36/05; [2005] VSC 470

SUPREME COURT OF VICTORIA

DPP v FEDERICO

Cummins J

21-30 November, 1 December 2005

CRIMINAL LAW – SELF-DEFENCE – ESCAPING PRISONER SHOT BY PRISON OFFICER IN PUBLIC HOSPITAL – PRISON OFFICER CHARGED WITH MURDER - SUBMISSION OF NO CASE – CONSIDERATIONS APPLICABLE – ELEMENTS OF SELF-DEFENCE – OBJECTIVE AND SUBJECTIVE ELEMENTS – WHETHER SUBMISSION OF NO CASE SHOULD BE UPHELD.

1. The principles governing a no case submission are that the question to be decided is whether on the evidence as it stands could the accused lawfully be convicted. 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.

***May v O'Sullivan* [1955] HCA 38; (1955) 92 CLR 654; [1955] ALR 671; and**

***Doney v R* [1990] HCA 51; (1990) 171 CLR 207; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416, applied.**

2. In relation to the law of self-defence, the prosecution for conviction must prove beyond reasonable doubt either that the accused did not believe on reasonable grounds that it was necessary in self-defence to do what was done or that there were no reasonable grounds for such a belief. It involves a subjective question (the accused's state of mind) and an objective question (reasonable grounds).

***Zecevic v DPP* [1987] HCA 26; (1987) 162 CLR 645; (1987) 71 ALR 641; (1987) 25 A Crim R 163; 61 ALJR 375, applied.**

3. Where a prison officer fatally shot a prisoner escaping from the ward of a public hospital, and stated that he acted instinctively, in fear for his life and in order to prevent his lethal firearm being commandeered by the escaping prisoner, there was no evidential or rational basis to reject his account as to his state of belief. In those circumstances there was no evidence upon which a jury properly instructed could lawfully find that the accused did not believe that it was necessary in the circumstances to do what he did. In relation to the objective question, given the reality of the accused's actions in the agony of the moment, there was no evidence upon which a jury properly instructed could lawfully find that there were no reasonable grounds for the accused's belief.

CUMMINS J:

1. In this case the accused, Fabrizio Bartolo Federico is charged with the murder of Garry Gauld Whyte at Fitzroy on 7 May 2002. The events occurred at St Vincent's Public Hospital, Fitzroy. The deceased was an escaping prisoner, handcuffed to the front, who had been taken to that hospital for medical investigation. The accused was a prison officer, armed, who had the lawful duty of guarding the prisoner and of protecting the public. The prisoner was taken to the medical imaging section of St Vincent's Hospital to undergo a CAT scan. He was so taken because the prison authorities in the proper exercise of their duty of care caused him to be taken there for medical investigation. The symptoms which caused the prison authorities responsibly so to act were all feigned by the prisoner. The removal of the prisoner from prison to St Vincent's Hospital was contrived by the prisoner in order to escape. He was placed on an imaging table, still handcuffed to the front, for medical investigation. An unarmed prison officer stood in an adjoining room with a view of the procedure. The accused, who was the armed guard, took up a position in the corridor outside the closed doors of the imaging room. He had no view within the room other than a slight aperture which told him nothing from his external position. Suddenly and without warning the prisoner came through the doors of the medical imaging room in the direction of the accused. The accused fired one shot which missed followed immediately by a second shot which struck the deceased. The deceased died some minutes later.

2. Yesterday, at the conclusion of the prosecution case on the eighth day of a jury trial in which 48 witnesses were called, I ruled that there was no case for the accused to answer on the charge preferred against him, and directed the jury to acquit the accused which the jury duly did.

3. I now publish my reasons.

4. The principles governing judicial determination of a submission of no case to answer are well known and need no rehearsal. They are stated in *May v O'Sullivan*[1]:

> "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 really a question of law."

In *Doney v R*[2] the Court stated:

> "There is no doubt that it is a trial judge's duty to direct ... a verdict [of not guilty] if the evidence cannot sustain a guilty verdict or, as is commonly said, if there is no evidence upon which a jury could convict" (authority cited).

The Court proceeded:[3]

> " ... 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."

The Court stated[4] that the supervisory nature of a court of criminal appeal founded its power to set aside a verdict on the unsafe and unsatisfactory ground eschewed at trial level on a no case ruling.

5. I proceed upon those principles.

6. The law of self-defence relevant for this ruling is stated in *Zecevic v DPP*[5]:

> "The question to be asked in the end is quite simple. It is whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he did. If he had that belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt about the matter, then he is entitled to an acquittal."

Where as here the element of lawful justification properly arises, the prosecution for conviction must prove beyond reasonable doubt either that the accused did not so believe or that there were no reasonable grounds for such a belief.

7. In this case although the law of self-defence was encapsulated, accurately, in one sentence in the learned senior prosecutor's opening[6], there was no descension to particularity as to whether it was the subjective leg (no belief) or the objective leg (no reasonable grounds) of *Zecevic* which was propounded by the prosecution or both legs. At the conclusion of the prosecution case and after enquiry by me I was told it was both[7].

8. I turn first to the subjective question as formulated in *Zecevic*.

9. Classically, self-defence is a jury question. That is because it involves a subjective question – the state of mind of the accused, which itself is a matter of inferential reasoning. Here, there was a further matter which would tend to jury determination. That was that there was a hiatus in the accused's recall of the events (the drawing and aiming of the firearm, a Smith and Wesson .38 revolver) as stated in the Homicide record of interview on 7 May 2002 at questions 243, 330, 362 and 428 and in the re-enactment on 9 May 2002 at questions 108, 111, 178 and 179.

