36/79

COURT OF APPEAL at WELLINGTON (NEW ZEALAND)

R v McCARTNEY and ANOR

McCarthy, Richmond and Cooke JJ

9, 18 December 1975

CRIMINAL LAW – INSUFFICIENT DIRECTION – EVIDENCE AND PROOF – ADMISSIBILITY OF EVIDENCE – TRACKING BY POLICE DOG – OPINION OF DOG HANDLER INTERPRETING DOG'S ACTIONS – OPINION EVIDENCE OF FOOTWEAR EXPERT.

The appellants had been convicted of receiving on or about 30 January 1975, two shotguns knowing they bad been dishonestly obtained, of unlawfully getting into a Holden motorcar on or about 1 February and on 2 February:
(a) of being armed with intent to enter a building,
(b) of having in their possession by night instruments capable of being used for burglary, and
(c) of having had their faces masked by night without lawful excuse.

Neither of the appellants had been identified with the offices and the crucial link between them and the offences was evidence that a tracker dog early in the morning of 4 February, had followed the scent of McCartney from a point where he had been seen to the place where the shotguns and other objects had been previously found and removed by the police.

The appellants appealed against conviction *inter alia* on the ground that the judge failed to direct the jury as required in *R v Lindsay* (1970) NZLR 1002 concerning the evidence in respect of the tracker dog. The defence called evidence to show that McCartney had an alibi in respect of 31 January and 1 February, and Whoollery in respect of the evenings of the days preceding 3 February.

HELD: quashing the convictions and directing a new trial:
(1) In *R v Lindsay (supra)* at p1005, line 45, where it is stated that "the weight of the evidence should always be carefully examined by the trial judge in his direction to the jury", means that the importance of an adequate direction to the jury varies according to the extent which the tracker dog evidence is relied upon by the Crown and whether it stands alone or is supported by other evidence (see p477 line 37).

(2) In *R v Lindsay* at p1006, line 10 *et seq* the dangers and risks of too readily arriving at a conclusion drawn from tracker evidence, of which the judge has a duty to warn the jury are: (a) that the jury might draw greater inferences from the actions of the dog than were truly justified, and (b) a jury might be misled into giving excessive credit to the evidence of the dog's itinerary because of a superstitious faith in the instincts of dogs (see p478 line 2).

(3) The caution given in *R v Lindsay (supra)* at p1006 line 29 *et seq* on the admissibility of the evidence concerning the dog tracker does not prevent an expression of opinion by a properly trained and experienced dog handler as to the inferences to be drawn from a particular action by a dog from being properly admissible (see p447 line 15).

(4) Where expert opinion is given that different pairs of footwear have been worn by the same person the judge is not bound to warn the jury of the danger of accepting that evidence; he needs only to make sure that the jury understands that they are not bound to accept expert opinion and it is for them to decide and not the witness (see p482 line 53).

APPEALS
These were appeals against conviction on the ground of failure to direct the jury concerning certain evidence.

McCARTHY P: A number of grounds were advanced by Mr Hart and Mr Conway in support of the two appeals. We will deal first with the one which seems to us to have the most substance.

The Judge failed to direct the jury, as required by the judgment of this court in *R v Lindsay* (1970) NZLR 1002, of the dangers and risks of too readily arriving at the conclusion, from the evidence as to the tracker dog, that McCartney went to point 2 on the plan.

The starting point is *R v Lindsay*. In that case there was a complete challenge to the admissibility in criminal cases of evidence as to tracker dogs. The court rejected this submission, holding that such evidence was logically relevant and not excluded by the hearsay rule or by the fact that the dog could not be made the subject of cross-examination. But the court recognised that a dog is a creature with some faculty of choice, and may conceivably be mistaken, or even wilful, in what it does. While accepting the proposition that the evidence was admissible the court said that:

> "... if evidence of so unusual a type is to be admitted certain safeguards are plainly called for. As this case may be the forerunner of others we venture to add a little in elaboration of this proposition" (ibid, 1005).

After repeating that 'some limitations and safeguards should be prescribed' the court went on to explain the duty of a trial judge in such cases. First it was stated that:

> "The weight of the evidence should always be carefully examined by the trial judge in his direction to the jury".

It was pointed out that, according to the circumstances otherwise deposed to in evidence the evidence as to the dog might be of great weight or of lesser weight. We read this part of the judgment as meaning that the importance of an adequate direction to the jury varies according to the extent which the tracker dog evidence is relied on by the Crown and whether it stands alone or is supported by other evidence.

