis on which the appellate jurisdiction of the High Court is to be exercised. In the case of general appeals to the Court of Appeal s 385 of the Crimes Act 1961 provides that an appeal shall be allowed if any one of three grounds is established, viz that the verdict should be set aside as unreasonable or not supported by the evidence, that the judgment of the Court should be set aside on grounds of a wrong decision of any question of law, or that there has been a miscarriage of justice; in each case subject to the proviso that the Court may dismiss the appeal if of opinion that no substantial miscarriage of justice has occurred.

(c) The Summary Proceedings Act does not spell out the jurisdiction in any comparable way. Dealing with general appeals such as the present, s 115 simply refers to an appeal by a convicted person. Section 119 provides that the appeal is to be by way of rehearing, but on the notes of evidence. Pursuant to s 121 the Court may affirm, set aside or amend the conviction while s 131 empowers

the Court to remit the determination for rehearing.

(d) With guidance from statutes that spell out the jurisdiction of the Court in a more detailed way, but without endeavouring to state the position exhaustively, I conclude that the Court may allow an appeal not only where the conviction is not supported by the evidence, but also where there has been a wrong decision on a question of law, or a miscarriage of justice.

(e) As to error of law, writing of the English legislation on which s 385 of the Crimes Act was modelled Ross, The Court of Criminal Appeal (1911) said that an appeal may relate to the way the Judge has dealt with any question of law which occurred during the hearing. Under the Summary Proceedings Act wrongful admission or rejection of evidence, per se, is excluded as a ground by s 108.

(f) I do not imagine that every error of law in the course of a summary proceeding would suffice to lead to a successful appeal. In addition there must I think be an element of miscarriage of justice.

(g) It is well established that the question whether there is a case to go to the jury is a question of law, see (e g) Ireland v Connolly 1901, 21 NZLR 314.

(h) In strict logic it might be thought that the wrongful rejection of a submission of "no case" should always lead to the allowance of an appeal based on that ground, regardless whether the missing evidence is thereafter supplied by the appellant or, in the case of a joint trial, through a co-accused. However, in New Zealand at any rate the position is otherwise. In R v Peddle 1907, 26 NZLR 972 on a trial on indictment a submission of no

case had been overruled. Evidence given on behalf of the defence supplied the deficiency. On a case reserved for the Court of Appeal, Williams J in whose judgment all the other members of the Court (Denniston, Cooper, Chapman and Button JJ) concurred said :

> " The case is exactly analogous to the case where nonsuit has been moved and the trial goes on, and in the case for the defendant evidence is adduced which cures the defect in the plaintiff's evidence. The circumstance that, in the case of the plaintiff, there was not sufficient evidence to go to the jury is at once cured if, in the course of the defendant's case, such evidence is forthcoming. "
>
> (p 977-8)

That decision of course is binding on me.

Basically then, the issue I have to address is whether a different principle applies where the gap in the evidence is filled not by evidence called for the appellant, but by a co-accused. In England, that question has had a chequered history. In 1919 the earlier conflicting decisions were considered by a Court of five Judges in R v Power 1919 1 KB 572. A submission made

at the close of the prosecution case that there was no evidence against the appellant had been overruled. Both co-accused then gave evidence, the accused making statements that incriminated the appellant. The Court did not say whether the submission of no case was rightly rejected, a point thought to be of significance in the subsequent case of R v Abbott 1955 2 QB 497. There was also an allegation of misdirection, which succeeded. However the Court put its decision on this branch of the case squarely on the basis that the Court ought to look at the whole of the evidence, disapproving R v Joiner 1910, 4 Cr App Rep 64. The latter had involved a single accused and an erroneous rejection of a submission of no case, that is to say the identical facts of Peddle, and the Court had taken the opposite course, that is had declined to take into account evidence elicited after the submission was rejected.

There, in England, the matter rested until R v Abbott. As in Power it was a joint trial. At the conclusion of the prosecution evidence there was a case against one accused, Mrs Wales, but none against the appellant Abbott. A submission of no case was rejected. Both accused then gave evidence. Abbott said nothing of an incriminatory nature but Mrs Wales placed the whole of the blame on him. The Court of Criminal Appeal (Lord Goddard CJ and Finnemore & Devlin JJ) allowed the appeal. In argument Devlin J said :

> " There might well be a difference between cases where there is a doubtful point for the Judge to decide and cases where he wrongly allows a case against one prisoner to continue and another prisoner gives evidence against him. It would be wrong for the Court to

take that evidence into account. "

Later the learned Judge added that if the trial Judge had been wrong not to stop the case, then since the appellant should have been able to leave the dock he was thus convicted on an error of law. In giving the reasons for the judgment of the Court Goddard CJ, referring to Power, said that he did not know whether the Court there dealt with the case on the footing that there was no evidence against the appellant. What the Court had decided, in Lord Goddard CJ's view, was that if the case went to the jury, the evidence given by the accused was part of the sum of the evidence in the case, and that the Court of Appeal, when asked to quash the conviction, might take the whole of the evidence into account : "They did not say that the Court must do so, but that this Court might do so".

