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IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

217

M. No. 2/84

BETWEEN MURRAY EVANS CRAWFORD
on behalf of the
DEPARTMENT OF LABOUR

APPELLANT

A N D FLETCHER

RESPONDENT

Hearing : 17th February 1984

Counsel : G.L. Lang for appellant
M. Courtney for respondent

Judgment : 17th February 1984

ORAL JUDGMENT OF CHILWELL J.

The Department of Labour, through its informant Murray Evans Crawford, appeals by way of case stated from a decision of the District Court Judge in Napier given on the 17th October 1983 dismissing the information. The information, sworn on 6th September 1983, charged the respondent Fletcher with an offence against Section 14(5)(b) of the Immigration Act 1964. Essentially the charge was that Mr. Fletcher, on 4th November 1982 at Napier and other places in New Zealand, being a person to whom the Act applies and to whom a temporary permit to enter New Zealand was granted, having been granted an extension of the period for which that

permit was granted, did remain in New Zealand after the expiry of the extended period.

In the District Court three officers of the Department of Labour (Immigration Division) gave evidence for the informant. This evidence was, generally speaking, of a formal nature. It was not attacked in any material way. At the conclusion of the case for the informant, now appellant, counsel for Mr. Fletcher elected to call no evidence and submitted that on several grounds the information should be dismissed. The District Court Judge rejected those submissions except for one which he accepted but after he had pointed out that the issue involved in that particular submission was simpler in scope than argued before him. Essentially the basis upon which he dismissed the information was that there was no positive evidence establishing the presence of Mr. Fletcher in New Zealand on 4th November 1982.

The question in the case stated for the opinion of this Court is whether the decision of the District Court Judge was erroneous in point of law. That question is particularised into two sub questions. They are :-

(a) Was it necessary for the informant to provide direct evidence that the defendant was in New Zealand on 4th November 1982?

(b) On the evidence adduced could the District

> Court Judge reasonably have reached a conclusion that the informant failed to prove that Mr. Fletcher was in New Zealand on 4th November 1982?

There is no need for me to say a great deal about the first question because it is conceded by counsel that any essential fact can be established by circumstantial evidence. There is no rule of law in the general run of criminal cases which requires direct evidence as distinct from indirect evidence to prove beyond reasonable doubt the ingredients of an offence. There is no need to cite authority for the law is well known. The case, therefore, turns on the second question. Having regard to the way in which it is framed it can readily be seen that the issue for determination of this appeal is a factual one. That being so the appellate function is limited to ascertaining whether or not it is established that the District Court Judge, in determining the facts, was guilty of an error of law.

A common way of phrasing such a question, which in the process highlights the limitation on the appellate function, is the type of question phrased by Henry J. in Conroy v Patterson (1965) N.Z.L.R. 790 at 792 :-

> "'did the facts found (and as set out in the case stated) amount in law to an assault, so that if the Magistrate acted judicially his proper and only course was to convict respondent of assault?'"

In Police v Newnham (1978) 1 N.Z.L.R. 844 at 847-848 Mahon J. re-stated the principle :-

> "This being an appeal on a point of law by way of case stated and the subject of the appeal being a factual determination, the appellant can only succeed if he shows that on the facts found to be proved by the magistrate the only available conclusion was a determination of guilt."

He went on to enunciate a collateral proposition which stems from the primary proposition as follows :-

> "If more than one conclusion, direct or inferential, is open on the facts, then the question whether the right conclusion was selected by the magistrate is a question of fact and on an appeal by way of case stated the Supreme Court has no jurisdiction to substitute its own conclusion." (page 848)

Earlier in Police v Pereira (1977) 1 N.Z.L.R. 547 the same Judge had occasion to deal with the same principles. This was a case upon which an essential element (identity) was based entirely upon circumstantial evidence. The learned Judge at pages 552 to 554 referred to what is known as the Hodge direction. He then discussed the sometimes criticised decision of the House of Lords in McGreevy v Director of Public Prosecutions (1973) 1 ALL E.R. 503 and at page 554 he concluded, with reference to the Hodge direction, that it :-

> "..... is only appropriate where the case against the accused depends on circumstantial evidence alone. In such a case the allegation of

> liability presented by the Crown will rest upon an hypothesis to be inferred from the proved facts. But a contrary inference inconsistent with guilt may reasonably arise from the same facts, and in that event the duty of the tribunal is to acquit."

