09/83

HIGH COURT OF AUSTRALIA

R v DARBY

Gibbs CJ, Murphy, Aickin, Wilson and Brennan JJ

28 April 1981; 18 May 1982

[1982] HCA 32; (1982) 148 CLR 668; 40 ALR 594; (1982) 56 ALJR 688; noted 61 ALJ 134

CRIMINAL LAW – CONSPIRACY – ACQUITTAL OF CONSPIRATOR – EFFECT ON CONVICTION OF OTHER CONSPIRATOR.

D. and T. were tried together in the County Court for conspiring together to commit armed robbery. Both were convicted, but on appeal, T's conviction was quashed on the ground that the evidence fell short of establishing what crime he conspired to commit. The case against D. was stronger, in that there had been evidence of admissions by D. that the object of the conspiracy was armed robbery. D. appealed to the Full Court (Victoria) on the ground that T. had been acquitted of the conspiracy. The Full Court allowed the appeal, and followed the authority of the Privy Council in *Dharmasena v The King* 66 TLR (Pt 2) 365, [1950] UKPC 15, [1951] AC 1, [1950] WN 39, wherein it was held that where 2 persons are jointly presented for trial on a single count of conspiracy between themselves, the acquittal of one necessitates the acquittal of the other. On appeal to the High Court—

HELD: (Murphy J dissenting) Appeal allowed. Judgment of Full Court set aside; conviction and sentence of County Court affirmed.
The conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted, unless in the circumstance of the case his conviction is inconsistent with the acquittal of the other person.

(Note: For comment on this decision, see MC 55/1982 and (1982) 56 ALJ 666. Ed.]

GIBBS CJ, AICKIN, WILSON and BRENNAN JJ: *[After setting out the facts, the joint judgment continued]:* It is said that the rule expressed in *Dharmasena v R* [1950] UKPC 15; [1951] AC 1; [1950] WN 39; 66 TLR (Pt 2) 365, while explicable in its historical origins, is without any present justification and is wrong in principle. This Court is now asked, in the exercise of its undoubted function, to declare the common law for Australia.

The agreement of minds is an essential element of the offence of conspiracy. It is therefore understandable that in times when the grounds for challenging a conviction were limited to errors which appeared on the face of the record of proceedings the courts were prepared to find a miscarriage of justice based on apparent inconsistency where that record showed that one conspirator has been convicted while his alleged co-conspirator had been acquitted. In reality, the verdicts may not have been inconsistent at all; the conviction of one may have proceeded upon evidence admissible against that one which was very much stronger than the evidence admissible against the other or others. But it was not until the passage of the *Criminal Appeal Act* 1907 that the English appellate courts were given jurisdiction to review convictions on grounds which permitted or required scrutiny of the evidence or the summing up of the trial judge. That Act abolished the Writ of Error procedure which had formerly applied: see, generally, Holdsworth, *A History of English Law* vol. I, 7th ed. (1956), pp 215-218.

However, notwithstanding that henceforth, the courts were enabled to have regard to the sufficiency of the evidence in support of a particular conviction, the old rule had became firmly established. There had been some distinctions drawn, depending on whether the conspirators were tried together or separately, and whether there were joint or separate informations. In *R v Plummer* (1902) 2 KB 339; [1900-3] All ER 613, the Court for the Consideration of Crown Cases Reserved applied the basic rule to a case in which three persons were charged jointly with conspiracy and one pleaded guilty and the other two were acquitted. The conviction of the third was quashed. It was held that the three accused being jointly indicted, the trial should be regarded as joint, with

the result that the record of conviction "would be inconsistent and contradictory, and so bad on its face" (p348, per Bruce J). The cases are exhaustively examined in the careful and comprehensive judgment of Roskill LJ in the decision of the Court of Appeal in *DPP v Shannon* (1975) AC 717; [1974] 2 All ER 1009; (1974) 59 Cr App R 250; [1974] 3 WLR 155. It is unnecessary to duplicate that review.

