R. v. OTERO ARGUEZ

COURT OF APPEAL (Neill, P., Waite and Russell, JJ.A.):
March 12th, 1998

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 respondent was charged in the Supreme Court with manslaughter.

In a confrontation in a night club, the respondent struck the victim a blow to the head and he allegedly hit his head against a mirrored pillar with metal edging as he fell to the floor, shattering the glass. The pillar was later found to be stained with blood. As the victim was propped, unconscious, against the pillar, it was alleged that his head fell back against it again. He died some days later. A pathologist gave evidence that the head injury which resulted in the victim's death was most probably caused by the initial violent contact with the pillar.

The respondent was acquitted upon the direction of the trial judge (Pizzarello, A.J.) following a no-case submission, on the basis that the respondent's blow might not have been the substantial cause of death and that in the absence of more conclusive evidence, it was not proper to ask the jury to decide the issue of causation. The Attorney-General appealed against the acquittal under s.9(2) of the Court of Appeal Ordinance, claiming that the judge had been wrong to withdraw the case from the jury. 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.

Schofield, C.J., sitting as a single Judge of the Court of Appeal, held that under s.9(2) the notice of appeal disclosed a valid ground of appeal, since the issue of how the trial judge should have approached the submission of no case to answer was a legal one. The proceedings before the Chief Justice are reported at 1997–98 Gib LR 190.

On the hearing of the substantive appeal, the Crown submitted that (a) the trial judge had erred in withdrawing the case from the jury, since there was sufficient evidence to support the prosecution case and it was within the province of the jury to decide the question of causation on the evidence before them; and accordingly (b) the respondent's acquittal

should be set aside and his case remitted to the Supreme Court for retrial.

The respondent submitted in reply that (a) since the Supreme Court's decision to acquit was one of mixed fact and law, there could be no appeal against it; and in any event (b) the trial judge had been justified in withdrawing the case from the jury since there was no clear evidence to support the prosecution case.

Held, allowing the appeal:

(1) The correct approach to the submission of no case to answer was a question of law alone, though the judge would inevitably refer to the facts in deciding whether the evidence should be left to the jury. Accordingly, the Attorney-General had shown a valid ground of appeal for the purposes of s.9(2) of the Court of Appeal Ordinance (page 262, lines 30–38).

(2) The test to be applied when assessing the evidence was 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 to support the charge against the respondent or if the strength of the evidence depended on matters which were in the province of the jury, the judge should have left the case to be tried by them. In this case the judge had discounted the link between the respondent's assault and the victim's collapse nearby despite the clear view of the medical witness that the blow to the victim's head and consequent impact with the pillar were the cause of death. Whilst the quality of the evidence as to causation was a matter for the jury, the existence of such evidence could not be denied. Accordingly, the trial judge had erred in directing the jury to acquit and its verdict would be set aside and the case remitted to the Supreme Court for retrial (page 260, line 28 – page 261, line 4; page 262, lines 20–33).

Cases cited:

(1) *R.* v. *Barker* (1975), 65 Cr. App. R. 287n; [1976] Crim. L.R. 324, applied.

(2) *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)(*a*): The relevant terms of this paragraph are set out at page 260, lines 6–10.

s.17(2)(*b*): The relevant terms of this paragraph are set out at page 260, lines 12–16.

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

RUSSELL, J.A., delivering the judgment of the court: Her Majesty's
45 Attorney-General appeals from an order of Pizzarello, A.J. in the

Supreme Court of Gibraltar, given on July 14th, 1997, whereby the judge withdrew from the jury at the conclusion of the prosecution case, a charge of manslaughter laid against the respondent, Daniel Otero Arguez. He directed the acquittal of the respondent.

The appeal is brought pursuant to s.9(2)(*a*) of the Court of Appeal Ordinance, which, so far as is material, provides that "where an accused person tried on indictment is discharged or acquitted . . . the Attorney-General . . . 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." Section 17(2)(*b*) of the Court of Appeal Ordinance, so far as material, provides that—

> "in a case which was tried on indictment, the Court of Appeal may, in an appropriate case and if the interests of justice so require, set aside the discharge or the acquittal of the accused person and remit the case to the Supreme Court to be retried or make such other order as it may consider just."

The Attorney-General, in a sentence, contends that the judge was wrong in law to have withdrawn the case from the jury, that there was evidence to go before the jury upon which it could properly have convicted and that the judge's order therefore did involve a question of law alone.

For the respondent, Mr. Finch submits that the decision of the judge was one of mixed law and fact and that consequently, this court has no jurisdiction to entertain the appeal. Alternatively, Mr. Finch submits that if his objection to the jurisdiction cannot be sustained, nevertheless the judge was entitled, on the evidence, to withdraw the case, properly exercising principles to be found in *R.* v *Galbraith* (2) and the earlier case of *R.* v. *Barker* (1).

