NORTHERN TERRITORY CRIMINAL LAWYERS' CONFERENCE

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THE TRIAL JUDGE, THE APPEAL COURT AND THE UNSAFE VERDICT

In Doney (1991) 50 A Crim R 157 the High Court finally and firmly put an end to the idea that a judge in a criminal trial could (and indeed some thought he should) direct a jury to acquit if he felt that the evidence against the accused was so weak that it would be unsafe to convict. The obvious distinction was drawn between a case where there was no evidence at all to prove the offence and one where there was evidence but, in the opinion of the judge, of scant weight. The former properly called for acquittal by direction: the latter did not.

The High Court approved several decisions of State Courts of Criminal Appeal which had come to the same conclusion. Attorney-General's Reference (No. 1 of 1983) [1983] 2 VR 410, R v R (1989) 18 NSWLR 74 and Prasad (1979) 23 SASR 161.

Doney and the State cases mentioned emphasise the exclusive right of the jury as fact finders. As their Honours put it in Doney:

> "It follows that, if there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."

Before the Courts of Criminal Appeal in New South Wales and Victoria had decided the cases which met with the approval of the High Court in Doney, there had certainly been instances where trial judges had directed acquittals not on the "no case to answer" ground, but on the broader ground that it would be unsafe to convict. Glass J. in an article in (1981) 55 ALJ 842 refers to the practice at 845:

> "In the recent past certain judges of the Supreme Court of New South Wales have exercised a power to direct an acquittal on the ground that there is a case to answer but that a conviction would be unsafe. This is a departure from the usual practice. I am given

> to understand that judges in Victoria regularly exercise such a power in accordance with a well-entrenched practice, whereas judges in Western Australia have never done so."

The practice was no doubt encouraged by some robust dicta from England. For instance in R v Young [1964] 2 All ER 480 at 482 the Court of Appeal (Lord Parker CJ, Phillimore and Winn JJ) said:

> "It may be that the time has come - the court does not desire to rule on it - when this practice (of inviting juries to stop the case) should be only rarely, if ever, used, and that judges should more often take the responsibility themselves of saying to the jury that it is not satisfactory evidence on which they could convict and, accordingly, direct an acquittal."

In R v Falconer-Atlee (1973) 58 Cr App R 348 Roskill LJ, delivering the judgment of the Court of Appeal (the other judges being Nield and Mars-Jones JJ) said at 357:

> "Not content with this address to the jury, the learned judge, having ruled that there was evidence to go to the jury, went on almost to

> invite the jury to stop the case. This Court has repeatedly said in recent years that this practice should not be followed. If a judge thinks that the case is tenuous, then, even though there is some evidence against the accused person, the judge, if he thinks it would be unsafe or unsatisfactory to allow the case to go to the jury even with a proper direction, should take upon himself the responsibility of stopping it there and then. If the judge is not prepared to stop the case on his own responsibility, it is wrong for him to try and cast the responsibility of stopping it on to the jury."

The highwater mark of this approach in England was reached in R v Mansfield [1978] 1 All ER 134. Lawton LJ, Cusack and Jupp JJ who constituted the Court of Appeal on that occasion considered it a well-established practice that at the end of the Crown case the trial judge could be invited to rule that on the evidence it would be unsafe for the jury to convict and withdraw the case from the jury if he formed that opinion. Lawton LJ, delivering the judgment of the Court remarked "that accords with the trial experience of the three members of this court" (p.140). Their Honours, in that case, decided that it was wrong for the trial judge to reject such an application on the ground that he had no power to

grant it. The Court did, however, draw a distinction between a Judge's view that a witness was lying (which was not a legitimate basis for directing an acquittal) and his view that some of the evidence was so conflicting as to be unreliable (which the court considered could be a legitimate basis for such a direction).

Mansfield, however, is recorded as not followed in Galbraith [1981] 2 All ER 1060. I put it that way because it seems to me, with great respect, that their Honours in Galbraith did not say anything very much different from what was said in Mansfield. Lord Lane, delivering the judgment of the court said at 1062:

> "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 Crown's evidence, taken at its highest, is such that a jury properly directed could not properly convict on it, it is his duty, on a submission being made, to

> stop the case. (b) Where however the Crown's 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 on 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 follows that we think the second of the two schools of thought is to be preferred.
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> There will of course, as always in this branch of the law, be borderline cases. They can safely be left to the discretion of the judge."

In commenting on this passage, the High Court in Doney at 161 observed that "there is some difficulty in reconciling proposition 2(a) (which has some similarity with the position earlier adopted in Victoria) with proposition 2(b)". It seems, however, clear from Doney that neither proposition may now be applied in Australia unless, of course, proposition 2(a) can be equated with proposition 1; in which case it would be unnecessary.

Gleeson CJ in R v R (1989) 18 NSWLR 74 makes some observations on the "borderline" cases mentioned in Galbraith. He says, at 84:

> "The distinction between the existence of evidence and the sufficiency or reliability of that evidence provides convenient categories for most purposes of analysis, but in truth that distinction is not absolutely rigorous. This does not invalidate the distinction. It simply means that it is to be applied with due regard to its limitations; what is involved is a matter of judgment rather than calculation. That, I consider, is what the Court of Appeal in England had in mind in R v Galbraith when reference was made to 'borderline cases' which can 'safely be left to the discretion of the judge'. The word 'discretion' was not being used in its widest sense."

