

Annex D.15

1983]

DAWSON v. STEVENS BROS. (Legoe J.)

355

unloading of the compressor which was still being used (by the appellant) as part and parcel of the contract of hire of that equipment (a motor vehicle). That was the "use of the vehicle" at that point of time.

For those reasons I would allow the appeal, set aside the order of the learned trial Judge in so far as he entered judgment for the third party State Government Insurance Commission on the appellant's third party claim therein, and substitute an order for judgment for the defendant Stevens against the third party State Government Insurance Commission. In these circumstances it would appear that I do not have to decide the alternative ground of appeal, but if that became necessary then I would agree with the conclusion and reasons of Mitchell A.C.J. in this regard.

*Appeal allowed and judgment entered
for appellant Stevens Bros. Pty. Ltd.
against third party respondent
State Government Insurance Commission.*

Solicitors for appellant: *Baker, McEwin & Co.*

Solicitors for respondent State Government Insurance Commission:
Ward & Partners.

THE QUEEN v. CALIDES

Supreme Court (In Banco): Wells, Legoe and
Matheson JJ.

Sep. 23, 1983.

*Criminal law—Summing up—Contest of credibility between directly
opposed bodies of evidence—Trial Judge directing jury that it was for
them to say where the truth lay—Whether a misdirection—Possibility
that jury might be unable to say where truth lay and have reasonable
doubt as to guilt of accused—Whether re-trial should be ordered.*

Upon a criminal trial where there was essentially a contest between two directly opposed bodies of evidence, for the prosecution and for the accused, the trial Judge directed the jury that it was for them to decide where the truth lay. The accused was convicted. On appeal.

Held, (1) That the trial Judge, in so directing the jury, had overlooked a third possibility, that the jury might be unable to say where the truth lay, in which event there would be a reasonable doubt as to the guilt of the accused and the verdict should be not guilty.

(2) That the failure of the trial Judge to direct the jury as to the third possibility amounted to a misdirection as to the onus of proof, and that the conviction should be set aside and a re-trial ordered.

CRIMINAL APPEAL.

The facts are stated in the judgment of Wells J.

S. W. Tilmouth and *Miss M. Smith*, for the appellant.

B. R. Martin and *M. T. Boylan*, for the Attorney-General.

Sep. 23, 1983.

The following judgments were delivered:

WELLS J.: In my opinion, this appeal must be allowed. The appellant stood charged, originally, with two other accused, on an information containing two counts: the first alleged cultivation of Indian hemp, contrary to the *Narcotic and Psychotropic Drugs Act*; and the second alleged permitting premises to be used for cultivation of Indian hemp, contrary to the same Act. As the learned trial Judge very properly pointed out, those two counts were in the alternative, and a verdict on the first automatically discharged the jury from a verdict on the second.

The first two accused (the co-accused of the appellant) pleaded guilty, and, at the appellant's trial, gave evidence for the Crown. They were obviously, therefore, accomplices, and their status as witnesses was very properly and clearly pointed out to the jury by the learned trial Judge.

The appellant was convicted on the first count, and now appeals against his conviction on several grounds under an amended notice of appeal. He was, historically, late in pursuing his appeal, but he received the leave of a single Judge to appeal, and we have received his submissions accordingly.

In the hearing so far, the arguments have centred upon ground one, and, in particular, upon directions in the learned trial Judge's summing up in which, it is said, he fell into error on an important matter relating to the onus of proof. It is, perhaps, therefore, necessary to state in outline how the question of onus of proof at the particular stage alluded to became important.

As the trial progressed it became clear that predominantly, or at least for the purpose of one clear method of approach, there stood opposed to one another, two bodies of evidence—on the one hand, evidence coming from the two accomplices and also from two detectives (all of whom gave evidence, of course, for the Crown) and, on the other, evidence given on oath by the accused. On one approach to the case, it would appear that those two bodies of evidence were fundamentally opposed to one another, and, as the learned Judge very properly pointed out to the jury, they could not both have been true on important matters. More

particularly, they could hardly have been both true in relation to matters to which the two accomplices deposed.

