16/2 NZ Law Reports

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

T 46-47/83

THE QUEEN

24

v.

DUNNE
McGRATH

Hearing: 7 and 8 February 1984

Counsel: B.E. Buckton for the Crown
D.L. Stevens for the accused

Ruling: 8 February 1984

(ORAL) RULING OF SAVAGE J.

The Crown case having been completed, Mr Stevens has submitted that there is no case for the two accused to answer and that they should be discharged under s 347 of the Crimes Act. The usual practice in a trial on indictment is for the Court to hear such a submission in the absence of the jury and then to rule upon it. Here, of course, there is no jury so the matter has been dealt with in open court.

Mr Stevens contended that the submission should be upheld if, first, there is no evidence to prove an essential element in the offence or, second, if the evidence adduced by the prosecution is so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it. He referred me to a practice note of the Queen's Bench Division [1962] 1 AER 448. Mr Stevens drew my attention to the fact that the practice note was directed by the Divisional Court to

justices sitting in magistrates' courts in England but his submission was that it applied in the circumstances here since this was a trial without a jury. Mr Buckton referred me to R v Myers [1963] NZLR 321, in which Wilson J. on an application under s 347 had discussed the general approach that should be applied to such applications. The headnote to the report says that if the Judge is satisfied that it is unlikely that any jury, properly directed, would convict, or a fortiori that it would be wrong for such a jury to convict, then he should exercise the discretion given him by s 347 of the Crimes Act. Now I have noted that in 11 Halsbury's Laws of England (4th edn) at paragraph 290 it is stated that on a submission of no case to go to the jury the Court should proceed in the way expressed by Lord Parker in the practice note referred to above. Halsbury refers to various authorities which are directed to showing that this principle as to the approach to be adopted applies to trials on indictment as much as to summary trials. I notice that in Adams's Criminal Law (2nd edn) at p 801, paragraph 3137, the matter is discussed and the practice note referred to earlier is considered. It is suggested that the practice note has a wider application than just to summary trials; so, in effect, though it does not refer to Halsbury, it appears to be adopting the approach set out in Halsbury. Adams, however, goes on to emphasise that the decision should depend not so much on the question of whether the tribunal would convict or acquit at that stage as on the question of whether a reasonable tribunal might convict. The question of the test to be applied concerned me because this is a

case of a trial on indictment without a jury. It appeared to me, at first glance, that to apply the test of could a reasonable tribunal, and generally speaking in a trial on indictment that meant could a jury, reasonably convict was not a wholly satisfactory one in a logical sense. If one applied the two heads referred to in the practice note, it was obvious that the first one was appropriate, that is was there some element in the Crown case that was lacking, but the second one presented some difficulty. That second one is that the evidence was so discredited or was so unreliable that no reasonable jury could convict on it. For a Judge to say to himself, "could I reasonably convict on such evidence?" seems somewhat artificial. One would think he might perhaps actually ask himself "am I satisfied on the Crown case to the degree necessary, which is beyond reasonable doubt, that the accused is guilty?". If the answer was no, then he should hold that the Crown, having given all its evidence, had failed to prove the charge beyond reasonable doubt and so the accused should be acquitted. But to do that would mean that the case was being decided on its merits without it having run its full course and without the parties,and, more particularly, the Crown, having had the opportunity to survey the evidence as a whole. The Judge would not have been able to weigh the evidence properly, nor to consider the principle of proof beyond reasonable doubt in relation to all the facts that had been given in evidence, if he were to make a determination then.

Now the practice of trial on indictment by a Judge without a jury is very rare in New Zealand but it is a good deal more common in Canada, and our legislation which provides

for trial by Judge alone was drawn from the Canadian legislation. The practice in Canada on applications for a no case ruling is to be found in Crankshaw's Criminal Code of Canada, Vol 3, paragraph 496, subparagraph 8. It is there said that sitting without a jury the trial judge must reject a motion to dismiss when there is a prima facie case. There is a reference to the case of R v Morabito [1949] 7 CR in which the Supreme Court of Canada canvassed the matter and made it clear that at the end of the Crown case on an application for a no case ruling the Judge should do no more than decide as a matter of law whether there was any evidence on which, had there been a jury, it could convict. That particular case was in 1949, I think, but was one where the Judge sat without a jury and the Court, in fact, expressly said that the Judge would have no right, as he in fact had done, to proceed to weigh the evidence until all the evidence was in. The Court determined, it appears to me, that what the Judge should do is no more than decide as a matter of law whether there is any evidence on which a jury could convict. So I propose to adopt that general approach which, in effect, is much the same as that submitted by Mr Stevens and, I think, in somewhat different words, by Mr Buckton.

I turn to Mr Stevens' submissions in which he very thoroughly canvassed all the important evidence. He did not rely on any question of an essential element not having been proved, nor, if I understood him correctly, did he suggest that any of the evidence was actually discredited as evidence, but what he submitted was that the evidence was so unreliable that no tribunal could reasonably convict upon it. He canvassed the evidence which he described as being circumstantial and divided it into two parts, the more

significant and the less significant, and I think he very fairly dealt with all the evidence in his submissions. He then submitted that this evidence lost the significance the Crown contended it had in proving that the accused had possession of the cannabis by his analysis of the evidence and by referring to other evidence and, more particularly, the evidence given by a Mr McClellan. As I understood it, his submission was principally directed to showing that the circumstantial evidence that the Crown relied on was so unreliable that a reasonable tribunal could not infer from it that the accused knew of the existence of the buried cannabis at all. He submitted that for the evidence to lead to a conviction the tribunal would have to be satisfied that there was no reasonable explanation open on the facts consistent with innocence, and he submitted that there were several explanations on the facts which were consistent with innocence. In my view, the question of whether an explanation is reasonably open on these facts requires the tribunal to make an assessment of the evidence, to weigh it all, and that is not something that it should do at this stage on a motion of no case. I have considered carefully the points, and many of them are cogent points, that Mr Stevens has made, but in my view many of them are more relevant to the weighing of the evidence as a whole and to a consideration of the principle of proof beyond reasonable doubt on this evidence. The evidence, in my view, is not unreliable in itself, at least so far as the matter has been urged to me so far, but it is a question of the strength of the inferences that may be drawn from that evidence. At this stage, then, applying the tests that I have postulated earlier, I do not think it could be said that the evidence is so unreliable that no reasonable

jury could convict; or, putting it in the words used by Wilson J., that the evidence is so unreliable that it is unlikely that any jury would convict. In result I dismiss the application.