In *Dharmasena* (*supra*) two persons were tried together on, *inter alia*, a joint charge of conspiracy to murder. They were both convicted. One appealed successfully, and on a new trial was acquitted of the conspiracy charge. Their Lordships advised that because of the rule that when two persons are tried together on a charge of conspiracy the only possible verdict is either that both are, or neither is, guilty, an order for the retrial of one makes it imperative that the other should also be retried at the same time. In the circumstances, that procedure not having been followed it was held that the proper course was to treat the later acquittal of one as requiring the acquittal of the other. In the course of the reasons of their Lordships, it was stated at pp5-6:

> "After this verdict (that is, on the retrial) the position was that of two conspirators one had been found guilty by one jury and the other acquitted by another. In their Lordships' opinion this is an impossible result where conspiracy is concerned. It is well established law that if two persons are accused of conspiracy and one is acquitted the other must also escape condemnation. Two at least are required to commit the crime of conspiracy; one alone cannot do so. In the present case the only conspirators suggested were the two accused persons, and there were no others, known or unknown, who might have participated in the crime. It is true that one conspirator may be tried and convicted in the absence of his companions in crime: *R v Ahearne* (1852) 6 Cox CC 6, but where two have been tried together so that the only possible verdict is either that both are, or neither is, guilty, an order for the retrial of one makes it imperative that the other should also be retried."

In the case of *Shannon* (*supra*) this area of the law was subjected to a rigorous review, both in the Court of Appeal and the House of Lords. Shannon was one of a number of defendants charged on an indictment containing twenty-two counts. In one of those counts he was charged with one Tracey with conspiring dishonestly to handle stolen goods. Shannon pleaded guilty, was convicted and sentenced to imprisonment for four years to run concurrently with sentences imposed in respect of other offences. Tracey pleaded not guilty, and was eventually acquitted. Shannon then appealed on the ground of mutually inconsistent entries on the record touching the guilt of Tracey and himself, there being but one record notwithstanding the different pleas and the fact that there was no joint trial. Roskill LJ, speaking for the Court of Appeal, summed up that Court's view of the development of the law in the following terms:

> "We think that the conspiracy cases decided before 1907 support the following propositions of law as at that date:
> (1) If A and B alone (that is with no other person named or unnamed) are indicted and tried together for conspiracy together, the jury must be told that both must be convicted or both must be acquitted, and if one is convicted and the other acquitted, the conviction must be quashed.
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> (2) If A and B alone (that is with no other person named or unnamed) are indicted but only A is tried, either because B is dead or has disappeared, and A is convicted of conspiracy with B, that conviction is in no way vitiated by B's death or absence.
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> (3) If A and B alone (that is with no other person known or unknown) are indicted for conspiracy and only A is tried and convicted, and subsequently B is tried and acquitted, A's conviction must be quashed.
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> (4) If A and B alone (that is with no other person known or unknown) are indicted for conspiracy together and A pleads guilty and B not guilty and B is tried and is acquitted, A's conviction must be quashed.
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> We further think it clear that since 1907 not only have the cases upon which the foregoing propositions of law are founded been consistently followed and applied, but that they and the later cases (if the latter be correctly decided) support the further propositions:
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> (5) If A and B alone (that is with no other person named or unnamed) are indicted for conspiracy together and both plead not guilty and both are tried and convicted, either together or on separate occasions, and B's conviction is later quashed for any reason, whether for misdirection or insufficient evidence to justify conviction or (since 1966) because the verdict against B is unsafe and unsatisfactory, A's conviction must be quashed.
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> (6) If A and B alone (that is with no other person named or unnamed) are indicted for conspiracy together and A pleads guilty, and B is tried either on the same occasion or on a later occasion and is convicted but B's conviction is later quashed for any reason, A's conviction must be quashed." (pp733-734).

The Court of Appeal then considered whether it could justify a departure from these propositions because of the changes in the law applicable to criminal appeals brought in 1907 and in later years. It accepted the force of the academic criticisms that have been levelled at the present state of the law (Smith and Hogan, *Criminal Law*, 3rd ed (1973), p181, and Glanville Williams, *Criminal Law*, 2nd ed (1961), par 213), and made no secret of the conclusion to which it would come if it was free to do so. However, the Court decided that it was "clear law beyond the power of judicial review" that if A and B are indicted and tried together (there being no other alleged conspirators), however strong the evidence against A and however weak it be against B, both must be convicted or both acquitted. The question was not one of appellate procedure or one of evidence or proof, but of the nature in law of the offence of conspiracy. Notwithstanding that A admits that he is guilty of conspiring with B (and no one else), the effect of the acquittal of B is to deny the existence of the conspiracy and not merely a finding of no conspiracy against B. Since there is no conspiracy, A's conviction must be quashed.