The Hodge direction is to the effect that where a case is entirely circumstantial, before a jury finds a person guilty, the jury should be directed that they must be satisfied :-

> ".... not only that those circumstances were consistent with his having committed the act but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the person was the guilty person." R v Hodge (1838) 2 Lew.CC. 227; 168 ER 1136 at 228, 1137.

That direction accords with my understanding of the duty of a trial Judge when directing a jury in a case involving circumstantial evidence. However, Mahon J. went on to say that in the case of a Judge sitting alone conducting a criminal trial he is not obliged to publicise the fact that he has directed himself in that way. Mahon J. said at 554 :-

> "..... it is my opinion that a magistrate, with his trained judicial mind, should apply the logical process, in a case wholly depending on circumstantial evidence, of seeing whether on all the proved facts there is any reasonable hypothesis open which is inconsistent with the guilt of the accused."

It will be necessary for me to return to the principles enunciated. They are mentioned at this stage because I have been invited by counsel for the appellant to go beyond

the facts stated in the case as drafted by him and to have regard to the whole of the record of the District Court including the evidence, the exhibits, the submissions of counsel and the actual reasons for judgment delivered by the District Court Judge when giving his reserved decision. I say at once that this is not one of those cases where the Court is being asked to ferret through a mass of written material because first, the written material is of a limited compass and secondly, there are only parts of it which counsel desires to have incorporated as part of the case upon which my determination can be based.

Counsel for Mr. Fletcher has opposed this course. He relies upon the strict rule propounded by Henry J. in Conroy v Patterson (supra) which is to the effect that the Court should not go beyond the case as stated except in rare cases: this not being a rare case. I have also been referred to Police v Newnham (supra) for a qualification upon the strict principle. In that case Mahon J. said at page 848 that in a case similar to the present where the issue is a factual one :-

> "..... it is sometimes permissible to supplement the case stated by production of the notes of evidence against the possibility that the facts found in the stated case might overlook some evidential material upon which the respondent could rely in order to show that a conclusion against liability was reasonably open, and this course was adopted in the present case."

Without detracting from his submission based on the decision of Henry J., counsel for Mr. Fletcher, by way

of supplementary submission, submitted that the dictum just referred to imposed a limitation upon the right of the Court to supplement the case stated. He said this was not a case where he disagreed with the case stated. He had no occasion to criticise the draft when it was submitted to him and the District Judge had signed the case as drafted by counsel for the appellant without amendment. He submitted that it is permissible to supplement the case for the purpose only of ensuring that a respondent facing possible conviction is not convicted because of inadequacies in the case stated. However, the converse does not, in his submission, apply to the appellant because the appellant has the control of the drafting of the case and must take all the consequences of failing to ensure that it contains all required for the purpose of conducting the appellant's submission.

In answer to that counsel for the appellant submitted that in a case such as the present the Court owes a duty to the respondent, whether the respondent asks for it or not, to examine relevant supplemental material in case something is found to assist the respondent. However, once the Court embarks upon that course and happens to find something that assists the appellant justice is not blind or blinkered and the Court is entitled to take into account relevant supplemental material so discovered.

It is my judgment that the correct principle is to be found in the judgment of Henry J. in Conroy v

Patterson (supra) at 791 where he said :-

> "The evidence as a whole is not material except in rare cases where the question is whether or not the finding was supported by the evidence."

