28/91

HIGH COURT OF AUSTRALIA

DONEY v R

Deane, Dawson, Toohey, Gaudron and McHugh JJ

11 October, 27 November 1990

[1990] HCA 51; (1990) 171 CLR 207; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416; Noted 65 Law Inst Jo 933)

CRIMINAL LAW – IMPORTATION OF CANNABIS – EVIDENCE OF MAIN PROSECUTION WITNESS UNSATISFACTORY – SUBMISSION OF NO CASE TO ANSWER – SOME EVIDENCE CAPABLE OF SUPPORTING A VERDICT OF GUILTY – WHETHER POWER TO DIRECT AN ACQUITTAL ON THE GROUND THAT A VERDICT OF GUILTY WOULD BE UNSAFE OR UNSATISFACTORY.

D. was convicted of being knowingly concerned in the importation of cannabis resin. The prosecution case depended on the evidence of an accomplice F. who was by no means "a perfect witness". At the trial, F. admitted to giving false evidence in a number of respects, gave a false account when first interviewed by police and had prior convictions for dishonesty. The trial judge formed an unfavourable view of F.'s truthfulness as a witness; however, he ruled that he had no power to direct an acquittal on the ground that a verdict of guilty would be unsafe or unsatisfactory. Upon application for leave to appeal—

HELD: *Per curiam*; special leave to appeal granted; appeal dismissed.
1. If there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision.
***Attorney-General's Reference (No.1 of 1983)* [1983] VicRp 101; (1983) 2 VR 410, followed.**

2. Accordingly, as there was evidence sufficient to sustain a conviction, the trial judge was not in error in ruling that he had no power to direct an acquittal on the ground that in his view, a verdict of guilty would be unsafe or unsatisfactory.

THE COURT: [ALR 540] The applicant, Richard John Doney, seeks special leave to appeal from a decision of the Court of Criminal Appeal of the Supreme Court of New South Wales dismissing an appeal against his conviction for being knowingly concerned in the importation of cannabis resin. See s233B(1)(d) of the *Customs Act* 1901 (Cth). The cannabis resin was secreted in the core section of certain bolts of voile cloth packed in boxes which, in turn, were packed in a container consigned by sea from Karachi to Sydney. The named consignee, a fabric importer, had not ordered the cloth. Its name had been used without its authority. The prosecution case depended on the evidence of an accomplice, Gerard Clayton Freeman. He gave evidence that he had been approached by the applicant to arrange customs clearance of a container of cloth, and that later, but shortly before the consignment arrived in Sydney, the applicant made the shipping papers available to him and informed him that there would be some cannabis resin in the container. Freeman was by no means a perfect witness.

Not only was he an accomplice who attracted the usual warning that it would be dangerous to convict on his uncorroborated evidence, but his evidence was, on his own admission, false in a number of respects. He also admitted to having given a false account when first interviewed by investigating police, to having departed in some respects from evidence previously given and to having given evidence designed to conceal past dishonest dealings which had resulted in convictions for offences of dishonesty. It is clear that the trial judge formed an unfavourable view of his truthfulness as a witness.

The application for special leave to appeal raises two issues. The first is whether there was any evidence capable of corroborating the account given by Freeman. The second is whether the trial judge erred in holding that he had no power to direct the jury to enter a verdict of not guilty on the ground that, although there was evidence sufficient to sustain a conviction, a verdict of

guilty would be unsafe and unsatisfactory. The Court of Criminal Appeal held that the applicant's conviction was not unsafe or unsatisfactory. That aspect of its decision is not challenged other than on the basis that there was nothing to corroborate the account given by Freeman. Rather, it is put that even if there was corroborative evidence, the applicant was denied the right to have the trial judge who heard and observed the witness, Freeman, determine whether, in his view, a guilty verdict would be unsafe or unsatisfactory.

[The Court than dealt with the question whether the note could constitute corroborative evidence and continued] .... **[542]** The question whether a trial judge may direct a jury to return a verdict of not guilty if, in his or her opinion, a guilty verdict would be unsafe or unsatisfactory was adverted to but left unanswered in *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657 at 689; 49 ALR 448; (1983) 57 ALJR 809; 9 A Crim R 107. There is no doubt that it is a trial judge's duty to direct such a verdict if the evidence cannot sustain a guilty verdict or, as is commonly said, if there is no evidence upon which a jury could convict. See, for example, *Plomp v R* [1963] HCA 44; (1963) 110 CLR 234 at 246; [1964] ALR 267; *R v Prasad* (1979) 23 SASR 161 at 162; (1979) 2 A Crim R 45; *R v R* (1989) 18 NSWLR 74 at 77; (1989) 44 A Crim R 404.

And it may sometimes happen (although it should be but rarely) that evidence is withdrawn because it becomes apparent that, although technically admissible, it has no or insignificant probative value in comparison with its prejudicial effect, with the consequence that, if the remaining evidence will not support a guilty verdict, a verdict of not guilty must be directed. See, as to the discretion to reject technically admissible evidence, *R v Christie* [1914] AC 545 at 560; [1914-15] All ER 63; (1914) 10 Cr App R 141; *Harris v DPP* [1952] AC 694 at 707; [1952] 1 All ER 1044; 36 Cr App R 39; [1952] 1 TLR 1075; 116 JP 248; *Driscoll v R* [1977] HCA 43; (1977) 137 CLR 517 at 541; (1977) 15 ALR 47; (1977) 51 ALJR 731; *Harriman v R* [1989] HCA 50; (1989) 167 CLR 590 at 619; 88 ALR 161; (1989) 63 ALJR 694; 43 A Crim R 221; and, as to the withdrawal of evidence and the subsequent direction of a verdict of not guilty, *R v R* (1989) 18 NSWLR 74 at 76; (1989) 44 A Crim R 404. However, the question raised when, for whatever reason, the evidence will not sustain a verdict of guilty is distinct from that raised in the present case where the evidence of Freeman, if believed, is itself sufficient to sustain the applicant's conviction.

