49/86

SUPREME COURT OF NEW SOUTH WALES

TORRANCE v CORNISH

Yeldham J

24 June, 23 July 1985 — (1985) 79 FLR 87

CRIMINAL LAW – FALSE PRETENCES – SUMMARY HEARING – CROWN CASE BASED ON CIRCUMSTANTIAL EVIDENCE – REASONABLE HYPOTHESIS CONSISTENT WITH INNOCENCE – SUBMISSION OF NO CASE TO ANSWER – TEST TO BE APPLIED BY COURT.

(1) On a submission of 'no case' at the close of the Crown case, the court should only consider whether there is evidence upon which the accused could lawfully be convicted.
***May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671, applied.**

(2) Where at the close of the Crown case the court thinks:
(a) that a reasonable hypothesis consistent with innocence is capable of being inferred from the evidence; or
(b) that inferences of fact could be properly drawn equally consistent with the innocence or guilt of the accused, the court should not rule that there is no case to answer.
***Attorney-General's Reference (No. 1 of 1983)* [1983] VicRp 101; (1983) 2 VR 410, followed.**

YELDHAM J: *[After setting out the nature of the charge, and the details of the magistrate's determination, His Honour continued]:* ... **[88]** It is not necessary, in view of the conclusion at which I have arrived, for me to set out the facts found by the learned magistrate. There is no doubt that there was no direct evidence of any intent to defraud and the prosecution relied upon inferences from circumstances proved in evidence – that is circumstantial evidence. In *May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671 five justices of the High Court of Australia, in a joint judgment, observed (at 658) that when, at the close of the case for the prosecution, a submission is made that there is "no case to answer", the question to be decided is not whether on the evidence as it stands the defendant ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted. This is a question of law. See also per Kitto J in *Zanetti v Hill* [1962] HCA 62; (1962) 108 CLR 433 at 442; [1963] ALR 165; 36 ALJR 276, and *Wentworth v Rogers* (1984) 2 NSWLR 422 at 435-436; (1984) 15 A Crim R 376 (a case which, however, was not concerned really with the present question).

A number of cases were cited to me concerning the test to be applied where the evidence is wholly circumstantial. It is necessary only to mention *Peacock v R* [1911] HCA 66; (1911) 13 CLR 619; 17 ALR 566; and more recently *Plomp v R* [1963] HCA 44; (1963) 110 CLR 234; [1964] ALR 267 and *Barca v R* [1975] HCA 42; (1975) 133 CLR 82; 7 ALR 78; (1975) 50 ALJR 108. **[89]** None of these were concerned with the present problem of whether or not a judge or magistrate (and the test is exactly the same in either case) is entitled to direct an acquittal, in the one case, or to discharge a defendant in the other, where, at the end of a Crown case based on circumstantial evidence, there are competing inferences of guilt and innocence.

I do not think it necessary to refer to the other authorities which counsel mentioned, because most of them are dealt with in a recent decision of the Full Court of the Supreme Court of Victoria, with which I entirely respectfully agree, and which in my view established that the magistrate in the present case fell into error. The case is *Attorney-General's Reference (No.1 of 1983)* [1983] VicRp 101; [1983] 2 VR 410. There the respondent was presented for trial on four counts of theft. At the close of the Crown case counsel submitted that there was no case for the respondent to answer. The trial judge found that there were "countervailing inferences which (were) capable of being drawn from the evidence, and with at least an equal degree of probability" and he ruled that, as there was a reasonable hypothesis consistent with innocence, it was his duty to direct an acquittal. The Full Court, upon reference by the Attorney-General, held that he was in error and that a trial judge is neither bound nor entitled to direct the jury to acquit if at the

close of the Crown case (a) he thinks that a reasonable hypothesis consistent with the innocence of the accused is capable of being inferred from the evidence or, (b) inferences of fact could be properly drawn which were consistent with the innocence of the accused and other inferences of fact could equally properly be drawn which were consistent with the guilt of the accused. In the course of the joint judgment of the court, after referring to *May v O'Sullivan* (1955) 92 CLR 654 and cases dealing with circumstantial evidence, and to the recent Privy Council decision in *Haw Tua Tau v Public Prosecutor* [1981] UKPC 23, [1982] AC 136; [1981] 3 WLR 395, [1981] 3 All ER 14; [1981] Crim LR 840 their Honours say (at 415-416):

> "The question whether the Crown has ultimately excluded every reasonable hypothesis consistent with innocence is a question of fact for the jury and therefore, if the Crown has led evidence upon which the accused could be convicted, a trial judge should not rule that there is no case to answer or direct the jury to acquit simply because he thinks that there could be formulated a reasonable hypothesis consistent with the innocence of the accused which the Crown has failed to exclude. Similarly a trial judge should not rule that there is no case for the accused to answer because he has formed the view that, if the decision on the facts were his and not the jury's, he would entertain a reasonable doubt as to the guilt of the accused ...
>
> Where the same tribunal is judge both of law and fact the tribunal may be satisfied that there is a case for an accused to answer and yet, if the accused chooses not to call any evidence, refuse to convict upon the evidence. That this is the correct logical analysis appears clearly from *May v O'Sullivan*. There is no distinction to be drawn between cases sought to be proved by circumstantial evidence and other cases."

and at 417:

> "When a trial judge is considering at the close of the Crown case whether there is a case to answer, he should not be concerned whether a verdict of guilt based upon such evidence might be set aside by an appellate court as unsafe. He should only consider whether there is evidence upon which the accused could lawfully be convicted."

[90] These are views which accord in substance with those expressed by Glass JA in a learned article in 55 ALJ 842. I do not derive any assistance from decisions in civil proceedings, to a number of which I was referred. Based upon the reasoning of the Full Court of the Victorian Supreme Court, with which I have already expressed my respectful concurrence, I consider that the magistrate in the present case should have found that there was a case for the respondent to answer. Whether, ultimately, and irrespective of whether or not she calls evidence, she is to be convicted is entirely another matter, and one with which, in this appeal, I am in no way concerned.

Mr Cassidy, senior counsel for the respondent, sought to support the actual decision of the magistrate (as he is entitled to do – see *NRMA Insurance Ltd v B & B Shipping and Marine Salvage Co Pty Ltd* (1947) 47 SR (NSW) 273 at 282; 64 WN (NSW) 58) upon other grounds. The first was that, even if the magistrate was wrong in the precise test which he applied, he had an overriding discretion to dismiss the information when he did on the ground that the evidence was so slight as to make it unsafe to convict. But in my opinion that is to substitute for the appropriate test at the end of the Crown case something which it is necessary for the magistrate to consider at the end of all the evidence.

The second submission was that a finding made by the magistrate "for the purpose of argument" namely, "that a referral document made by a doctor who had not attended to the patient would amount to a false pretence" was erroneous, having regard to the form of the referral itself. In my opinion there is no substance in that submission.

The third argument was that there was no evidence that the respondent made any representation, or that she authorised any person to fill in the referral form or use it without herself being consulted. Again I think it sufficient to say that such an argument is without substance, remarks which apply also to the final submission, which was to the effect that the payment, having in fact been made to Mrs Webster, could not be regarded as having been made to her husband. I do not regard any of these arguments that I have mentioned as having any validity.

I answer the question asked in the case in the affirmative and remit the matter to the magistrate with that expression of opinion. I order the respondent to pay the costs of the appellant and she is to have a certificate under the *Suitors' Fund Act* 1951. Magistrate's determination erroneous and matter remitted accordingly.