That principle was followed by Casey J. in MacKenzie v Hawkins (1975) 1 N.Z.L.R. 165, 169 where he said :-

> "In this case, having regard to question (2), I considered that the decision and notes of evidence were necessary to enable a proper decision on appeal to be reached. Henry J recognised at p 791 of Conroy v Patterson that the evidence could be material in the rare case of whether or not the finding was supported by the evidence. I take this to be another way of referring to question (2) of the present case - it means in effect an inquiry into the evidence, to ascertain whether there has been a misconception of law responsible for the determination appealed from - see Edwards v Bairstow (1956) AC 14, 36; (1955) 3 All ER 48, 57.
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> If there is a general practice of including the decision and notes of evidence I can see no harm in it so long as the essential elements prescribed by s 107(3) are otherwise present in the case stated, so that the Court (to quote Henry J's words) does not have 'to ferret around among the notes of evidence and the judgment ... to see just what was determined either as a matter of law or fact'((1956)NZLR 790, 792). A question of law does not exist in a vacuum, and the decision and notes of evidence can be of assistance in clarifying and considering the legal issues involved. For these reasons I would not object to such a general practice being continued."

Whatever might be appropriate or not in the general run of cases it is my judgment that this is a case which is sufficiently rare for supplementing the record. I do not regret having come to this conclusion because from a judicial point of view one is constantly reminded that justice favours

neither party and with great respect to Mahon J., if he intended his words to place a limitation upon the power of the Court to supplement a case, then I respectfully find myself in disagreement. I rather suspect, however, that the facts and circumstances of that case were such that he was merely illustrating that it was in the interests of the respondent in that particular case to supplement the record for in the end he was obliged to allow the appeal.

The case stated, before setting out the matters proved, contains a resumé of the evidence which I will endeavour further to paraphrase. A senior immigration officer produced a certificate pursuant to Section 34 of the Act certifying that Mr. Fletcher was not a New Zealand citizen and that he had entered New Zealand on 30th November 1981. Subsequent witnesses gave evidence of extensions granted to that permit which I will refer to soon. The senior officer went on to say that he interviewed Mr. Fletcher on the 25th January 1983. Mr. Fletcher conceded that he had arrived in New Zealand on 30th November 1981 and had overstayed the temporary permit granted to him. I interpolate here to say that both counsel agreed that Mr. Fletcher's reference to overstaying ought properly to be interpreted as referring to staying here beyond the 20th November 1982, the significance of which date will appear. The same senior officer referred to an application made by Mr. Fletcher for permanent residence which was declined, that there was subsequent

confirmation of that decision in a letter dated 12th November 1982 given to Mr. Fletcher. The officer stated that Mr. Fletcher had filed an application for judicial review of that decision in the High Court at Napier on 19th November 1982. The Judge who heard that particular application delivered judgment on 20th June 1983. He ordered a review. The application for permanent residence was reviewed. It was again declined. Mr. Fletcher was given a letter dated 2nd August 1983 advising that the application had been declined. I interpolate here to observe that the next step was the filing of the present information on the 6th September 1983.

There were two other Departmental witnesses. Their evidence was primarily concerned with outlining the history of extensions of the original temporary permit. While the case stated refers to four extensions there were, in fact, five as follows :-

(a) From 10th December 1981 to 27th February 1982 given by Immigration Officer Tait at Napier.

(b) From 15th February 1982 to 30th August 1982 given by Immigration Officer Benjamin at Palmerston North.

(c) From 25th February 1982 until 20th October 1982 given by Immigration Officer Tait at Napier.

(d) From 18th October 1982 until 3rd November 1982 given by Immigration Officer Tait at Napier.

(e) From 11th November 1982 until 20th November 1982 given by Immigration Officer Tait at Napier.

These extensions were recorded in the passport of the defendant which was produced in evidence. One of the extensions was not recorded for the reason that at the material time Mr. Fletcher's passport was with the Singapore High Commission in Wellington awaiting extension of the passport on behalf of the Government of Singapore which was the issuing Government. Nothing turns on this point nor does anything turn on the apparent overlap in the extensions in 1982.