In the House of Lords, emphasis was placed upon the distinction, in a case where there is a charge of conspiracy against A and B (and no one else), between separate trials, on the one hand, and a joint trial on the other. The facts in the case satisfied the former description, and their lordships were unanimous in holding that a subsequent acquittal of B does not of itself warrant setting aside the conviction of A. In that respect the decision in *Dharmasena* was disapproved. However, differing views were expressed in relation to the case of a joint trial. Lord Morris of Borth-y-Gest (with whom Lord Reid agreed) frankly acknowledged that here the force of logic comes into collision with the rule that on a joint trial of alleged conspirators (there being no one else) the jury must either convict or acquit them all. He considered it a desirable goal in the administration of the criminal law to avoid complications and subtleties, and that viewed in that light the old rule had much to commend it and it would therefore be wiser, to adhere to it.

Viscount Dilhorne recognized the propriety of the rule in the case of a joint trial where there is no material difference in the evidence admissible against each. He then postulated a case very similar to the facts of the present case, namely, one where there is very material difference in the evidence which is admissible against A and B because A has made a voluntary confession and B has not. He emphasized the necessity for the trial judge to direct the jury to consider the evidence against each of the accused separately and then said it would be described as "a nonsense" if they then be told that they must, even though satisfied of A's quilt, acquit him if they think that the evidence admissible against B is sufficient to convict B. He expressed an inclination to hold the rule obsolete, the foundation for it having gone and the court now being able to ascertain what happened at the trial", but declined to give a firm conclusion on a question which did not arise for decision.

Lord Simon of Glaisdale acknowledged that it would be enough to dispose of the appeal to declare that the old rule has no subsisting validity in the case of separate trials, but he urged that such a declaration would be both illogical and practically inexpedient. He observed that to affirm the old rule in the case of joint trials would leave it in anomaly with the *dicta* in *Robinson v Robinson and Lane* (1858) 1 Sta & Tr 362; 164 ER 767 (relating to proof of adultery) and with the reasoning in *R v Andrews Weatherfoil Ltd* (1972) 1 All ER 65; (1972) 1 WLR 118 (relating to corruption), and lead to injustice. He favoured a declaration that the whole body of rules whereby the acquittal of B of conspiracy with A must of itself be held to be inconsistent with A's conviction of conspiracy with B has no subsisting validity.

Lord Salmon, while recognizing that originally there was a sound reason for the existence of the rule, considered that that reason had probably disappeared by the middle of the last century (with the creation of the Court for the Consideration of Crown Cases Reserved), and certainly by 1907. He said:

> "The courts are no longer obliged to approach a conviction in blinkers with their eyes directed to nothing but the record. It seems to me that the old rule has long since outlived its usefulness and should now be swept away, together with the anomalies and absurdities from which it is inseparable."

It is apparent that, like Lord Simon of Glaisdale, he would abolish the rule in its entirety. There was a parliamentary sequel to *Shannon* in 1977, when the *Criminal Law Act* 1977 (UK) abolished the rule that the acquittal of all other alleged conspirators must necessarily result in the acquittal of the person accused of conspiring with them (s5(8)). That result will now follow

only when under all the circumstances of the case the conviction is inconsistent with the acquittal of the others. It is argued for the respondent that the rule, in so far as it refers to joint trials, should not be disturbed, and several submissions are advanced in support of that contention. It is observed that certain of their Lordships in *Shannon* were prepared to support the continuance of the rule. The respondent also relies on the decision of this Court in *Smith v R* [1970] HCA 48; (1970) 121 CLR 572; [1971] ALR 193; (1970) 44 ALJR 467 where, so it is said, the existence of the rule is both recognized and accepted. We pause to remark that in our opinion the respondent cannot gain much comfort from that decision for two reasons: the first is that no issue was raised in that case concerning the existence of the rule, and the second is that at the time when it was decided the rule was supported by the then binding authority of the Privy Council in *Dharmasena*. That authority as a matter of law no longer exists: cf. *Privy Council (Appeals from the High Court) Act* 1975; *Viro v R* [1978] HCA 9; (1978) 141 CLR 88; (1978) 18 ALR 257; (1978) 52 ALJR 418.