The trial, as one would have expected, resolved itself very largely into questions concerning the credibility of the witnesses, who formed the protagonists for the two prospective sides. That shape of the issues was duly reflected in the learned trial Judge's summing up.

The structure of his summing up was straightforward and simple. He gave certain basic directions as to the duties respectively of judge and jury. He impressed upon them their role as the finders of fact. He gave them what appears to me to have been a sound direction on the need for corroboration, because there had never been any doubt that the two co-accused were accomplices. He very properly directed them that there was no corroboration, and that they, therefore, had to be mindful of the warning, which, so far as I can see, was given in a perfectly acceptable form. Jumping the middle part of the summing up and turning towards the end, he once again gave certain fundamental directions to the jury as to which no exception could reasonably be taken. It was, however, in the central body of his summing up that it seems to me that he fell into error.

Let me preface what I am about to say with the strong assertion that I am totally opposed to the practice that is sometimes adopted, for example in grounds of appeal, of taking small snippets from a summing up, and criticising them, wholly divorced from their context. It seems to me that the line of cases on summings up, dating from the very beginning of this century, all speak with one voice, and that is that one must have regard to the overall impression that would have been created on the minds of the jury if one is fairly to judge a summing up. It is quite wrong to extract portions of it, adversely criticise them, and then blandly claim that they have destroyed the whole structure of an otherwise perfectly competent summing up. But such questions always raise matters of fact and degree, and general impression; and, unfortunately, it seems to me, that where a judge proceeds to discuss, for the benefit of the jury, the central factual issues upon which their decision is almost certain to rest, it is essential that he should ensure that anything that he says directly about onus of proof, or that is capable of affecting his directions on onus of proof, should be carefully and clearly stated in a manner free from error.

The two passages in which it is said the learned trial Judge fell into error are quoted in ground one of the grounds of appeal and appear at pp. 13 and 14 respectively. The first passage reads as follows:

"Well, that's all for you to say but it probably doesn't take me to tell you, ladies and gentlemen, that both versions in this case cannot be true. Either [and then he names the four witnesses that I have alluded to who gave evidence for the Crown] have told you things on oath that are not true, or the accused has. The two versions cannot be explained by any misunderstanding. It is for you to decide where the truth lies." Pausing there, I point out that that passage came at the conclusion of a rather longer passage in which the learned trial Judge adverted to the

nature of the evidence given by the respective parties. Then again, having spoken further of evidence in the case and more particularly of what the accused said, he proceeds (this is p. 14):

“The accused says that Lochel [this is one of the Crown witnesses] left almost before the interview started and that Patterson only asked him four questions. The rest of the interview didn’t happen according to the accused in the way Patterson described and again both versions cannot be correct. You must decide where the truth lies.”

It seems to me that where a case has so shaped itself that the outcome is likely to depend upon the view taken by a jury of two opposing bodies of evidence, it is a very natural and easy thing for a jury, indeed for anyone, including a judge, to begin by saying to themselves or himself:

“Here are two opposing bodies of evidence; they can’t both be true. I suppose we have to decide who’s telling the truth.” That, I repeat, is a perfectly natural and almost inevitable approach to begin with, at least for the man in the street. That may be a perfectly practical start, but, unfortunately, in my opinion, it suffers badly from a lack of proper guidance from the principles relating to onus and standard of proof. It has been said again and again in this Court, and in the cases to which I invited counsel’s attention, which I do not propose to repeat, that where you have two opposing bodies of evidence on matters central to the case which will almost certainly lead, if properly considered and weighed, to a resolution of the case, it is wrong to treat them with the comment, “It is for you to decide where the truth lies.”*

The onus of proof and the standard of proof must be correctly applied. It is not just for the jury to decide where the truth lies if that means, and it could well mean to a jury, that it is for them to say whether there is some material which could give them an inclination of opinion in favour of one side or the other. It would be even worse if the jury were left with the impression that it was their task to decide, and to find, whether there is some material for providing a basis for an inclination of opinion one way or the other.