It was common ground that the extension granted on the 11th November 1982 was invalid, application not having been made prior to the 3rd November 1982. Both the District Court Judge and counsel on this appeal accept the correctness of the decision of Savage J. in Bendile v Department of Labour (unreported; 14th November 1982, M.No. 399/82, Wellington). It is also common ground, as appearing from the cross-examination of the senior immigration officer and of Immigration Officer Tait, that it was assumed by the officers and by Mr. Fletcher that he had a valid extension of his temporary permit until 20th November 1982. Hence the significance of an earlier comment in this judgment

with reference to the 20th November 1982.

A summary of the facts found proved by the District Court Judge taken from the case stated is as follows :-

1. Mr. Fletcher is not a New Zealand citizen.

2. He was not a New Zealand citizen on 4th November 1982.

3. He entered New Zealand on 30th November 1981 in terms of a passport issued by the Republic of Singapore.

4. The immigration division of the Department of Labour granted three valid extensions of time for the purpose of enabling him to remain in New Zealand. Putting aside the overlap situation the extensions referred to are those earlier listed with the exception of the last, that is, the invalid one.

5. Mr. Fletcher sought permanent residence but his application was declined.

6. He filed a motion for review in the High Court at Napier on 19th November 1982.

7. On 20th June 1983 Eichelbaum J. directed the Minister of Immigration to reconsider and

determine the application for permanent residence.

8. The Minister reconsidered the application but declined it.

9. The Minister notified Mr. Fletcher's solicitors by letter dated 2nd August 1983.

I propose now to refer to the material part of the reasons for judgment given by the District Court Judge in order to examine precisely what he said in preference to referring to the paraphrased version appearing in the case stated as his determination. The relevant passage from the judgment reads :-

> "..... we come to the second submission as to the informant requiring to prove that the defendant continuously remained in New Zealand since the 4th of November 1982. Malungahu's case (Malungahu v Department of Labour (1981) 1 N.Z.L.R. 668) held that a charge under s.14(5) of the Act of remaining in New Zealand after the expiry of a temporary permit constitutes a single offence beginning on the expiry of the temporary permit and continuing from day to day until the person concerned leaves the country. The offence is of remaining in New Zealand after the expiry of the period for which the temporary permit was granted. The offending continues so long as the person concerned remains in New Zealand. The word 'remain' connotes a continuous remainder - where the offender stays continuously in New Zealand from the expiry of the permit - and the proof of that is on the prosecution. I am not in agreement with Mr Lang's submission when he says that there has to be some form of evidence before the Court that the nexus has been broken before the defence can rely on the foregoing principles enunciated in the Malungahu case.
>
> In any event there is one decisive point which appears to have been overlooked by both counsel.

> It is this: the defendant is charged that 'on the 4th November 1982 at Napier and other places in New Zealand he committed an offence under Section 14(5)(b) in remaining in New Zealand after the expiry of the extended period.' It does not allege a continuous remainder in New Zealand for a defined period. It refers to the 4th November 1982 only. That would be sufficient to constitute an offence if evidence had been adduced that the defendant was in New Zealand on that day. But a perusal of the evidence shows no reference to the defendant being in this country on the 4th November 1982. It is likely he was because of the purported fourth extension of the permit and because of the defendant's pursuit of legal measures to stay in New Zealand. But as to his being in New Zealand on the 4th November 1982, in the absence of positive evidence to that effect, his stay here on that day is but conjecture, surmise or assumption. It seems a footling reason for a dismissal of the information but that is the position. When the charge is called on the remanded date a dismissal will be entered on the record."

I agree with the District Judge's interpretation of the decision in Malungahu's case. Counsel, on this appeal, were candid enough to concede that perhaps they had not quite seen the point at issue so clearly as did the District Judge. I pause here to say that in my judgment the information in this case had to allege at least a commencement date, the 4th November 1982. It could have referred to a period from and including that date but if that expedient had been chosen the appellant would be in no better position because, as I understand Malungahu's case, it was essential for the appellant to establish that Mr. Fletcher was in New Zealand on the 4th November 1982. That disposes of one of the points discussed in argument to which it is no longer necessary to refer.

