15/85

FEDERAL COURT OF AUSTRALIA

EDWARDS and ORS v VON EINEM and ORS

Smithers J

8 June 1984 — [1984] 12 A Crim R 463

PRACTICE AND PROCEDURE – COMMITTAL PROCEEDINGS – STANDARD OF PROOF TO COMMIT – ELEMENT OF "DISHONESTY" IN CONSPIRACY TO DEFRAUD COMMONWEALTH: *MAGISTRATES (SUMMARY PROCEEDINGS) ACT* 1975, SS56(1), 59(7).

The defendants were committed for trial in respect of charges alleging a conspiracy to defraud the Commonwealth and to defeat the Commonwealth sales tax legislation. They applied for an order quashing or setting aside the Magistrate's decision to commit.

HELD: Application dismissed.
In committal proceedings, a Magistrate should caution or commit the defendant where the evidence is such that the Magistrate is of the opinion that a jury could be satisfied of guilt beyond reasonable doubt or is of the opinion that there is a strong or probable presumption of guilt arising from the evidence.

***Armah v The Government of Ghana* [1968] AC 192; [1966] 3 All ER 177, applied.**

SMITHERS J: *[After setting out details of the charges, the committal hearing and whether the decision to commit was subject to review, His Honour continued]*: … **[15]** At the hearing before me there was considerable discussion as to the nature **[16]** and quality of the state of mind of an accused which will amount to dishonesty. To my mind it would be unsound to attempt a definition. It is sufficient to accept what was said in *R v Ghosh* [1982] EWCA Crim 2; [1982] 2 All ER 689 at 696; [1982] 1 QB 1053 at 1063-4; (1982) 75 Cr App R 154:

> "This brings us to the heart of the problem. Is 'dishonestly' in s1 of the 1968 Act intended to characterise a course of conduct? Or is it intended to describe a state of mind? If the former, then we can well understand that it could be established independently of the knowledge or belief of the accused. But if, as we think, it is the latter, then the knowledge and belief of the accused are at the root of the problem. …
>
> There remains the objection that to adopt a subjective test is to abandon all standards but that of the accused himself, and to bring about a state of affairs in which 'Robin Hood would be no robber' (See *R v Greenstein* [1976] 1 All ER 1; (1975) 1 WLR 1353). This objection misunderstands the nature of the subjective test. It is no defence for a man to say, 'I knew that what I was doing is generally regarded as dishonest; but I do not regard it as dishonest myself. Therefore I am not guilty'. What he is, however, entitled to say is, 'I did not know that anybody would regard what I was doing as dishonest'. He may not be believed; just as he may not be believed if he sets up 'a claim of right' under s2(1) of the 1968 Act, or asserts that he believed in the truth of a misrepresentation under s15 of the 1968 Act. But if he <u>is</u> believed, or raises a real doubt about the matter, the jury cannot be sure that he was dishonest.
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> In determining whether the prosecution has proved that the defendant was acting dishonestly, a jury must first of all decide whether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest. In most cases, where the **[17]** actions are obviously dishonest by ordinary standards, there will be no doubt about it. It will be obvious that the defendant himself knew that he was acting dishonestly. It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood …"

On this basis there is in my view no fault to be found with the approach of the Magistrate in identifying the elements of the offence of conspiracy to defraud the Commonwealth under

s86(1)(e) of the *Crimes Act* 1914. The stated reasons of the Magistrate were also attacked on the ground that they reveal an error as to the circumstances in which it would be proper for him to conclude that a strong or probable presumption of guilt was established. Attention was focussed on the passage "A strong or probable presumption of guilt appears to be established by evidence or circumstances that point to the commission of a crime and to the accused person as the criminal, which circumstances are not completely explained or cleared up by the evidence of the accused".

Considerable emphasis was placed on the final adjectival clause. It was said that its presence indicated that the magistrate's view was that the necessary strong or probable presumption of guilt was established where evidence or circumstances pointed to the commission of a crime by the **[18]** accused, no matter how waveringly, unless the implication of the accused arising therefrom was completely negatived by evidence of, or called by, the accused. It appears to me, however, that the Magistrate is to be understood as saying that, where the question whether there is a strong or probable presumption of guilt arises for decision, an affirmative answer may be given where the evidence of the prosecution or the circumstances point to the commission of a crime by the accused unless the implication of the accused in the crime arising from such evidence or circumstances is explained away by evidence of, or called by, the accused. The word "completely" in the passage under discussion is inaptly included. The ultimate question would not be whether the evidence for the accused completely rebutted the implication of the accused arising from the evidence of the Crown, but whether it so weakened that implication that it could no longer be said to be sufficient either to require that the accused be put upon his trial or to support the existence of a strong or probable presumption of guilt. Reading the reasons as a whole I am not persuaded that the Magistrate did not so understand the problem before him.

It is to be observed that it is only where in his opinion the evidence is sufficient to put the accused person upon his trial for the relevant offence or, in his opinion the evidence given for the prosecution raises a strong or probable presumption of guilt of the accused person, that it is the **[19]** duty of the Magistrate under s56(1)(b) of the Act to caution the accused. And where the question arises under s59(7), after evidence has been given by the accused or his witnesses, if any, whether the accused shall be directed to be tried for the offence in question, the duty so to direct arises only where the Magistrate holds the opinion either that the evidence is sufficient to put the accused person upon his trial or raises a strong or probable presumption of guilt. The word "presumption" in these contexts may introduce a perplexity. What is involved is a process of drawing inferences. A presumption is something that does not necessarily proceed by inference or even by logic. However, in this context a relevant presumption only exists where inference is justified.