In support of the continued existence of the rule, counsel for the respondent also relies on the nature in law of the offence of conspiracy. He argues that the question is not one of changing appellate procedures or distinctions in the quantum of weight of evidence. It is the very agreement of minds that forms an essential element of the crime, and this consideration makes it logical and fair to say that even though A may admit that he is guilty of conspiring with B (and no-one else), the effect of an acquittal of B is to deny the existence of the conspiracy itself. The matter may be put another way: is there not a fundamental inconsistency in sustaining a conviction that A conspired with B when B has been declared to be innocent of conspiring with A? Despite the plausibility of the argument, we are unable to accept it. In our opinion, it proceeds upon a mistaken view of the true effect of an acquittal. We agree, with respect, with the observations of Lord Salmon in *Shannon*, at p772:

> "An accused is entitled to be acquitted unless the evidence satisfies the jury beyond reasonable doubt that he is guilty. A verdict of not guilty may mean that the jury is certain that the accused is innocent, or it may mean that, although the evidence arouses considerable suspicion, it is insufficient to convince the jury of the accused's guilt beyond reasonable doubt. The verdict of not guilty is consistent with the jury having taken either view. The only effect of an acquittal, in law is that the accused can never again be brought before a criminal court and tried for the same offence. So far as the Crown is concerned, the accused is deemed in law, to be innocent. His acquittal cannot, however, affect anyone but himself and indeed would not be admissible in evidence on behalf of or against anyone else. Anyone acquitted of a criminal conspiracy may still be sued in damages for the conspiracy of which he has been acquitted at his trial."

It is true that greater conceptual difficulties attend the task of a jury determining the guilt of both A and B on a joint trial for conspiring together (and with no one else) than in the case of separate trials. A can only be convicted if the jury is satisfied beyond reasonable doubt on evidence admissible against him, *inter alia*, that A and B conspired together. In essaying their duty in the case of B, the same jury which was satisfied of A's guilt in conspiring with B may on evidence admissible against B fail to be satisfied beyond reasonable doubt that B did conspire with A. The result is then that in the one trial the jury is saying at the same time that A is guilty of conspiring with B but B is not guilty of conspiring with A.

In reality, of course, the apparent phenomenon is readily explained in terms of the obligation of the jury to consider separately the guilt of the two accused on the basis only of the evidence admissible against each. Nevertheless, there remains an incongruity in the direction of a trial judge which on the one hand instructs the jury that they must consider separately the guilt of each accused, taking into account only the evidence admissible against each and on the other tells them that they must either convict them both or acquit them both. But it may be worse than that. Such a direction might well result in injustice to one accused. In a case where the evidence against A is overwhelming, a jury which is directed that they must either convict or acquit both may find it practically impossible to sustain and act on a reasonable doubt on the evidence admissible against B.

In the light of these considerations, in our opinion there is much to be said for the recent decision of the Supreme Court of Canada in *Guimond v R* (1979), 44 CCC 2d 481 requiring separate trials in cases where the evidence admissible against one accused is significantly different from the evidence admissible against the other. We would encourage the adoption of such a practice. In cases where there is no material distinction in the evidence admissible against both alleged conspirators, the trial judge's advice to the jury that they will either convict or acquit both accused

will continue to be appropriate not because of any technical rule but because of the circumstances of the case (cf. Lord Simon of Glaisdale in *Shannon (supra*) at p768). The old rule has been subjected to much academic criticism: see, for example, *Russell on Crimes and Misdemeanours*, 4th ed (1865), vol 3, p146; Smith and Hogan, *Criminal Law* (*supra*): Glanville Williams, *Criminal Law* (*supra*); Peter Gillies, *The Law of Criminal Conspiracy* (1981), p203; Professor Smith in 1974 Crim LR 178ff; IR Scott *Verdicts in Conspiracy Cases*, (1975) Vol 38, Mod LR 221. It has received rough treatment in England, in *Shannon*, in Canada, in *Guimond*, and in the Supreme Court of Nebraska in *Platt v State* (1943) 3 NW 2d 849, although the last mentioned case was confined to the question of apparent inconsistency in verdicts resulting from separate trials.

In the light of the wealth of both academic and judicial consideration that has been devoted to this topic in recent years, we have no doubt that this Court should now redirect the common law of Australia on to its true course. It should determine that the conviction of a conspirator whether tried together with or separately from an alleged co-conspirator may stand notwithstanding that the latter is or may be acquitted unless in all the circumstances of the case his conviction is inconsistent with the acquittal of the other person. In our opinion such a determination will focus upon the justice of the case rather than upon the technical obscurities that now confound the subject.

We would grant special leave to appeal, allow the appeal, set aside the judgment of the Full Court, affirm the conviction and sentence and remit the matter to the Supreme Court to make such orders as may be appropriate.