However the court, after rejecting a submission that the same strong direction should be given to the jury varies as a matter of course, in cases like this, as must be given in cases requiring corroboration, did say:

> "But we agree that whenever the evidence of the tracking activities of a police dog is given in evidence, it ought to be the subject of a sufficient direction by a Judge. What is sufficient will vary with the circumstances. But it is clearly the Judge's duty to draw attention to such matters as the nature of the conclusion to which the jury is asked to come on the evidence and the dangers and risks of too readily arriving at that conclusion from evidentiary material which has not to pass the acid test of cross-examination. It may be sufficient to draw attention to the passage in *Wigmore on Evidence* 3rd ed. para.177 and its footnotes, in which that great authority points out that 'the very limited nature of the inference possible is apt to be overestimated' and observes that 'the hesitation shown in some courts to the use of this evidence is due to the risks of its misuse by the jury' to see how very necessary an adequate direction is, in ordinary fairness to him who is on trial". (ibid, 1006).

After referring to the full text of *Wigmore on Evidence* (3rd ed.) vol.1 para 177, we are satisfied that the dangers which that learned author had in mind were twofold. First, that a jury might draw greater inferences from the actions of the dog than were truly justified. Second, that a jury might be misled into giving excessive credit to the evidence of the dog's itinerary because of a superstitious faith in the inerrant inspiration of dogs, induced by "the mysteriously accurate operation of the Dogs" senses.

> "We do not leave this topic without a final word as to the dangers inherent in allowing such evidence as we have been considering to expand beyond fairly strict limits. Obviously such evidence must begin with material properly qualifying the dog and his handler; indeed this is essential, and it will include a description of the course which the dog took in following the scent – where it started and where it went. But once the witness has gone so far, the possible danger which follows from allowing him to go further becomes immediately apparent. Care must be exercised lest any over-readiness to admit peripheral testimony should result in unfairness to accused persons." (1970 NZLR 1002, 1006).

By this we understand that the court advised caution in admitting evidence which went beyond the scope of qualifying the dog and its handler and describing the actual conduct of the dog. But we see no reason to interpret these remarks as intended to declare inadmissible an expression of opinion by a dog handler, properly trained and experienced in interpreting the action by the dog. In the present case Constable Payne was asked to express an opinion, based on the behaviour of the dog, as to the freshness of the track it was following. Likewise he gave evidence as to the habit of tracker dogs to follow the most recent human scent in the area where they are commanded to begin tracking. Both those matters were properly the subject of expert evidence.

Although we appreciate that *Lindsay* acknowledges that the extent to which a Judge must deal with the weight of tracker dog evidence in each particular case must vary according to the extent that the reliability of the dog's tracking ability is supported by other evidence, nevertheless we cannot interpret the judgement otherwise than as laying down a rule that in every case where such evidence is relied on by the Crown the judge must at least draw the attention of the jury to (a) the nature of the conclusion to which they are asked to come on the tracker dog evidence and (b) the risks of arriving at that conclusion 'from evidentiary material, which has not to pass the acid test of cross-examination'.

These passages in the summing up are the only ones to which we need refer in the present context except that in one other passage the judge again commented that 'the real crux of this case is did that dog correctly pick up the scent and follow the movements of McCartney?'

We must now consider what was the duty of the judge, in the light of *R v Lindsay* (1970) NZLR 1002, in the circumstances of the present case. So far as his duty to explain the conclusions which the jury were asked to draw from the actions of the dog are concerned, we think that the summing-up left little doubt in the jury's mind concerning what the conclusions were foremost amongst which was that the dog had followed a track made by a human being but not necessarily McCartney's. The dog had no means of knowing McCartney's scent at the time, Constable Payne had made this plain in his evidence. Indeed, Mr Hart did not contend for a failure of the judge to perform his duty in respect of this requirement. But he did rely heavily on the absence of a warning of 'the dangers and risks of too readily arriving at that conclusion from evidentiary material which has not to pass the acid test of cross-examination' (ibid, 1006). Mr Upton accepts that nothing in the summing up can be construed as giving such a warning. When the requirement for it was laid down in *Lindsays case* the court clearly had in mind the danger that a jury could attribute infallible powers to a tracker dog, without sufficient reflection upon the possibility that the dog could be mistaken, or even wilful, in what it was doing. The dangers of treating a dog as some kind of infallible 'tracking instrument' are dismissed in a note by F.J. Newark, *What the Dog Said* (1966) 82 LQR 311. On this particular point (the weight to be given to the dog's activities) the judge, in the first extensive passage which we have cited, told the jury:

> "At this stage the Crown case depends completely upon the ability of a trained dog to follow a human scent and for you to determine what weight you shall give to that type of evidence."