As the former Chief Justice, Sir Mellis Napier, used to say many times in this Criminal Court, in such circumstances there are really, for all practical purposes, three possibilities: the jury may be completely satisfied with the evidence led from the Crown, in which case, assuming all other matters to be properly established, the verdict will be guilty; the jury may be perfectly satisfied with the version presented by the accused, in which case there will inevitably be a verdict of not guilty; and there is the third possibility, which must never be overlooked, and that is that the jury, after a full and careful consideration, may arrive at the result that they are unable to say where the truth lies, or that they are unable to

*[The cases to which his Honour referred were: *The Queen v. Jackson* (1957) 74 W.N. (N.S.W.) 477; *The Queen v. El Mir* (1958) 75 W.N. (N.S.W.) 191; *Price v. The Queen* (1962) 36 A.L.J.R. 235; *The Queen v. Lapuse* (1964) V.R. 43; *The Queen v. Smith* (1964) V.R. 217; *Re Lamperd* (1983) 46 A.L.R. 371.]

say who is telling the truth. If that is the situation, then, of course, the verdict must also be not guilty. Now, it is true, what Mr. Martin has pointed out so clearly, that the directions on the onus and standard of proof given at the beginning and at the end of his summing up by the learned trial Judge in this case are impeccable, and, if applied logically, they would not lead the jury into error; in other words, they would provide, if correctly applied, a resolution of the difficulties created by the two references to the jury's task to decide where the truth lies. But, unfortunately, the portions of the summing up to which objections have been taken were concerned very closely with the essential factual issues, and when considering those factual issues an allusion was made—it may not have been an intended reference, but an allusion was made—to something that directly concerns onus and standard of proof, and as the matters then discussed by the learned trial Judge were so central to the case, it was more than possible that the jury could have been misled, that they could have believed that they were doing their duty, notwithstanding the directions on onus of proof, by finding some reason for accepting one side or the other, and that that could well lead to a miscarriage of justice.

It was pointed out to us that no objection was taken by either counsel to the learned trial Judge's summing up. Let me say it once that I always attribute great weight to the reaction of counsel at a trial. It is very much their task to monitor the summing up as it progresses, to make notes of matters to which they would wish to invite the learned trial Judge's attention, and to be careful to bring forward anything that might possibly lead to a mistrial. The reason why it is important that they should do this is that if they are left with the impression that the summing up was fair and reasonable and properly balanced, then there is so much the less reason to suppose that there has been a miscarriage of justice, and if the matters hang nicely in the balance, such an attitude by counsel could well be decisive. It is particularly useful and critical where the appeal is concerned with the discussion of evidence, with inferences, with the presentation of the defence, with all matters of debate with which a jury is closely concerned, and which show themselves, by the general course of the trial and the structure of the issues developed at it. But the situation, I apprehend, is very different when one is dealing with something that closely concerns a matter so fundamental as onus of proof and here, as I have said, in my view, we have such a matter.

The question of objections by counsel to summings up were considered at some length in the well-known case of *The Queen v. Carbone (No. 2)*¹, and more particularly at p. 287; I propose to read only a very small portion of what was there said. In brief I think I am justified in summarizing the learned Chief Justice's judgment by saying that these matters, in other words, the failure by counsel to object to a summing up, can be of great weight, but the failure need not necessarily be decisive. At the bottom of p. 287 he says this:

(1) (1976) 14 S.A.S.R. 280.

“A misdirection on the law, for example, of sufficient substance will usually stand on a different footing from an omission to give a particular direction on the facts. In such a case an appeal may well be allowed despite a failure to take any objection at the trial; see, for example, *Reg. v. Stafford*².”

