30/85

SUPREME COURT OF VICTORIA — FULL COURT

R v THOMAS

Young CJ, Crockett and Tadgell JJ

29 September 1980

CRIMINAL LAW – CONSPIRACY TO COMMIT ARMED ROBBERY – EVIDENCE SUFFICIENT TO SUPPORT CONSPIRACIES OTHER THAN THAT CHARGED – WHETHER SUFFICIENT TO SUPPORT A SPECIFIC CONSPIRACY.

T., and one Darby were convicted of having conspired together to rob, whilst having with them a firearm. On appeal, it was argued that the evidence led failed to make out the elements of conspiracy to commit armed robbery.

HELD: Appeal allowed. Conviction quashed. Verdict and judgment of acquittal entered.
(1) The jury was not entitled to return a verdict of guilty unless the circumstances were such as to be inconsistent with any reasonable hypothesis other than that of the accused's guilt of the crime charged.

(2) The evidence against T. established an overwhelming case that he conspired with Darby to commit a criminal act, but the evidence fell short of establishing that that crime was that T. conspired to commit armed robbery.

(3) As discussion of the possible content of the unlawful agreement involved much that was speculation and mere surmise, it could not be said that the only permissible inference which could be drawn pointed exclusively to the commission of the crime charged.

CROCKETT J: (With whom the other Judges agreed) *[After setting out the grounds of appeal and referring to the ground raising for consideration whether it was open to the jury to convict one co-accused and acquit the other, His Honour continued]:* ... **[4]** The submission that the evidence admissible against the applicant fell short of establishing his guilt of the offence charged was made without success to the trial Judge at the close of the Crown case. At the conclusion of all the evidence the submission was made, also unsuccessfully, that the evidence was so weak that any verdict of guilt resting upon it should be considered unsafe and, accordingly, the jury should be directed to acquit. The latter of these submissions was an appeal to what was essentially an exercise of discretion by the trial Judge and doubtless for this reason, was not repeated in this Court. However, it was strongly argued that the evidence led against the applicant failed to make out the elements of the offence of conspiracy to commit armed robbery. It is thus necessary to make some reference to that evidence.

The applicant and Darby were seen to meet in Bridge Road, Richmond, at about 11 pm. outside the premises in which Gregurek conducted a restaurant. The circumstances of the meeting would allow the inference that it was by prearrangement. Darby got into the applicant's car and the two men remained there for about seven minutes. The evidence established also that Gregurek usually left the restaurant for his home in Gipps Street, East Melbourne, between 11.30 pm. and 12.30 a.m. and that sometimes he took with him the takings from his business and sometimes he was escorted by an employee driving a second car; although none of these matters was shown to have been in the knowledge of the alleged conspirators. The two men were then seen to **[5]** drive to a point near Gregurek's home. Both men made some exploration of two lanes on to one of which the rear gate of Gregurek's premises opened. That gate was examined by them. The men returned to the car which was then driven to, and parked in, Powlett Street at a point which, it might be inferred, was sufficiently distant from the front entrance to Gregurek's home in Gipps Street as not to attract the attention of anyone travelling by car to Gregurek's home.

Darby then went on to Gregurek's premises, knocked on the front door and attempted to gain entry to the house by posing as a policeman and giving some description of Gregurek's motor vehicle that was sufficiently accurate as to indicate that the two men were aware both of the vehicle and the identity of its owner. However, Mrs Gregurek was not deceived by the simulation and

refused to admit Darby. Moreover, she could see him through a window of an adjacent room and so was able in court to identify Darby as the man to whom she had refused entry to the house. Darby then rejoined the applicant in his car which was driven a little further away. The two men alighted from the car and donned masks and gloves. Darby then returned to the car from which he took a pistol which he placed in the rear of his trousers and, apparently in order to conceal it, pulled his jumper over it. They went back to Gregurek's front gate where they remained for about five minutes before returning to their car. The car had just begun to be driven when it was intercepted by police who found in it the masks, glove and pistol, as well as a jemmy, a pair of pliers and overalls. Darby and the applicant were arrested and interviewed.

The applicant made no intentional admissions. **[6]** However, when first questioned, he did give a false name and said he was unable to say who owned the incriminatory clothing and pistol or how they had got into his car where he had seen them found by the police. Later he gave his correct name and proffered an explanation for the presence of the clothing and pistol in his car. That explanation was that Darby had brought the equipment, the nature of which was unknown to him. He said that Darby had arrived at Bridge Road by train – although the evidence of the police officers was that he arrived by car. The applicant also denied having left the car whilst it was in East Melbourne, and having worn a mask, although these facts were sworn to by eyewitnesses. At his trial the applicant made an unsworn statement in which he claimed to be innocent of any offence. Darby, on the other hand, did, according to the evidence of the investigating police officers, make an admission to them of his guilt of the offence with which he was charged.

So far as the applicant is concerned the evidence that alone is admissible against him established an overwhelming case to go the jury that he conspired with Darby to commit a criminal act. Similarly, the answers given by him at his interrogation disclosed consciousness of guilt of a crime. The evidence, however, appears to me to fall short of establishing that that crime was that the applicant conspired with Darby to commit armed robbery. The Crown was required to establish each of the elements of the offence. I am prepared to assume, without deciding, that for the purpose of determining this particular ground it may be conceded that the identity of the person to be robbed, and that of which he was to be robbed, are **[7]** mere particulars and the non-proof of them, or either of them, would not serve to invalidate the conviction. It may also be assumed that the elements of a conspiracy and relevant possession of a firearm were fully established by the evidence. But the evidence upon which the Crown placed reliance to establish that the applicant conspired to commit robbery is, at best, equivocal. Proof that the agreement entered into was one to rob was dependent upon circumstantial evidence. To enable the jury to have been satisfied beyond reasonable doubt of the applicant's guilt of the offence charged it was necessary not only that his guilt should be a rational inference, but that it should be the only rational inference, that the circumstances enabled them to draw. That is to say the jury were disentitled to return a verdict of guilty unless the circumstances were such as to be inconsistent with any reasonable hypothesis other than that of the applicant's guilt of the crime charged. Of course suspicion (which was considerable in the present case) is not sufficient. Nor is it enough that the only rational inference is that a crime has been committed. The permissible inference as the learned Prosecutor for the Queen conceded, must point exclusively to the commission of the crime charged – or at least to a lesser alternative offence, of which, at common law or by statute, the jury were entitled to find the applicant guilty. There is, of course, no such alternative to the common law offence of conspiracy.

