05/06; [2006] HCA 2

HIGH COURT OF AUSTRALIA

ANTOUN v THE QUEEN

Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ

8 February 2006

(2006) 224 ALR 51; (2006) 80 ALJR 497; (2006) 159 A Crim R 513

PRACTICE AND PROCEDURE – NO CASE SUBMISSION – TEST TO BE APPLIED.

GLEESON CJ:

15. The issue which Judge Christie had to decide when dealing with the no case to answer submission was not an issue of fact; it was an issue of law. That is how it was described by trial counsel; that is how it was seen by the judge; and that is how it was characterised by counsel in argument in this Court. In the course of argument in the present appeal, counsel were invited to provide further written submissions on the nature of the application that was made to Judge Christie at the conclusion of the prosecution case. It appears from those written submissions that there is no disagreement on this point.

16. In *Doney v R*[5], this Court held that, at a criminal trial before a judge and jury, if at the end of a prosecution case there is evidence that is capable of supporting a verdict of guilty then the trial judge may not direct a verdict of not guilty, but must leave the matter to the jury for its decision. This Court affirmed the New South Wales decision in *R v R*[6], the South Australian decision in *R v Prasad*[7], and the Victorian decision in *Attorney-General's Reference (No 1 of 1983)* [8]. No challenge was made to the correctness of *Doney*. The question whether there is evidence capable of supporting a verdict at a civil or criminal trial by jury is a question of law. As was explained in *Doney*[9], this is a different question from whether a jury ought to be warned about the probative value of evidence. It is different from the question whether a trial judge might properly inform a jury, at any time after the close of the prosecution case, of its power to acquit[10]. And it is different from the question which confronts an appellate court when it has to decide whether a conviction is unreasonable. There is no advantage to be gained by blurring these differences. Keeping them in mind helps to avoid confusion.

17. In *Haw Tua Tau v Public Prosecutor*[11], an appeal to the Privy Council from Singapore, Lord Diplock gave the reasons of the Judicial Committee. Trial by jury had been abolished in Singapore. His Lordship said[12]:

> "It is well established that in a jury trial at the conclusion of the prosecution's case it is the judge's function to decide for himself whether evidence has been adduced which, *if it were to be accepted by the jury as accurate,* would establish each essential element in the alleged offence: for what are the essential elements in any criminal offence is a question of law ...
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> In their Lordships' view the same principle applies to criminal trials where the combined roles of decider of law and decider of fact are vested in a single judge (or in two judges trying capital cases). At the conclusion of the prosecution's case what has to be decided remains a question of law only. As decider of law, the judge must consider whether there is some evidence (not inherently incredible) which, if he were to accept it as accurate, would establish each essential element in the alleged offence." (Emphasis in original)

His Lordship's references to the accuracy of evidence over-simplifies the nature of issues of fact that may arise at a trial, civil or criminal. Questions concerning the weight of evidence, or the inferences to be drawn from it, or, in circumstantial cases, the reasonably available hypotheses, may also arise. The present case provides an example. There was no room for argument about what was said at the meeting of 22 June 2001. There was room for argument about the inferences to be drawn from what was said. But in deciding, as a matter of law, whether there was evidence

which could establish the prosecution case, the trial judge was concerned with inferences that were available. He was not, at that stage, concerned to decide what inferences he would ultimately draw.

18. In the same case, Lord Diplock said[13]:

> "Whoever has the function of deciding facts on the trial of a criminal offence should keep an open mind about the veracity and accuracy of recollection of any individual witness, whether called for the prosecution or the defence, until after all the evidence ... has been heard and it is possible to assess to what extent (if any) that witness's evidence has been confirmed, explained or contradicted by the evidence of other witnesses."