It will be convenient and sufficient if we refer to the headnote of *Galbraith* in the *Criminal Appeal Reports* for it accurately reflects the law appearing in the judgment of the court delivered by the then Lord Chief Justice. It reads (73 Cr. App. R. at 124):

> "The court gave the following guidelines on how a judge should approach a submission of no case to answer—(1) If there is no evidence that the crime alleged has been committed by the defendant, the case should be stopped. (2) If there is some evidence but it is of a tenuous character, *i.e.* 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 possible 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."

The Attorney-General relies principally upon sub-para. (2)(b) of that headnote. It will be convenient, therefore, at this stage to summarize the facts.

The victim of the alleged manslaughter was a young man named Dwayne Gary Lockwood, just 20 years of age. He was a member of a Territorial Army unit and was on a training visit to Gibraltar. On Saturday, May 11th, 1996, a group of soldiers including young Mr. Lockwood went into the city. They visited various establishments, had a drink or two, and they finished up at a small discotheque called "Kiss." A number of witnesses were called who testified that the respondent was in "Kiss" that night at a time when the victim was there and before he suffered any injury. This was subsequently to be consistently denied by the respondent.

Apart from his presence in the discotheque, one colleague of Lockwood, a young man called Wilson, gave evidence that he saw the respondent striding purposefully and in a determined manner towards Mr. Lockwood. This was at a time when it seems that a group of young men with whom the respondent was associated had created an atmosphere of hostility towards the soldiers. Wilson testified that he saw the respondent strike a blow at Mr. Lockwood's head while Mr. Lockwood was dancing on the small dance floor depicted in photographs before the court. Immediately thereafter Lockwood fell over and the Crown's case was that he struck his head upon a pillar tiled with mirror tiles and with an aluminum edging. The tiles were subsequently found to be blood-stained and the glass shattered. Lockwood was almost immediately rendered unconscious and he never recovered, dying from his injuries some days later.

The evidence of the pathologist in the United Kingdom, a Dr. Ainsworth, was to the effect that the wound to the back of the deceased's head was caused by that contact with the glass pillar and not simply by his falling to the floor. After the deceased had been struck it seems that a bouncer employed at the club endeavoured to prop him up against the pillar and it may be that the head was allowed to flop back into contact with the pillar and/or the floor. Be that as it may, Dr. Ainsworth took the view that by far the most probable cause of death was violent contact with the pillar associated with the blow.

Subsequently, the respondent was identified at an identification parade as the assailant and also as the person who was present in the discotheque at an earlier stage in the evening than he had suggested was the case. The respondent contended that he did not arrive in the discotheque until the violence had taken place and the deceased had been injured. The Crown, therefore, relied heavily upon the evidence of Wilson but they also relied upon the proximity in terms of time and space between the blow struck by

the respondent and the injury sustained by the victim. Those, the Crown contended, were all matters for the jury.

We turn now to the judge's ruling at the conclusion of the case for the prosecution, which he reduced into writing. It is a comparatively lengthy document and, we have to say, in parts, a little difficult to understand and certainly unhappily expressed. However, it appears to us that the kernel of the ruling is to be found in the last few lines. They read as follows:

> "If the injuries which led to death might have been caused by the bouncer, against the pillar, or in the second or subsequent falls, that would not amount to manslaughter by the assailant; that would, in my view, be an *actus interveniens* and the original assault would not have been the substantial cause of death. To ask the jury to decide which of these alternatives is correct is to ask them to toss a coin, because there is no evidence which can guide them to a proper choice, and so the prosecution have failed to lay sufficient evidence to prove beyond a reasonable doubt that it was the assailant's actions which were the substantial cause of Mr. Lockwood's death. There is therefore not sufficient evidence for this jury to convict this defendant and I rule that there is no case to answer."

In our judgment, that passage discloses an error of law alone. It seems the judge took the view that there was no evidence of a causal link between the violence and the fatal injury, and therefore there was no evidence that the respondent was criminally responsible for the death. That, in our view, is to discount the evidence of Dr. Ainsworth and other features of the case to which we have made reference, namely the violence used by the respondent, the proximity to the place where the deceased fell close to the pillar and other matters upon which the Crown was entitled to rely. The quality of the evidence was, of course, at all times for the jury, but the judge, in our view, was plainly wrong to assert that there was no evidence on causation. That was an error of law. If the judge in the passage cited was intending to say that the evidence was insufficient to prove causation, he was not, in our judgment, entitled to take that view in the light of the decision in *Galbraith* (2) earlier cited in this judgment.

Mr. Finch submits that because the ruling involved references to the evidence it became a ruling of mixed law and fact. We reject that submission. Inevitably there has to be a reference to the facts in order to set the scene for the ruling. A finding in this case that there was no evidence was, in our judgment, plainly a ruling of law alone.

Accordingly, we shall allow this appeal. We shall set aside the ruling of the judge and the verdict of the jury and we shall exercise our powers to direct a retrial of the respondent in the Supreme Court before the Chief Justice.

Appeal allowed.