10. However there is absolutely no rational basis for rejecting the accused's account that he acted instinctively, in fear for his life and in order to prevent his lethal firearm being commandeered

by the escaping prisoner. The accused on the evidence was a person of excellent character and one of decency and restraint. His answers were spontaneous and consistent. He had the benefit of legal advice and of the presence of a very able solicitor and answered every one of the 631 questions asked of him over two days by investigating officers. The accused knew the prisoner knew he had a firearm. The act of the prisoner in escaping was an act of desperation. The accused knew the setting was a busy inner suburban public hospital with all its attendant vulnerabilities and risks. The answers of the accused were consistent with the objective evidence. As to the hiatus abovementioned, the evidence is that the accused had no warning in time or space of the impending escape, the events were traumatic, the sound of the shots in the confined space was deafening, the events occurred in the agony of the moment, and the accused acted instinctively and in accordance with his training. In those circumstances I consider there is no proper basis to find the momentary hiatus in recall was untrue. In my view there was no evidential or rational basis to reject the accused's account as to his state of belief. A jury could reject it only through perversity. I consider on the first leg of *Zecevic* there was no evidence upon which a jury properly instructed could lawfully find that the accused did not believe that it was necessary in the circumstances to do what he did.

11. I turn to the second leg of *Zecevic*, the objective question.

12. In my view the evidence was overwhelming, and always was, that there were reasonable grounds for the requisite belief. They were:

> (a) the setting: this was a busy emergency ward of a major inner suburban public hospital in which there were many vulnerable persons and in which an escaping prisoner handcuffed to the front could wreak havoc by use of a weapon being heavy handcuffs or a commandeered lethal firearm;
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> (b) training: the accused acted precisely in accordance with his training;
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> (c) spatial considerations: the prisoner came from behind closed doors only a couple of metres from the accused;
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> (d) temporal considerations: the fatal events happened in a couple of seconds;
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> (e) expert evidence:
> (i) the evidence of the pathologist, Dr M.J. Lynch, was that the prisoner was shot from the deceased's left to right, very slightly from front to back. He was not shot in the back.
> (ii) the evidence of the firearms examiner Senior Constable Glaser and the forensic officer Mr H.A. Wrobel was that the prisoner was shot at a distance of between 10 centimetres and half a metre.

Accepting as I do that for purposes of a no case ruling the evidence must be viewed on the basis most favourable to the prosecution, and acting for that purpose upon the evidence of Mr M.F. Jones, forensic biologist, most favourable to the prosecution, the evidence establishes that the prisoner was moving across the accused from the accused's right to left at very close range. He had entered the field of observation of the accused with no warning. The law recognises, and rightly so, the reality of actions in the agony of the moment. In my view there was no evidence upon which a jury properly instructed could lawfully find that there were no reasonable grounds for the accused's belief.

13. For those reasons I directed the jury to acquit the accused.

14. It is necessary to make some further observations.

15. First, to direct an acquittal is a most exceptional course. In nearly 18 years on the Bench I have done so only once before. Its rarity is testament to the fact that the courts and the community have profound respect for juries, none more so than me. Its existence is testament to the fact that there is in law a threshold test before a matter finally is placed in the hands of a jury for deliberation and verdict.

16. Second, I consider that the prosecution case throughout has been based upon analytical error. At its outset the learned senior prosecutor stated:

> "He panicked, he forgot [his training], and the last resort became the first resort."[8]

> The following discussion occurred at the close of the prosecution case:
> "(Counsel) The true issue is whether he panicked and shot without thinking ... And if a man panics and shoots he is not acting in self defence. He shot in panic.
>
> HIS HONOUR: You keep going up a side alley called panic. Let's get back onto the main road called belief. It doesn't matter how he comes to the belief ...
> (Counsel) He has to have it.
>
> HIS HONOUR: ... whether it's a belief that derives from panic or whether it's a belief that derives from studying a Ph.D., if he has the belief, that's the first leg of *Zecevic*."[9]

Panic does not preclude thought. Instinctive behaviour is not automatism. Panic and instinctive behaviour preclude neither thinking nor believing. The first question in *Zecevic* is one of belief.

17. Third, I wish to commend the mother of the deceased, Mrs Gauld, for her dignity and loyalty throughout the proceedings in circumstances which I am sure must have been most distressing for her.

18. Finally, I acknowledge the quiet and dignified conduct of the accused throughout the proceedings, which have been a heavy burden upon him.

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[1] [1955] HCA 38; (1955) 92 CLR 654 at 658; [1955] ALR 671 *per curiam.* See also *Attorney-General's Reference (No. 1 of 1983)* [1983] VicRp 101; (1983) 2 VR 410 and generally J. Thomson "No Case Submissions" (1997) 71 ALJ 207 and Glass JA "The insufficiency of evidence to raise a case to answer" (1981) 55 ALJ 842.
[2] [1990] HCA 51; (1990) 171 CLR 207 at 212; 96 ALR 539; (1990) 65 ALJR 45; 50 A Crim R 157; [1990] LRC (Crim) 416.
[3] At 214-215.
[4] At 215.
[5] [1987] HCA 26; (1987) 162 CLR 645 at 661; (1987) 71 ALR 641; (1987) 25 A Crim R 163; 61 ALJR 375 per Wilson, Dawson and Toohey JJ.
[6] T.38.
[7] T.582.
[8] Prosecution opening, T.38.
[9] T.587-588.

APPEARANCES: For the DPP: Mr CJ Ryan SC with Mr TC Wallwork, counsel. Office of Public Prosecutions. For the accused Federico: Mr R Richter QC with Ms C Burnside, counsel. Paul Horvath solicitor.