Counsel were in agreement that the District

Court Judge, once he had crystalised the issue, did not seek further submissions from counsel. Neither counsel expressed criticism of the District Court Judge. In their view he was entitled, as he was, to deliver his decision without further assistance. Counsel for the appellant merely observes that perhaps he could have given the District Court Judge some assistance on the difficult topic of circumstantial evidence. It is his submission that with that assistance he may well have determined the issue differently. Counsel for Mr. Fletcher naturally does not take that view. He strongly submits that the decision, apart from being entirely correct, is also one with which this Court cannot interfere.

I turn now to the circumstantial evidence relied upon by counsel for the appellant which, in his submission, ought to have compelled a contrary decision by the District Court Judge. I will deal with the evidence under five separate headings.

1. Permit Extensions.

The undeniable facts are that these were personally applied for by Mr. Fletcher and given to him in person on the dates above set out. Also, the invalid extension was believed by the Departmental officers and by Mr. Fletcher to be a valid extension. Counsel for the appellant referred me to the evidence of Immigration Officer Tait to the effect that in all except one instance

the extension was stamped in Mr. Fletcher's passport. When one examines the passport the extensions are there plainly to be seen. When the evidence of Immigration Officers Tait and Benjamin is examined it is established that Mr. Fletcher was a person known to them and that there was personal contact, particularly between Immigration Officer Tait and Mr. Fletcher in connection with each if his extension applications and with the grant thereof.

The submission is that the inference properly to be drawn from the foregoing evidence is that Mr. Fletcher acknowledged in several ways his desire to remain in New Zealand, that the only proper inference to be drawn from his known conduct and from the entries in his passport is that he was well aware of the need to have extensions so that he could remain in New Zealand. By contrast Mr. Courtney submitted that the eight day delay in applying for the last permit, that is the invalid one, has determinative significance for the reason that Mr. Fletcher had on no prior occasion been late. This salient fact gives rise to a contrary inference inconsistent with presence in New Zealand on the 4th November and, indeed, entirely consistent with absence from New Zealand on 4th November.

In reply counsel for the appellant emphasised that the issue so far as Mr. Fletcher was concerned was at all times his right to remain in New Zealand and that that also was the issue before the District Court Judge and the issue now, that is to say, was he still here on 4th November as a person remaining after midnight on the 3rd November?

He submitted that the reasonable hypothesis contended for by counsel for Mr. Fletcher was far from reasonable but, to the contrary, speculative and, indeed, when the issue of remaining is brought to the forefront the fact that he was here on the 8th November applying to remain is a concession that he had remained after midnight on the 3rd November.

2. Permanent residence application.

The evidence of the senior immigration officer, particularly his cross-examination, establishes as a fact that the decision declining was first given on 21st October 1982, that there followed further correspondence between the appellant and Mr. Fletcher's solicitors culminating in a further letter dated 12th November 1982 confirming the declination. The submission is that the questions put to the senior immigration officer in cross-examination and the officer's answers received are redolent of a desire and a pursuit of permanent residence in respect of which Mr. Fletcher was categorically disabused on the 12th November 1982, that is to say, nine days after expiry of the extension of the temporary permit at midnight on the 3rd November.

The submission of counsel for the appellant is that the only proper inference from the facts outlined is that Mr. Fletcher was in New Zealand on the 4th because it ought to be presumed that he was hoping for a favourable decision on his permanent residence application. It is

further submitted that the evidence to which I have referred is inconsistent with the inference that he was absent from New Zealand on the 4th November.

Counsel for Mr. Fletcher submitted that neither the two letters advising the result of the application nor the facts to which I have referred establish as a matter of proper inference presence in New Zealand on the 4th November. I rather understood from that submission that there was a world of difference between an application for permanent residence and an application for extension of a temporary permit so that no inference with regard to where precisely he was on the 4th November could properly be drawn against him.

