19/89

QUEENSLAND DISTRICT COURT AT BRISBANE

BRAY v McALLISTER

Judge Skoien

21 September 1988

CRIMINAL LAW – EVIDENCE – DEFENCE CASE CLOSED – APPLICATION TO CALL EVIDENCE IN REBUTTAL – TEST TO BE APPLIED – WHETHER CIRCUMSTANCES "REASONABLY FORESEEABLE".

1. Generally speaking, a court should not allow the prosecution to call further evidence after evidence has been given for the defence, if the occasion for calling the further evidence was reasonably foreseeable.

***R v Chin* [1985] HCA 35; (1985) 157 CLR 671; (1985) 59 ALR 1; 59 ALJR 495; (1985) 16 A Crim R 147, applied.**

2. Accordingly, where a person charged with failing to obey a direction of a police officer gave evidence that he was not in the vicinity when the direction was given nor had heard it, such circumstances should have been anticipated by the prosecution, and the magistrate erred in the exercise of his discretion in permitting the prosecutor to lead further evidence to rebut the matter raised by the defence.

JUDGE SKOIEN: This is an appeal against conviction by a Stipendiary Magistrate, at the Magistrates Court Brisbane on 31 May 1988 of the appellant on a charge of failing to obey a direction given by a member of the police force under s36 of the *Traffic Act*, 1949 (as amended). The prosecution concerned a student demonstration which took place in Eagle Street near its intersection with Queen Street shortly after 3 pm. on 5 May 1988. The evidence given to the magistrate was that at 3.13 pm. Inspector McCaul gave a direction that those who were congregated on the carriageway should leave the carriageway and disperse.

Taking the prosecution case at its highest, the defendant was seen to be on the roadway some three minutes later, apparently taking photographs and was then arrested. There was no direct evidence that he had been anywhere within ear-shot of the direction at any time earlier than about three minutes after the direction was given.

The defendant gave evidence that about 10 minutes before his arrest his camera had run out of film and he therefore walked to a nearby chemist's shop and bought a new roll of film. It was on his return to the scene that he was arrested. His evidence was that he had not heard any direction to leave the roadway. In giving leave to re-open, the stipendiary magistrate said:

> "It seems to me that the whole purpose of these proceedings is to ascertain the truth of the matter, and if the prosecution has evidence it can call to rebut the evidence that has been given by the defence it should be heard."

With respect to the stipendiary magistrate that is not a correct statement of law. As Dawson J said in *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657; 49 ALR 448; (1983) 57 ALJR 809 at 819; 9 A Crim R 107:

> "A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge's role in that system is to hold the balance between the contending parties without himself taking part in their disputations".

The correct test to be applied on an application to re-open a prosecution case has most recently been restated by the High Court of Australia in *R v Chin* [1985] HCA 35; (1985) 157 CLR 671; (1985) 16 A Crim R 147 at 151; (1985) 59 ALR 1 at 6; 59 ALJR 495 at 497 per Gibbs CJ and Wilson J. It is as follows:

> "The general principle is that the prosecution must present its case completely before the accused is called upon for his defence. Although the trial judge has a discretion to allow the prosecution to call further evidence after evidence has been given for the defence, he should permit the prosecution to call evidence at that stage only if the circumstances are very special or exceptional and, generally speaking, not if the occasion for calling the further evidence ought reasonably to have been foreseen.
>
> The principle applies where the prosecution seeks to call evidence to rebut matters raised for the first time by the defence; if the rebutting evidence was itself relevant to prove the prosecution case (unless, perhaps, it was no more than marginally, minimally or doubtfully relevant: *R v Levy and Tait*, (1966) 50 Cr App R 198 at 202), and the need to give it could have been foreseen it will, generally speaking, be rejected."

In a charge of the type which was before the magistrate, it is an essential element that the direction be given to the person charged. In this case, at its very highest, the prosecution placed the defendant on the scene only some minutes after the direction was given. In those circumstances it seems to me that it was incumbent on the prosecution to lead evidence designed to satisfy the magistrate beyond reasonable doubt of his presence at the relevant time. It was therefore, a matter which should have been within the anticipation of the prosecution.

The case is, I think, quite distinguishable from that of *R v Natasien* (1972) 2 NSWLR 227, in which the Crown was permitted to re-open to rebut evidence of accident raised for the first time during evidence called by the defence. That was not a matter which the Crown could reasonably have foreseen. *Natasien* is, I think, an illustration of the proper application of the test as set out in *Chin*. It follows that in my opinion the stipendiary magistrate was wrong in allowing the prosecution to re-open, and in those circumstances I think the conviction must be set aside.

Whilst it is not necessary for me to do so, I would also observe that the stipendiary magistrate appears to have taken into consideration in deciding to impose a fine upon the appellant certain facts which were not part of the prosecution case. He said, "You deliberately disrupted the free passage of citizens of this city along Eagle Street and Queen Street at the time by gathering on those streets". First, there was no evidence that the free passage of any citizen was disrupted, and second, there was no evidence that the defendant had deliberately disrupted anyone's passage. The demonstration was peaceful, no damage was done and no violence occurred. In those circumstances it seems to me that it would have been proper for the magistrate to apply the provisions of s657A of the *Criminal Code* rather than to impose a fine.

In the result I allow the appeal and set aside the conviction.

[Judgment supplied courtesy of the CSM Brisbane].