We are driven to the conclusion that neither in this passage, nor, elsewhere, did the judge go far enough. The case illustrates the complexities of a judge's task in summing up in criminal cases for we think it likely that on this occasion the judge himself did not have *Lindsays case* in mind, nor could it have been drawn to his attention by counsel.

The question, then, is whether this is a case in which the court should apply the proviso to s385(1) of the *Crimes Act* 1961. The Court's approach to the application of the proviso is by now well demonstrated: *R v Horry* (1949) NZLR 791; *R v McKewen (No.2)* (1974) 1 NZLR 626; *R v Edwards* (1975) 1 NZLR 402. In the last mentioned case an accomplice warning had not been given. After repeating the guiding principle that the court should not apply the proviso unless it had no doubt that a reasonable jury properly directed would have returned the same verdict, it went on to add that in accomplice cases its use should be regarded as exceptional. We think that a failure to warn about the use of evidence concerning tracking by dogs should be considered in very much the same light.

Now there was, as we have already noted, evidence which gave strong support to the Crown contention that the dog was following a continuous human track to the point marked 2 on the plan. Mr Nicholson's evidence as to seeing a man in the trees was not challenged, nor was the fact that the constable saw marks under the trees between point 3 and point 2. It seems highly unlikely that more than one person would take such a difficult path, involving crawling along the ground. Furthermore, the ability of this particular dog to follow a continuous track does not appear to have been the subject of any serious challenge in the cross-examination of Constable Payne. Had there been no evidence called by the defence we would perhaps have felt justified in saying that the jury, properly directed, would have inevitably accepted the reliability of the dog.

But the problem is that the defence did call extensive evidence, particularly alibi evidence, and

the judge emphasised that the evidence as to the dog was 'crucial' in deciding what weight to give to the alibi evidence. We have no means of assessing how much concern the alibi evidence gave to the jury. Equally we have no means of knowing whether the jury, if cautioned as to the risks of tracker dog evidence, would have regarded that evidence as a sufficient basis on which to reject the alibis. That caution might have made a substantial difference, at least in the approach of some of the jurors.

It is essentially the trial judge's view of the importance of the evidence of the dog in the critical area of the case which makes it impossible to say that the demanding test, which is a prerequisite to an application of the proviso, has been fulfilled in the present case. Therefore, there must be a new trial. Having reached that decision we can deal with the other complaints briefly.

The trial judge unfairly disallowed the material part of Dr Sprott's evidence. Dr Sprott was called as an expert witness for the defence to give evidence as to points of similarity and difference in wear between the basketball boots and Whoollery's shoes taken by the police and submitted (along with the boots) to the footwear expert called by the Crown. The judge had, of course, to rule on the question whether Dr Sprott had qualified himself as an expert witness. He ruled that Dr Sprott was qualified to give evidence of the kind we have just mentioned but not to take the extra step of expressing an opinion whether the two pairs of footwear had or had not been worn by the same person. In other words he held that there was nothing established as to Dr Sprott's particular expertise which put him in a better position than the members of the jury to express an opinion on this point. After carefully considering the transcript of Dr Sprott's evidence we can see no grounds for disagreeing with the judge's ruling. It is true that Dr Sprott had some practical experience in the shoe manufacturing industry, but his evidence did not establish that this gave him any special knowledge of a kind relevant to the inferences to be drawn from wear on footwear.

The Crown footwear expert (Mr Taylor) should not have been allowed to express an opinion as to whether the shoes and boots had both been worn by the same person as this was a fact directly in issue.

The present day attitude of the courts on this particular point was the subject of discussion in this court in *Blackie v Police* (1966) NZLR 910. We have no doubt that the drawing of inferences from similarities in wear on shoes is a matter on which a jury can properly be given the assistance of a properly qualified expert opinion. There is no suggestion that Mr Taylor was not so qualified.

In this context there was a subsidiary submission that because footwear evidence, in forensic terms, is in its infancy and bears no realistic comparison in terms of precision with, for example, fingerprint evidence, the judge was under a duty to warn the jury of the danger of accepting such evidence before they had examined it with great care.

Counsel could produce no authority of any kind for these several propositions. In our opinion the judge was under no legal duty to do more than make sure that the jury understood that they were not bound to accept expert opinion and that the ultimate issue was for them to decide and not for the witness. This he did, as well as pointing out that Dr Sprott's evidence about the differences he had found might lead the jury to an opposite conclusion from that expressed by Mr Taylor. We cannot accept the submissions made under this particular head.