3. Application for review.

The cross-examination of the senior immigration officer establishes that this was filed in the High Court at Napier on 19th November 1982, that an order for review was made by Eichelbaum J. at Napier on 20th June 1983 and that the Minister reconsidered the matter giving a final decision by letter dated 2nd August 1983 addressed to Mr. Fletcher's solicitors finally declining the application.

The submission of counsel for the appellant is that the only proper inference is that Mr. Fletcher remained in New Zealand for the purpose of advancing his application for permanent residence to the point of successfully taking

legal proceedings in the High Court. Any inference to the contrary, that is that he was not here on the 4th November, is in the realm of fantasy rather than fact.

Counsel for Mr. Fletcher submitted that the appellant is not assisted in any way by events subsequent to the 11th November 1982 being the date on which it was proved that he was in New Zealand, that is, the date upon which he obtained the last, though invalid, extension to his temporary permit. The submission is to the effect that subsequent facts add nothing to the proper determination of the whereabouts of Mr. Fletcher on the preceeding 4th of the month.

4. Interview with senior immigration officer.

The precise evidence of this officer on the topic was as follows :-

> "On 25 January 1983 I interviewed the defendant, present in Court, who informed me that his name - that is the defendant seated to Mr Courtney's right - he informed me that his name is Cyril Methodius Fletcher and that he was born on 7 July 1956. He also informed me that he arrived in New Zealand on 30 November 1981 and had overstayed his Temporary Permit that was granted to him."

The proper inference, it was submitted by counsel for the appellant, is that the appellant must be taken to have been aware at the time of that interview, that his permit had not been renewed since 20th November 1982. When

Mr. Fletcher referred to overstaying he meant that he had remained in New Zealand. Although that evidence relates to remaining after the 20th November 1982 nevertheless it indicates a mind set on remaining and a mind which had considered himself to be legally here until he overstayed on 20th November.

Counsel for Mr. Fletcher repeated the same submission as with the previous heading, that events subsequent to 11th November add nothing to the appellant's case and he stressed again the submission that the eight day delay following expiry of the permit on the 3rd November created the contrary hypothesis as a reasonable hypothesis that he was here on the 4th, otherwise he would have been straight into the Department for his extended permit as he had done on each previous occasion.

5. Passport.

Over the objection of counsel for Mr. Fletcher I have examined the passport. It establishes that Mr. Fletcher arrived in New Zealand on the date already mentioned. It shows every extension of the permit except for the one which was unable to be stamped when the passport was at the Singapore High Commission office in Wellington. There, in fact, is no entry in the passport showing the exit from New Zealand of Mr. Fletcher since his first arrival. Although counsel for the appellant conceded that no evidence was given as to the procedure in the case of a Singaporean leaving New Zealand, that is to say, whether the passport

would show the exit date and whether the slip which was initially put in the passport on his arrival would have been removed, nevertheless the Court is entitled to add to the rest of the circumstantial evidence the fact that the passport in no way supports the hypothesis contended for by counsel for Mr. Fletcher that he could well have been absent on the 4th November. Furthermore, counsel for the appellant submitted that there had been no cross-examination of the informant's witnesses suggesting the remotest possibility that he had in fact left the country or that he was not here on the 4th November. That absence of cross-examination plus the passport is capable, counsel for the appellant submitted, of the only reasonable conclusion that the appellant was in New Zealand on the 4th.

Counsel for Mr. Fletcher submitted that reliance upon the passport is an afterthought. It was never adduced in evidence for any purpose other than to establish the entries in it. There was no attempt in evidence in chief to establish that the passport could also be used as evidence that Mr. Fletcher had never left New Zealand but now that the appellant finds itself in its present difficulty with the judgment of the District Court Judge counsel for the appellant is endeavouring to rely upon an hypothesis. It was never contemplated as part of the appellant's case and has only been developed as an aid on this appeal.

I think it proper to say that counsel for Mr.

Fletcher may well not have cross-examined because it was never made clear that the passport was being produced other than for the purpose of establishing what was recorded in it and not what was not recorded in it. Hence, the failure to cross-examine lacks the significance, in my judgment, that it would otherwise have. On the other hand, while it is easy to be wise after the event, if the District Court Judge had sought submissions from counsel after he had correctly crystalised the issue, it may well be that counsel for the appellant would have developed his circumstantial evidence argument in much the same way as it has been developed on appeal.