Like the earlier English cases, Abbott was decided under s 4 of the Criminal Appeal Act 1907, similar in its terms to our s 385. It was pointed out in Abbott that the reference therein to a "wrong decision on any question of law" had been interpreted as referring to a decision on a question of law during the course of the proceedings, see R v Cohen & Bateman 1909, 2 Cr App R 197 where Channell J had said :

" Taking s 4 with its proviso, the effect is that if there is a wrong decision of any question of law the appellant

> has the right to have his appeal allowed, unless the case can be brought within the proviso. "
>
> (p 207)

Thus in Abbott the Court reached the position that there had been an error of law, that is the failure to accede to the submission of no case, and there was of course no question of application of the proviso; had the correct decision in law been taken the appellant could not have been convicted. On the basis of the English statute and the interpretation placed upon it that reasoning seems irresistible. I add with respect that the grounds given by the Court for disposing of R v Power appear difficult to justify; the two cases appear indistinguishable from one another and, I may add, so far as the facts are concerned, from the present. They also appear indistinguishable from a recent decision of the Court of Appeal, R v Cockley, at any rate so far as one can judge from the only report presently available viz The Times, 17 March 1984. The Court (May LJ and Bristow & Macpherson JJ) is reported as saying that if the trial Judge had erred in not upholding a submission of no case to go to the jury, it was not open to the Court nevertheless to look at the whole of the evidence given below in deciding whether to quash the conviction. Again, the context was that evidence called on behalf of co-accused had implicated the appellant.

Prior to Cockley, two commentators had said that the English position did not appear to be settled, refer Phipson on Evidence 13th Ed (1982) p 765 and Rosemary

Pattenden, "The submission of no case - some recent developments" 1982 Crim L R 558. See also J C Wood, "The submission of no case to answer in Criminal Trials - the quantum of proof" 1961, 77 LQR 491, 492-5.

A number of Canadian authorities have followed and approved R v Power. In R v Boyer 1968, 4 CRNS 127 (British Columbia Court of Appeal) the contention was that the trial Judge had wrongly overruled a submission that there was no evidence fit to be left to the jury. After reviewing the authorities, including Power, but without reference to Abbott, Tysoe JA with whom Norris JA agreed stated that the question was purely academic. Since the appellant had given evidence on his own behalf the case had to be dealt with on the totality of the evidence (p 139). In his judgment Tysoe JA referred to Girvin v R 1911 45 SCR 167, decided in the Supreme Court of Canada. The latter involved a single accused, and the Supreme Court of Alberta had declined to follow R v Joiner (above). The Supreme Court dismissed the appeal.

In an article "The submission of no case in Canadian criminal cases" 1972-73, 15 Crim LQ 52 (D L Pomerant) the learned author pointing out that in R v Boyer the Court did not refer to Abbott, stated that in Boyer the evidence supporting the conviction was to be found only in the case presented by a co-accused. On my reading of the decision however it seems that of the accused only the appellant gave evidence, see the statement of facts in the judgment of Robertson JA at p 148. Reference may also be made to Vander-Beek & Albright v R 1970, 15 DLR (3d) 347 where R v Abbott (above) was distinguished on the basis that the prosecution had established a case against all co-accused, but the possibility was left open that Abbott might be applied where there was no evidence against one accused in

a joint trial. The learned author concluded his article with the submission that Abbott ought to be applied in future, but if that was to occur the philosophy underlying a number of earlier decisions, some of which I have mentioned above, would require to be reconsidered.

I come then to the New Zealand cases. In Davies v Glover (above) the Magistrate reserved his decision on a submission of no case. The defendant then gave evidence in the course of which he supplied the element lacking. The Magistrate then dismissed the information, holding that he was bound to have regard only to the evidence of the prosecution, and was not permitted to take into account the evidence subsequently given on behalf of the respondent. Kennedy J decided that this view was erroneous. He reviewed the English authorities, concluding with R v Power, and decided that the Magistrate was not precluded from considering the defence evidence.

Davies v Glover has not been commented upon in any reported New Zealand case but I was referred to the unreported judgment of Prichard J in McIntosh v Police already mentioned. The facts were similar to Davies v Glover. In the District Court counsel for the appellant had submitted that there was no case to answer. As a matter of convenience, because witnesses were waiting, the Judge reserved his decision on the submission, and heard the evidence called by the appellant. At the conclusion of the hearing, without making further reference to the defence submission of no case, the Judge found that the prosecution case had been proved. Prichard J said the weight of authority favoured the view that an appellate court can look at the defence evidence to supply a missing ingredient in the prosecution case. He referred to R v Peddle, dealt with earlier, as New Zealand authority for that proposition.

