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IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

NO. M.603/83

BETWEEN CHRISTOPHER STANLEY COUZENS

Appellant

A N D THE POLICE

Respondent

Hearing: 1 February 1984

Counsel: S. Barker for Appellant
B.M. Stanaway for Respondent

Judgment: 9/2/84.

JUDGMENT OF COOK J.

The appellant was convicted of an offence under the Fire Services Act 1975, that he knowingly caused to be given a false alarm of fire.

On the day in question the appellant, who was at the Christchurch Public Hospital seeking medical assistance for a cut hand, was one of approximately 24 persons in the foyer adjacent to the casualty department. He and a friend were standing waiting and an action on the part of the appellant activated the fire alarm attached to a pillar against which he was leaning. That is not in dispute, but the appellant denied that it was done deliberately. His statement at the time to the police constable was that he had leant against the wall and with the palm of his hand had activated the alarm; that it was an accident.

For the appellant, Mr Barker submitted that the prosecution must prove beyond reasonable doubt (inter alia) that the appellant deliberately, and not accidentally, caused the alarm to activate; that the appellant's answer to the police implied a defence of accident and that prior to Mr O'Cain, the principal witness for the prosecution being

recalled, there was no direct evidence to suggest that the alarm was deliberately activated. As will be mentioned, Mr O'Cain was recalled by the District Court Judge following the conclusion of the defence case and it was submitted that the Judge was not entitled to do so when no application to adduce rebuttal evidence was made by the prosecution; that his intervention was not in accordance with the adversary syster In support reference was made to Jones v. National Coal Board 1957 2 Q.B. 55 and Reid v. The Queen 1980 A.C. 343 P.C. The former case related to a civil action before a jury and contair the well-known remarks of Denning L.J., who delivered the judgment of the Court, as to the duties of Judge and counsel, concluding at page 64:-

> "The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well."

As will appear, I do not think the Judge in the present case assumed the robes of an advocate, but, in any event, the present situation does not raise the same questions. Reid's case discusses the principles which apply in connection with the ordering of a new trial following a successful appeal and the fact that, where the verdict of the jury had been set aside on appeal on the ground that the evidence adduced by the prosecution was insufficient to justify a conviction, it was contrary to principle and not in the interests of justice that the prosecution should be given an opportunity to cure the deficiencies in its case against the defendant by a new trial. Once again, that is not the situation here and I do not think help can be gained from the principles there expressed.

It seems to me rather that, as stated in Sullivan (1923) 1 K.B. 47, a Judge in a criminal trial has a

discretionary power, with which a court of appeal cannot interfere unless it appears that an injustice has thereby resulted, of recalling witnesses at any stage of the trial and of putting such questions to them as the exigencies of justice require (see headnote). A witness should be recalled, not in order to repeat his evidence, but for the purpose of rebutting the case set up by an accused person in his evidence; in that particular case, to meet a suggestion made by counsel for the accused in his speech to the jury.

I do not see that the direction in Section 65 of the Summary Proceedings Act Section, as to the procedure to be adopted at a hearing, is to be read as limiting or removing the discretion referred to. The basic question must always be whether or not justice has been done. If it appears that, by reason of intervention by a Judge, justice may not have been done, then the conviction should be quashed.

In the present case, Mr O'Cain, employed by the Christchurch Hospital and on duty as an orderly at the time, who was seated at a desk some 10 to 15 feet from the alarm, said in his evidence in chief that a man, whom he identified as the accused, "pushed the fire alarm". He used the word "push" several times in describing the incident. He had noticed the accused and another man because of the noise they were making, laughing and speaking loudly:-

> "I stood there at the desk and watched him and all of a sudden he pushed the button with his left hand. The alarm on the wall is on a pillar standing in the middle of the foyer on the side facing the seats. The alarm is a glass square of about 3 inches in diameter surrounded by a red border. One must push the glass section. There is a red spot in the middle of the glass. One must push that. The glass was broken. Once the alarm was pushed the bell started ringing and the man left the hospital."

The senior station officer who was called to the hospital in response to the alarm, said that the two had informed him that the accused "was responsible for breaking the manual call point". To the police constable who arrested him, the accused gave this account:-

> "I spoke to the Defendant and asked him what had happened. He told me that he had been in the foyer of the Accident and Emergency, had leaned against the wall and with the palm of his hand had activated the fire alarm. He told me it was a silly place to have a fire alarm and that it was an accident. I then spoke to the previous witness, Mr O'Cain, and as a result of that I arrested the Defendant and charged him with false activation of a fire alarm."

When the accused gave evidence, his description of what happened was quite different from that of Mr O'Cain. It was to the effect that he was leaning on the concrete post, holding up his hand which had been injured;-

> "I felt something give under my hand and immediately an alarm started going off. At that time I realised I had put my hand through a fire alarm. When I say my hand on the alarm, it was my whole hand as far as I could tell but my fingers definitely went through. That would be my cut finger. My right fingers. I had not seen the alarm."

Under cross-examination, when asked if he had heard the evidence of Mr O'Cain, he said that he had but that it was not correct. Giving brief evidence in support, the person who had been with him generally confirmed the accused's evidence.

At that stage the Judge was faced with a sharp conflict. The use of the word "push" by Mr O'Cain creates the impression of a deliberate intentional act, but the case for the defence had not been put to him in any way. Faced with this situation, the Judge recalled Mr O'Cain and put the defence evidence to him. This was done carefully and questions were asked which it is apparent were designed to assist the Judge to visualise the situation and decide where the truth lay. Cross-examination of Mr O'Cain by counsel for the appellant followed and then re-examination by the prosecuting officer.

It seems to me that this was a proper exercise of the Judge's discretion when faced with such a conflict in the evidence. While certainly, as already noted, the accused had said to the constable at the outset that it was an accident, this defence was not put to Mr O'Cain when he first appeared in the witness box. Had the prosecution asked to recall him

in rebuttal, the Judge could properly have granted the request; for him to do so himself, especially as he was sitting alone and not with a jury, I do not see to be objectionable or to produce an injustice. While it is important that a Judge does not adopt the role of an advocate, or appear eager to find for the prosecution, in this case I am unable to see that either occurred. The appeal must be dismissed.

Hoar J.

Solicitors:

S. Barker, Christchurch, for Appellant
Crown Solicitor's Office, Christchurch, for Respondent.