Before I draw the threads together I think it appropriate to refer to a submission of counsel for the appellant to the effect that the District Court Judge failed to give consideration to the proof of facts by indirect evidence. Counsel took me through an analysis of the precise words used by the Judge being those contained in the last five sentences of his reasons for judgment. The knub of the submission is that the District Court Judge considered it a case requiring positive evidence, that is to say, direct evidence and once that was in the forefront of his mind he failed to apply at all the principles with regard to the reception of circumstantial evidence and in consequence failed to analyse and consider the circumstantial evidence. With respect to that argument it seems to me that counsel has embarked upon what might appear to be a strict interpretation method of approach as one might approach the interpretation of a statute. The Judge in question is

an experienced Judge. He clearly knows the difference between direct and circumstantial evidence. In my view, in an elliptical way, he said that while as a matter of inference it was likely that Mr. Fletcher was in New Zealand on the 4th November he could not bring himself to draw that inference as the only credible interpretation of the evidence and he felt obliged to relegate it to conjecture, surmise or assumption.

The approach to circumstantial evidence is well known. One of the more succinct statements is to be found in the judgment of Mahon J. in Police v Pereira (supra) pages 552-553 :-

> "The finding of guilt necessarily had to be reached by a process of inductive inference founded upon proved facts. It was not, of course, necessary that each specific fact be proved beyond reasonable doubt, but when all the facts and circumstances were gathered together and considered, then the cumulative effect had to be such as to satisfy the magistrate beyond reasonable doubt that the inference of guilt was the only inference to be draw. I cite here Thomas v The Queen (1972) NZLR 34 (CA). Then the question arises as to what degree of circumstantial proof will suffice to support a conviction."

Counsel for the appellant conceded that a piecemeal approach may well result in an adverse decision taking each of the headings to which he referred on its own. That, however, was the approach adopted by counsel for the police in Thomas v R and rejected in that case. The law is quite clear that one must have regard to the cumulative effect of the relevant circumstances. The law is also clear that

the relevant circumstances do not necessarily relate to the precise day upon which the offence was committed but cover the total relevant scene including subsequent events.

It is my judgment that the cumulative impact of the circumstantial evidence in this case leads one inevitably to the rational conclusion that Mr. Fletcher was in New Zealand on the 4th November. Furthermore, I can detect no contrary inference inconsistent with his presence here on that day and in doing so I have considered the submissions of counsel for Mr. Fletcher and in particular his submission based on the eight day delay. As to that I am convinced by the submission of counsel for the appellant that beyond any doubt at all Mr. Fletcher was in New Zealand on the 11th November on which date he applied for and obtained a permit to remain here. That, in my judgment, is inconsistent with a person who has broken the nexus by leaving the country, then returning, and then asking to remain.

I am conscious of the fact that I have had to disagree with a factual issue determined by a very experienced Judge. I have approached the task conscious of his experience and of the need for appellate Courts to recognise the skill and ability of the Judges of the District Court. I think that if the Judge had had the benefit of the full argument that I have had which has occupied probably a great deal more of my time than it did his that he may well have come to the same conclusion as I have now done.

It remains to say that the appeal is allowed and

the questions asked of this Court are to be answered as follows :-

(a) Q. Was it necessary for the informant to provide direct evidence that the defendant was in New Zealand on the 4th day of November 1982?

A. No.

(b) Q. On the evidence adduced could I reasonably have reached the conclusion that the informant failed to prove that the defendant was in New Zealand on the 4th day of November 1982?

A. No.

In terms of Section 112 of the Summary Proceedings Act 1957 I remit the matter back to the District Court with the above opinion and with the direction that a conviction be entered against the respondent.

Solicitors :

Appellant : Robinson, Toomey & Partners, Napier.

Respondent : Langley, Twigg & Co., Napier.