19. If a submission of no case to answer is understood as raising a question of law about whether there is evidence capable of supporting a finding of guilt, that warning presents no problem. It would be otherwise if a judge were invited to embark upon a factual evaluation of the evidence called up to a particular stage of the trial, and give a ruling based on the weight of that evidence. No such problem arose in the present case. Counsel for the first appellant, who had the carriage of the argument, made both written and oral submissions in support of his argument that there was no case to answer. Those submissions were consistent with the principles stated above. Counsel said: "I accept for the purposes of my submission that I must take the Crown case at its highest". The trial judge, in giving reasons for his later refusal to disqualify himself because of what had happened in connection with the "no case" submission, said that he had formed "a very, very firm view" that the submission must fail "as a matter of law".

20. As a matter of law, there was a case to answer. On the evidence, it was open to the trial judge to interpret the demands made by the appellants as demands for ongoing protection payments, extending beyond the sum of $8,000. It was also open to the trial judge to conclude, in the light of the menacing words and conduct of the appellants, that, far from pursuing a genuinely held belief in their right to be paid $8,000, they were pursuing a campaign of extortion. When counsel for the first appellant acknowledged, as he was bound to do, that the judge had to take the prosecution case at its highest, implicit in that was an acknowledgment that the prosecution evidence was being examined, for its sufficiency of proof, without any testimony from the appellants in explanation of their conduct; in a context where the central issue concerned the existence and honesty of their belief in the legitimacy of their claims. At the time of the trial judge's ruling, they had not said they held such a belief; and there was ample evidence to sustain a conclusion that they did not hold such a belief.

21. The terms of the written opening handed up by counsel for the first appellant suggest that, from the beginning, the trial judge would have been anticipating a no case to answer submission. He would have been thinking about the argument foreshadowed in the opening. If he had surmised that it would be very difficult to sustain, he would have been correct. Nevertheless, his peremptory announcement, as soon as the application was mentioned, that he would dismiss it, was a departure from the standards of fairness and detachment required of a trial judge.

22. Judges do not have to devote unlimited time to listening to unmeritorious arguments. Sometimes, a brief hearing will suffice. Judges may anticipate events at trial, and foresee lines of argument that may be developed. Here, the appellants made it clear from the outset that they hoped to be able to secure acquittal without giving evidence themselves. Perhaps the judge felt indignant about the conduct disclosed by the evidence, or about the tactics adopted by the appellants. Indignation is a natural reaction to some facts that are disclosed, or some events that occur, at a criminal trial or, for that matter, on an appeal. It should never be permitted to compromise the appearance of impartiality that is required of judges.

23. It appears from the remarks on sentence that the first appellant has a serious criminal record for offences including armed robbery. It further appears from comments made by the judge that he found the demeanour of the first appellant during the trial to be menacing. The judge regarded this as a strong case of extortion. He formed the view, with good reason, that the no case to answer submission was likely to be implausible. Yet he should not have decided to reject it without giving counsel an opportunity to put the argument. In the circumstances, that would not have required much time. The way in which the judge dealt with the no case argument, and later with the question of bail, gave rise to an appearance of lack of impartiality. Strong as the case against the appellants appeared to be, they were entitled to a fair hearing.

24. The appeals should be allowed. The orders of the Court of Criminal Appeal should be set aside. The convictions and sentences should be quashed and there should be a new trial of each appellant.

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[5] [1990] HCA 51; (1990) 171 CLR 207 at 214-215; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416.
[6] (1989) 18 NSWLR 74; (1989) 44 A Crim R 404.
[7] (1979) 23 SASR 161; (1979) 2 A Crim R 45.
[8] [1983] VicRp 101 [1983] 2 VR 410.
[9] [1990] HCA 51; (1990) 171 CLR 207 at 214; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416.
[10] cf *R v Prasad* (1979) 23 SASR 161; (1979) 2 A Crim R 45.
[11] [1982] AC 136; [1981] 3 All ER 14; [1981] 3 WLR 395.
[12] [1982] AC 136 at 151; [1981] 3 All ER 14; [1981] 3 WLR 395.
[13] [1982] AC 136 at 150-151; [1981] 3 All ER 14; [1981] 3 WLR 395.