In my opinion, the passage which I have just read is directly applicable to the situation that confronts us, and I accept and apply it accordingly.

The final question arises as to whether or not the proviso should be applied. In my view, this is not a case where the proviso should be applied at all. There can be matters where an error of law—even quite an important error of law as some of the English cases show—can be disregarded where there is an overwhelming case in favour of the conviction against which the appeal has been brought. But here, I think, it is impossible to say there was an overwhelming case. Given the acceptance of certain evidence, as the learned trial Judge very properly pointed out, it was an extremely strong Crown case, but the whole issue was: Was that evidence to be accepted beyond reasonable doubt, and, in those circumstances, it seems to me it would be quite wrong to apply the proviso.

Since I take that view on Ground 1, and since I am of the opinion that the error disclosed by the summing up should lead to a retrial, I do not propose to examine the further grounds of appeal contained in the notice. I simply remark, in passing, that I observe that Ground 2 contains an objection to directions as to the use of evidence of good character. Counsel have not been heard about that ground, and the last thing I want to do is to give an impression that I have decided it. All I say is that, before the retrial proceeds, it would, I think, be desirable for counsel, and the learned trial Judge, to give close attention to some recent pronouncements by the High Court on what are proper directions in relation to evidence of that kind.

In the result, as I have indicated, I am of the view that the conviction should be set aside, and that there should be a retrial. I, therefore, propose the following order: that the appeal should be allowed; that the conviction be set aside; and that the appellant be retried in the District Criminal Court upon the original information (upon which he stood trial before this appeal).

LEGOE J.: I wish to associate myself completely with everything that the learned presiding Judge has said in exposing the problem which arose in this summing up.

I would merely add that the jury were not told, within the body of the summing up, nor at the very end of the summing up, that if they (the jury) were in doubt as to where the truth lies, the accused is entitled to the benefit of that doubt and the verdict should be not guilty. In this regard I refer to *Reg. v. Jackson*³; *Reg. v. El Mir*⁴; *Price v. The Queen*⁵; *Reg. v. Lapuse*⁶; and *Reg. v. Smith*⁷. This failure, or omission, overlay

(2) (1976) 13 S.A.S.R. 392.

(3) (1957) 74 W.N. (N.S.W.) 477.

(4) (1958) 75 W.N. (N.S.W.) 191.

(5) (1962) 36 A.L.J. 235.

(6) [1964] V.R. 43.

(7) [1964] V.R. 217.

an otherwise correct direction on onus of proof, and so in my opinion created a strong possibility of confusion in the jury's mind as to their proper function: see the recent Courts-Martial Appeal Tribunal decision of *Re Lamperd*⁸. For all these reasons I would concur in the proposed order.

MATHESON J.: I also agree with the order proposed by Wells J. and with his reasons. I merely add that in my view it is regrettable, in some respects, that this appeal is to be allowed, because the relevant objection to the learned trial Judge's direction was not taken at the end thereof. If it had been, it could so easily have been corrected. On the other hand, the appeal has given this Court the opportunity to draw attention to a line of cases which I suspect is not widely known in South Australia, and of which I myself had previously been unaware, although the principle expounded in those cases is obvious, when one thinks about it.

WELLS J.: In those circumstances the order will be as I proposed: appeal allowed, conviction set aside, the appellant will be retried in the District Criminal Court upon the original information.

[NOTE by Wells J.: Since this judgment was delivered the decision of the Court of Criminal Appeal in Tasmania in *The Queen v. Tegg* (1982) 7 A.Cr.Rep. 188 has been brought to my attention. It appears to support the conclusion reached by our own Court of Criminal Appeal.]

*Appeal allowed; conviction
set aside; and re-trial ordered.*

Solicitor for appellant: C. J. Kourakis.

Solicitor for the Attorney-General: The Crown Solicitor.