The learned Judge regarded these decisions as applicable to the situation where a no case submission had been made and overruled. In Davies v Glover on the other hand the trial Judge had reserved judgment on the submissions. He thought that in that situation the analogy with non-suit broke down. In a civil action, where an application for non-suit is made, the Judge can require the defendant to elect whether evidence will be called. If he so elects, generally the non-suit application will be reserved. To the authorities cited by Prichard J on this aspect may be added Payne v Harrison and anor 1961 2 All ER 873, where incidentally the decisions on submissions of no case in criminal trials are reviewed by Holroyd Pearce LJ at pp 876-7. In criminal prosecutions there is of course no question of putting the defence to an election, see Jones v Metcalfe 1967 3 All ER 205.

The learned Judge went on to express the view that although it might sometimes be convenient to reserve decision on a submission of "no case" so that the evidence of waiting witnesses could be heard promptly, it was a course to be avoided at all cost. He concluded that where that procedure was followed the defence still had the right to the promised ruling, and was entitled to it on the evidence as it stood when the submission was made. He concluded that Davies v Glover was wrongly decided; but on a reading of the judgment as a whole it is quite clear that in so stating, he was confining his opinion to the situation where judgment on the no case submission had been reserved. He distinguished the instance where the defence had called evidence following an adverse ruling on the submission, on which facts of course Peddle was binding on Prichard J as it is on me.

Here, I should revert to the facts of the present case and for clarity, state that the co-accused Austin gave evidence first. Accordingly the appellant did not have to decide whether to call evidence until after he was aware of the additional factor of Austin's allegations against him. Clearly the case would take on a further complication where in a joint trial an accused, having elected not to give evidence, was subsequently faced with incriminating testimony from a co-accused. On the assumption that a submission of no case had been rejected erroneously, the facts only need to be stated to demonstrate the potential unfairness to the accused not giving evidence, if on a subsequent appeal reference may be made to the whole of the evidence. It is right to add however that such an accused may find himself in a disadvantageous position even in the absence of any rejection of a submission of no case.

I can now take up my earlier conclusion that an appeal may be founded on error of law concurrent with miscarriage of justice. I think it is difficult to escape the conclusion that here, both elements were present. Once it is accepted that there was no evidence against the appellant at the time of the submission of no case, there can be no doubt regarding the former. As to the latter, but for the error of law the appellant would no longer have been on trial at the time the co-accused gave his incriminating evidence. It was this circumstance that led the Court in Abbott to say there was no question of application of the proviso. These considerations, coupled with the recent trend of English authority, point towards setting aside the present conviction. In an article "The application for a directed verdict" 1965 Crim Law Review 342 Dr Glanville Williams argued that the opportunity to submit "no case" would best be abolished. In the present state of the

law however he supported Abbott's case :

> " If .... the ability to make the application /sc. of no case/ is thought to be an essential method of compelling the prosecution to build up its own evidence without waiting for the evidence for the defence, it seems reasonable to say that it is the positive duty of the trial court to see that the defendant is not deprived of this protection through ignorance or mistake, and of the appellate court to see that the trial court does not err. "
>
> (p 350)

With respect I think there is force in that comment.

There remains however the obstacle of the rule, which so far as New Zealand is concerned must be regarded as settled by R v Peddle (above), that the defect in the prosecution case is cured if, on the trial of a single accused, the defence evidence supplies the missing element, after wrongful rejection of a submission of no case. Such decisions may be rationalised on the hypothesis that if in such circumstances the defence calls evidence, that may be regarded as a waiver of the right to have the rejection reviewed on appeal, that apparently being the view taken in USA, see the article by Wood referred to

earlier, 77 LQR at p 500. Alternatively it may be argued that if the defendant himself supplies the evidence, then notwithstanding the views previously expressed one cannot say there has been a miscarriage of justice. Otherwise one could have the seemingly absurd situation where the defendant confessed the offence in evidence, yet his conviction was said to be a miscarriage of justice, a point made by the Alberta Supreme Court in the Girvin decision, discussed earlier. I doubt that it is possible to expound any principle that be logically satisfying in every instance. It seems to me that one can properly say however that the situation where a co-defendant, over whom the appellant has no control, gives incriminating evidence is distinct from that where the appellant himself elected to call evidence and cured the defect in the prosecution case. That conclusion is supported by the learned author of Phipson op. cit para 33-23.

For these reasons I conclude that the appeal should be allowed and the conviction set aside. In other respects the evidence given at the hearing was unsatisfactory. The Judge directed that enquiry should be made regarding possible perjury. In the circumstances I direct that the case be remitted to the District Court to be reheard.

Solicitors :
Opie & Dron, (Palmerston North) for Appellant
Crown Solicitor (Palmerston North) for Respondent