In each situation the opinion referred to is of course that formed on the whole of the evidence. From the observations of Lord Reid in *Armah v The Government of Ghana* [1968] AC 192 at 229; [1966] 3 All ER 177, it would appear that before the Magistrate would contemplate cautioning or committing an accused by reference to an opinion that the evidence was sufficient to put the accused on his trial he would weigh it to see whether in his opinion twelve reasonable men and women could all properly think it sufficiently convincing to satisfy them beyond reasonable doubt of the guilt of the accused or, alternatively, whether a case had been made out fit for later consideration by a jury. The expression "fit for the **[20]** consideration of a jury" would appear to mean fit to be considered by a jury on the question of whether on the evidence it is satisfied beyond reasonable doubt of the guilt of the accused. But it would seem that on this latter test also, the opinion is one to be formed by the Magistrate on the evidence and would normally be an opinion to the effect that the evidence could be thought by a jury to be adequate to support a conviction.

But when one considers action to caution or commit upon an opinion of the Magistrate that the evidence raises a strong or probable presumption of guilt, what is involved is that the Magistrate, considering and weighing all the evidence for himself, should be of the opinion that there is a strong or probable presumption of guilt. In that case, as Lord Reid says at p229 he must "decide whether he, not a hypothetical jury, thinks it probable that the accused committed the offence. And "probable" does not mean certain or nearly certain, and on the other hand it does not mean a mere possibility". See also Lord Pearce in the same case at p253. Thus there is to be a warning at a committal where the evidence is such that the Magistrate is of the opinion that a jury could be satisfied of guilt beyond reasonable doubt, or the Magistrate himself is of the

opinion that there is a strong or probable presumption arising from the evidence that the accused is guilty. It is in the light of these observations that the Magistrate had to form his opinion on **[21]** the evidence and I have to consider whether there was evidence upon which he could form the opinion he did.

The statement of the Magistrate that there is a strong or probable presumption of guilt where the evidence or circumstances "point to" the commission of the offence by the accused was criticised and does raise a question whether the Magistrate had in mind evidence of implication of the accused sufficient to support strong or probable presumption that the accused was guilty or that the evidence was sufficient to put the accused on trial as explained by Lord Reid, or something less. I think, however, reading his reasons as a whole that he is to be understood as referring to evidence sufficient to support both of the opinions referred to. He pointed out that the accused should be discharged where no reasonable jury could convict on the evidence, and that it was not for him to determine guilt or innocence but rather, acting on the principles to which he referred, to decide at the then current stage whether there was sufficient evidence to place the accused on trial for each of the offences. He then devoted his attention to the elements of the offences: was there an agreement? Was it for an unlawful purpose? Did the accused play a part in the relevant agreement? Was there dishonesty? After discussing the tests by reference to which a finding of dishonesty might be made, he stated that he had come to the conclusion that applying any of the tests to which he referred there was a strong or probable presumption that the element of **[22]** dishonesty has been satisfied ... *[His Honour then dealt with the evidence led in support of the charges, and continued]* ... **[32]** The nature and content of the agreement between the promoters was a question of fact. And if there was evidence to support the opinion that the agreement which was made was an agreement that sales tax be not paid then the Magistrate was entitled to form the opinion he did. And I am not persuaded that there was not such evidence.

[33] Charges Under Section 86(1)(b).

In respect of these charges there was considerable debate at the hearing before me as to the nature of the conspiracy with which s86(1)(b) of the *Crimes Act* 1914 is concerned. The Magistrate formed the opinion that in respect of the charges against the applicants under s86(1)(b) there was sufficient evidence to place the accused on trial for each of the offences. He took the view that the agreement which the applicants had made with each other was that sales tax be not paid the circumstances being, however, that sales tax was legally payable. Having regard to his views of the appropriate test as to presence of dishonesty in a transaction, which he expressed in relation to the charges under s86(1)(e) and to his views as to the evidence of the presence of dishonesty in relation to those charges, and whether or not he considered that dishonesty was an element in the charges under s86(1)(b), there was a sufficient basis for an opinion that it would be open to a jury to find beyond reasonable doubt that each of the applicants entered into the agreement believing, at least, that sales tax might be payable according to law, but intending that it should not be paid, whether or not that was the case, and intending that the vendor company "C", referred to above, should not register as a wholesaler or make returns of its sales pursuant to the *Sales Tax Assessment Acts*. The conspiracy arising from that agreement would inevitably be one to prevent or defeat the **[34]** execution or enforcement of the relevant provisions of the *Sales Tax Assessment Acts*. Accordingly, the applications of each of the applicants must be dismissed.

Mr Crossley conceded his argument required interpretation of the two statutes to mean that no prosecution for a breach of s12 of the *Commerce (Trade Descriptions) Act* can be launched by anyone except the Department of Business and Consumer Affairs. In my view there is no call for such an interpretation.
