55/82; [1982] HCA 32

HIGH COURT OF AUSTRALIA

R v DARBY

Gibbs CJ, Brennan, Aickin and Murphy JJ

18 May 1982

[1982] HCA 32; (1982) 148 CLR 668; (1982) 40 ALR 594; 56 ALJR 688; noted 56 ALJ 666; 61 ALJ 134

CRIMINAL LAW - CONSPIRACY - IF ONE ACCUSED ACQUITTED WHETHER OTHER ACCUSED CAN BE CONVICTED - TRADITIONAL RULE.

D. and T. were each charged with conspiring with the other to commit armed robbery and both were convicted. T. appealed separately and his conviction was quashed on the ground that there was no evidence that he became a party to the alleged conspiracy. The Court of Criminal Appeal then allowed a subsequent appeal by D. and quashed that conviction, holding itself bound by the Privy Council's decision in *Dharmasena v The King* (1951) AC, which said:-

> "It is well established law that if two persons are accused of conspiracy and one is acquitted, the other also must escape condemnation. Two at least are required to commit the crime of conspiracy; one alone cannot do so."

The Crown applied for special leave to appeal against that order.

HELD: (Murphy J dissenting). Appeal allowed. Judgment of the Full Court set aside and conviction and sentence affirmed.

"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 subjects."

[Comment: This is a landmark decision which reverses the general rule which has stood the test of time. Because of the import of this decision, the following extracts from the High Court are published, emphasis being placed on 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, which "made no secret of the conclusion to which it would come if it was free to do so."]*

"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 was said, the existence of the rule is both recognised 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* [1951] AC 1. That authority as a matter of law no longer exists: cf. *Privy Council (Appeals from the High Court) Act* 1975; *Viro v R* (1978) [1978] HCA 9; (1978) 141 CLR 88; (1978) 18 ALR 257; (1978) 52 ALJR 418."

[In commenting further on the prima facie *inconsistency in sustaining a conviction that A conspired with B when B has been declared to be innocent of conspiring with A, the Court went on to say] ...* "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. ..."

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 on 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 & 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) 8 NW 2d 849, although the last mentioned case was confined to the question of apparent inconsistency in verdicts resulting from separate trials."
