ATTORNEY-GENERAL v. OTERO ARGUEZ

COURT OF APPEAL (Schofield, C.J.): October 15th, 1997

Criminal Procedure—appeals—striking out—may strike out notice of appeal as abuse of process if discloses no substantive ground of appeal under Court of Appeal Ordinance, s.9

Criminal Procedure—appeals—appeals against acquittal—judge's direction to acquit on grounds of no case to answer involves "question of law alone" for purpose of Court of Appeal Ordinance, s.9(2)

Criminal Procedure—prosecution case—case to answer—for court to decide whether evidence adduced upon which properly directed jury could convict—if clear evidence or if strength of evidence depends on matters within jury's province, case to be left to jury

The applicant was charged in the Supreme Court with manslaughter.

The applicant was tried and was acquitted upon the direction of the judge following a no-case submission. The Attorney-General appealed against the acquittal under s.9(2) of the Court of Appeal Ordinance, on the ground that the judge (Pizzarello, A.J.) had been wrong to withdraw the case from the jury and to direct them to acquit the applicant. The applicant applied for the notice of appeal to be struck out as an abuse of process on the basis that it disclosed no substantial ground of appeal.

He submitted that under s.9(2), there could only be an appeal against an acquittal by the Supreme Court on a question of law, whereas that court's decision to acquit was made on the facts before it.

The Crown submitted in reply that there had been no abuse of process, since the question of whether there had been sufficient evidence upon which the jury could properly convict the applicant of manslaughter was one of law.

Held, dismissing the application to strike out:

(1) The court had a discretion at common law to strike out as an abuse of process a notice of appeal against a decision of the Supreme Court in a criminal case. However, it should be exercised so as to strike out only in clear and obvious cases (page 192, lines 5–14).

(2) The notice of appeal did not constitute an abuse of process, since it disclosed a valid ground of appeal under s.9(2). The issue of how the trial judge should have approached the submission of no case to answer was a legal one. He was required to assess the evidence to decide whether the

jury, if properly directed, could on the strength of it properly convict the applicant of the offence charged. If there was clear evidence or if the strength of the evidence depended on matters which were in the province of the jury, *e.g.* the credibility of a witness, the judge should leave the case to be tried by them. If not, the case should be withdrawn from the jury and a direction given to them to acquit. The proper application of this legal test was the subject of the Attorney-General's appeal (page 192, line 15 – page 193, line 18).

Cases cited:

(1) *Burgess* v. *Stafford Hotel Ltd.*, [1990] 1 W.L.R. 1215; [1990] 3 All E.R. 222, *dicta* of Glidewell, L.J. applied.

(2) *Mediterranean Trust Corp. Ltd.* v. *Gibraltar Bldg. Socy.*, 1997–98 Gib LR 173, considered.

(3) *R.* v. *Galbraith*, [1981] 1 W.L.R. 1039; (1981), 73 Cr. App. R. 124, applied.

Legislation construed:

Court of Appeal Ordinance (1984 Edition), s.9(2):

> "In any of the following cases, that is to say—
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> (*a*) where an accused person tried on indictment is discharged or acquitted or is convicted of an offence other than the one with which he was charged;
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> . . .
>
> the Attorney-General, the informant or the accused person, as the case may be, may appeal to the Court of Appeal against the judgment of the Supreme Court on any ground of appeal which involves a question of law alone."

C. Finch for the applicant;
R.R. Rhoda, *Attorney-General*, for the Crown.

SCHOFIELD, C.J.: Daniel Otero Arguez ("Otero") was charged on indictment with manslaughter. His trial commenced before Pizzarello, A.J. and a jury on June 30th, 1997. At the end of the evidence for the Crown the defence submitted that the evidence was such that the case ought not to be left to the jury. This submission was accepted and the learned judge directed the jury to acquit Otero.

The Attorney-General has lodged a notice of appeal against "such part of the said decision as decides that, as a matter of law, there is no case for [Otero] to answer, that the matter should be withdrawn from the jury and that the jury should be directed to return a verdict of not guilty."

In this application Otero's counsel argues that the notice of appeal be struck out on the basis that it does not show any substantial ground of appeal. His argument is that an appeal by the Attorney-General to the Court of Appeal in accordance with the terms of s.9(2) of the Court of

Appeal Ordinance only lies on a ground which involves a question of law alone, and that in the present case the learned judge came to a decision on the evidence. He argues that any appeal in this case would be on the facts and would not involve a question of law.

The first question raised was whether this application to strike out a notice of appeal as an abuse of process may be made, in view of the absence of a statutory procedure such as exists in England for such an application. In *Mediterranean Trust Corp.* v. *Gibraltar Bldg. Socy.* (2) our Court of Appeal held that in the case of a civil appeal it had the power to strike out a notice of appeal as an abuse. It was acknowledged by the Attorney-General that this power must exist in respect of a criminal appeal. However, such a power must be exercised only in clear and obvious cases (see *Burgess* v. *Stafford Hotel Ltd.* (1) ([1990] 1 W.L.R. at 1222, *per* Glidewell, L.J.)).

Guidelines on how a judge should approach a submission of no case to answer were given by the English Court of Appeal in *R.* v. *Galbraith* (3). The court had this to say (73 Cr. App. R. at 125):

> "We are told that some doubt exists as to the proper approach to be adopted by the judge at the close of the prosecution case upon a submission of 'no case' (see *Archbold* (40th ed., 5th Supp.), para. 575 and TOBIN [1980] Crim. L.R. 731).
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> There are two schools of thought: (1) that the judge should stop the case if, in his view, it would be unsafe (alternatively unsafe or unsatisfactory) for the jury to convict; (2) that he should do so only if there is no evidence upon which a jury properly directed could properly convict. Although in many cases the question is one of semantics, and though in many cases each test would produce the same result, this is not necessarily so. A balance has to be struck between, on the one hand, a usurpation by the judge of the jury's function and on the other, the danger of an unjust conviction."

The Court of Appeal came down firmly in favour of the second of the two schools of thought. The main reason for so doing was that to apply the first approach would put the judge in danger of weighing the evidence and making a determination on the truthfulness of the witnesses, an approach which usurps the functions of the jury. The court said (*ibid.*, at 127):

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission

being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one view of the facts there *is* evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

It seems to me that the court was laying down a legal test and, in so doing, was acknowledging the principle that in a jury trial matters of law are for the judge and matters of fact are for the jury.

Pizzarello, A.J. considered *Galbraith* in his ruling and, although he obviously had to consider and review the prosecution evidence in determining that such evidence, taken at its highest, was such that a jury properly directed could not properly convict upon it, he was applying a legal test. If he was wrong in the application of that test he was wrong in law. It follows, therefore, I believe, that in putting the application of the guidelines laid down in *Galbraith* before the Court of Appeal, the Attorney-General seeks a decision on a question of law.

Accordingly, the application is dismissed.

Application dismissed.