There is a number of other crimes which the evidence placed before the jury would allow them rationally to infer the applicant conspired to commit. Reference to two such offences will suffice: abduction and aggravated burglary. **[8]** There is in the evidence nothing inconsistent – and such that is consistent – with an intention by the applicant that he and Darby commit either of these offences. The offence of abduction involves the taking away of a woman by force with the intent carnally to know her. The attempt by Darby to trick his way into the house and the subsequent return of the two men to the home are compatible with an intention to commit such an offence. The Crown's contention was that the earlier foregathering outside, and observation of, Gregurek's business premises in Richmond amounted to a "casing" of the premises as a preliminary to a robbery of Gregurek of the business takings when he arrived in his home.

There is a number of difficulties that stand in the way of the adoption of such a suggested inference. In the first place there is no evidence to establish that the applicant or Darby knew

that on occasions Gregurek took the takings with him to his home, or the time at which he might be expected to leave for home. Nor is it easy to perceive why, if he was to be robbed at all, the robbery should not take place at the restaurant where the money could certainly be expected to be found. However, if it was thought the offence might have better prospect of success if committed at Gregurek's home, then why the desire of one conspirator to gain entry to the home? According to the Crown, it was in order to hold the wife at gunpoint so as the more readily to persuade the surrender by Gregurek of his money upon his entering his home. But, the evidence almost certainly establishes that Darby did not have the pistol with him when he tried to gain a non-forcible entry to the home. Even had he then had a firearm with him, and assuming he was aware of Gregurek's usual movements, was **[9]** he intending to remain inside the house with his attention concentrated solely upon holding Mrs Gregurek at gunpoint awaiting the return of her husband for a time which might be at least an hour and a quarter after the invasion of the home at first perpetrated? And it must be recalled that on the occasion of this incident Darby made no attempt to conceal his identity.

An explanation, at least equally as plausible as that of the Crown, for the preliminary visit to Bridge Road, is that it was to check that Gregurek's business was still open and that he was following his usual routine so that if he was (which, in fact, it appears he was), the conspirators knew that they had at least a quarter of an hour to commit their contemplated offence in relation to the Gipps Street house without any interruption caused by Gregurek's arrival. But then the Crown argued that such an hypothesis was totally incompatible with the fact that the alleged offender's car contained a pistol, jemmy, screwdriver, overalls, gloves and balaclava-type face masks; that the co-conspirators donned gloves and masks, with one taking the pistol, and that they both went through the front gate of Gregurek's home where they remained for about five minutes. Whether that be so or not, those events still leave unexplained the attempt by Darby a short time before to trick his way into the home. All the evidence points to an intent by one means or another to get into the house for one reason or another – and not to waylay Gregurek at some point short of his home.

Accordingly, if the intent was to make an entry **[10]** to the home, by force if bluff failed, and that at a time some fifteen to thirty minutes before Gregurek was at the earliest expected home, and the purpose was not to abduct Mrs Gregurek or to kidnap her for ransom purposes (because those objectives might be thought to be inconsistent with the first attempted entry by one unarmed conspirator only) must the purpose necessarily have been to rob Gregurek? Again the answer must be, no. The entry as trespassers of the home of Mr and Mrs Gregurek might just as equally (indeed, on one possible view, more probably) have been with the intent, if not to commit an offence involving an assault on a person or involving damage to the building (which were at least possibilities), to steal from the building. Mrs Gregurek is an artist and we were told there was reason to suppose that there were articles of value within the house. That is to say that the evidence makes possible, perhaps probable, that the conspiracy was not to rob but to commit the offence of burglary. If the agreement included the intention that at least one of those acting in concert should have a firearm with him, the offence was then one of aggravated burglary.

The foregoing discussion of the possible content of the conspirators' agreement turns doubtless on much that is speculation or mere surmise. But the very speculation that the state of the evidence inevitably attracts in an endeavour to interpret the conspirators' criminal objective is itself indicative of the inability to feel a moral certainty that the evidence allows as the only rational inference to be drawn from it that that object was armed robbery.

[11] This conclusion is tantamount to the assertion that the evidence before the jury was insufficient to enable them to be persuaded beyond reasonable doubt that a vital element in the Crown case had been made out. Accordingly I consider that the trial Judge's failure to grant the applicant's counsel's application for an acquittal by direction to have been an error. I would thus allow the relevant amendment to the grounds of the notice of application for leave to appeal, grant the application, allow the appeal and quash the conviction.

YOUNG CJ: I agree in the judgment which has just been delivered and I have nothing to add.

TADGELL J: I also agree.

YOUNG CJ: The orders of the Court are as follows: The application to amend the notice of application for leave to appeal so as to add the ground that the conviction was against the weight of the evidence is granted. The application for leave to appeal against conviction is granted, the appeal treated as instituted and heard instanter and allowed. The conviction is quashed and a verdict and judgment of acquittal is entered.