There appear to have been two distinct notions allowing a power to a trial judge to direct a verdict of not guilty other than in circumstances where the evidence will not support a verdict of guilty. The earlier notion, adopted by some judges in Victoria prior to the decision in *Attorney-General's Reference (No.1 of 1983)* [1983] VicRp 101; (1983) 2 VR 410, was that a verdict of not guilty might be directed if there were but a scintilla of evidence. A more robust view to the effect that a trial judge should stop a trial if, in his or her opinion, a verdict of guilty would be unsafe or unsatisfactory appears to have developed in the United Kingdom following the passage of the *Criminal Appeal Act* 1966 (UK) which allowed for the setting aside, on appeal, of unsafe or unsatisfactory verdicts. See *R v Falconer-Atlee* (1973) 58 Cr App R 348 at 357; and *R v Mansfield* [1977] 1 WLR 1102 at 1106-7; [1978] 1 All ER 134 at 140.

The argument that a similar power in the trial judge derives from the **[543]** common criminal appeal provisions in Australia has been rejected in South Australia in *Prasad*, in Victoria *Attorney-General's Reference (No.1 of 1983)* and in New South Wales in *R v R* (1989) 18 NSWLR 74; (1989) 44 A Crim R 404. The current view in the United Kingdom is stated in *R v Galbraith* [1981] 1 WLR 1039 at 1042; [1981] 1 All ER 1060 at 1062; 73 Cr App R 124; 2 Crim LR 767, in these terms:

> "(1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case.
>
> (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case.
>
> (b) Where, however, the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness' reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which

> a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

It is convenient to approach the argument in the present case by reference to the view enunciated in *Galbraith*, noting, however, that there is some difficulty in reconciling proposition 2(a) (which has some similarity with the position earlier adopted in Victoria) with proposition 2(b). The acceptance or rejection of evidence involves an inference as to its truth, which inference is, at least in part, based on "a principle of faith in human veracity sanctioned by experience": Wigmore, *Evidence*, vol. 1A (1983), p954, referring to an unverified citation from Starkie's *Evidence*, (1824). It is usual not to so categorise the inferences involved in the acceptance of direct or testimonial evidence and to treat the process of inference as confined to circumstantial evidence.

But it is appropriate here to draw attention to the fact that the drawing of inferences extends beyond circumstantial evidence because the purpose and the genius of the jury system is that it allows for the ordinary experiences of ordinary people to be brought to bear in the determination of factual matters. It is fundamental to that purpose that the jury be allowed to determine, by inference from its collective experience of ordinary affairs, whether and, in the case of conflict, what evidence is truthful. That means that not only is proposition 2(b) in *Galbraith* correct but, so far as it refers to "inconsistent" evidence, proposition 2(a) cannot be accepted. The question whether, in the words used in *Galbraith*, evidence has a "tenuous character" or an "inherent weakness or vagueness" may raise, but is not restricted to, the question whether the evidence is truthful. Quite apart from any question of truthfulness, there may be something in the nature of the evidence that brings its probative value into question so that the trial judge must consider whether some warning should be given. And, as earlier noted, there may be rare cases in which it will be necessary to consider whether, although the evidence was not initially excluded as a matter of discretion, it should be withdrawn from the jury's consideration.

Evidence that attracts a warning is evidence that has been adjudged, either generally or in the particular case, as having probative value such that, subject to warning, it can be taken into account by the jury in its **[544]** deliberations. Assuming an appropriate warning, the weight to be given to that evidence is as much a matter to be determined by inference based on the jury's collective experience of ordinary affairs as is the question whether evidence is truthful. And, of course, the same is necessarily true of evidence that does not require a warning. It follows, that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty.

It is necessary only to observe that neither the power of a court of criminal appeal to set aside a verdict that is unsafe or unsatisfactory (as to which see *Whitehorn*, *Chamberlain v R (No.2)* [1984] HCA 7; (1984) 153 CLR 521; 51 ALR 225; (1984) 58 ALJR 133 and *Morris v R* [1987] HCA 50; (1987) 163 CLR 454; 74 ALR 161; 28 A Crim R 48; 61 ALJR 588) nor the inherent power of a court to prevent an abuse of process (as to which see *Jago v District Court (NSW)* [1989] HCA 46; (1989) 168 CLR 23; 87 ALR 577; (1989) 63 ALJR 640; 41 A Crim R 307) provides any basis for enlarging the powers of a trial judge at the expense of the traditional jury function. The power of a court of criminal appeal to set aside a verdict on the ground that it is unsafe or unsatisfactory, like other appellate powers, is supervisory in nature. Its application to the fact-finding function of a jury does not involve an interference with the traditional division of functions between judge and jury in a criminal trial. Nor does the existence in a trial judge or a court of powers to stay process or delay proceedings where the circumstances are such that the trial would be an abuse of process.

The Court of Criminal Appeal was correct in upholding the trial judge's ruling that he had no power to direct the jury to enter a verdict of not guilty on the ground that, in his view, a verdict of guilty would be unsafe or unsatisfactory. The matters raised by this application warrant the grant of special leave to appeal. However, the appeal must be dismissed. Order: Application for special leave to appeal granted. Appeal dismissed.