Nevertheless, after Doney it would, I think, be very difficult now to find some basis to cross into that undiscovered country from whose bourne no trial judge returns. Unless there is no scintilla of evidence against the accused at the end of the Crown case the judge must leave it to the jury. One can, I think, best illustrate this by the example suggested by Lord

Widgery CJ in Turnbull [1976] 3 All ER 549 at 553 when he postulates a case of identification by a fleeting glance but sworn to by a witness. Under the English position it may be that a judge could consider that situation so unsafe that he should direct an acquittal. Under Doney I would think that there would be no doubt that a judge could not do so.

There are at least three ways in which a judge could deal with a situation in which he felt that the evidence against the accused was an unsafe basis for conviction. The first would perhaps not be correctly described as ruling or commenting on the weight of evidence in any real sense. In R v R Gleeson CJ at 76 agreed with the proposition put by the counsel for the appellant that in the particular circumstances of that case (which turned on identification) it was open to the trial judge to have rejected the identification evidence with or without holding a voir dire. That would have left no evidence to go to the jury and the trial judge could then have properly directed an acquittal on that basis.

The second alternative would be to invite the jury to acquit at the end of the Crown case on the basis of weakness of the evidence. This does not seem prohibited by Doney. To invite the jury to do this is not to usurp their function but merely to ask them

whether they agree with certain comments then put to them. The difficulty may, of course, be that the jury, as they are plainly entitled to do, may reject the invitation. This occurred, for instance, in the rather remarkable case of Raspor (1958) 99 CLR 346, and I suspect made it much more difficult for the appellant to succeed.

Finally, the most obvious and proper course is for the trial judge to warn the jury of the weakness of the Crown case and the dangers inherent in conviction. That, too, however, carries with it the hazard that, if the accused is convicted, it may be more difficult to succeed on appeal; at least to the extent that grounds based on unfairness or prejudice in summing up may be hard to find. One suspects, for instance, that the appeal of Plomp (1963) 110 CLR 234 was not easy for the appellant's counsel in view of directions of the trial judge, which Dixon CJ considered went too far in the accused's favour (p.242).

Yet at the same time as the jury's fundamental functions are being so carefully protected at first instance, there has been a series of High Court cases (the most recent being Chidiac (1991) 65 ALJR 207) where the right and indeed the duty of an Appeal Court to differ from a jury verdict is emphasised if the Appeal Court considers that in all the circumstances the verdict

is unsafe and unsatisfactory. Whitehorn (1983) 152 CLR 657: Chamberlain (No 2) (1984) 153 CLR 521: Morris (1987) 163 CLR 454: Carr (1988) 165 CLR 314.

If the trial judge, who would seem to be the judge most familiar with the case and particularly possessing, (as Kitto J says in Lovell v Lovell (1950) 81 CLR 513 at 533) "Those advantages sometimes broad and sometimes subtle, which are the privilege of the judge who heard and tried the case", is not permitted to intervene in a weak case why should an Appeal Court be thought to possess some superior insight to disturb a verdict of a jury? If the views and determination of a jury are to be sacrosanct during a trial, what special magic does an Appeal Court have to set aside a verdict using the same process of reasoning which it prohibits in a trial judge? For the test is surely the same, that a conviction is or would be unsafe or unsatisfactory. Furthermore there would seem to be a real injustice to a person convicted in such circumstances. He must undergo the trouble and expense of an appeal to obtain that which he might have had at an earlier stage: and if he has received a custodial sentence he will usually remain in gaol, often for a considerable period, until the appeal is heard and judgment given that he should not have been in gaol at all. And what of those who, for various reasons, do not appeal at all? It is a little too glib to say that this proves they must be guilty. One can

easily think of reasons other than a consciousness of guilt. The sentence or non-parole period may be sufficiently short so that the convicted person will be released before the appeal is heard; or he may have been given some form of non-custodial sentence. In either of these situations he may not wish to proceed; but he will probably and rightly nurse a sense of grievance. Of even more concern would be those for whom the trial has been so traumatic and the result so apparently wrong that they have reached a sense of hopelessness that a further investigation will produce any more just result.

That the High Court was aware there might be some comment that it was illogical to prevent a trial judge from doing what a Court of Appeal could do to prevent unsafe verdicts appears from this passage in Doney at 162:

> "It is necessary only to observe that neither the power of a Court of Criminal Appeal to set aside a verdict that is unsafe or unsatisfactory (as to which see Whitehorn; Chamberlain (No 2) (1984) 153 CLR 521 and Morris (1987) 163 CLR 454; 28 A Crim R 48) nor the inherent power of a court to prevent an abuse of process (as to which see Jago v District Court of New South Wales (1989) 168 CLR 23; 41 A Crim R 307) provides any basis for

> enlarging the powers of a trial judge at the expense of the traditional jury function. The power of a Court of Criminal Appeal to set aside a verdict on the ground that it is unsafe or unsatisfactory, like other appellate powers, is supervisory in nature. Its application to the fact-finding function of a jury does not involve an interference with the traditional division of functions between judge and jury in a criminal trial. Nor does the existence in a trial judge or a court of powers to stay process or delay proceedings where the circumstances are such that the trial would be an abuse of process."

With great respect, this is rather casuistical. If an appellate court's supervisory powers extend to setting aside the verdict of a jury based on the facts presented to it, it is difficult to see how this does not "involve an interference with the traditional division of functions between judge and jury in a criminal trial." Does it make any difference that the interference comes from a bench of appellate judges rather than from the trial judge? In either case the non-fact-finding tribunal is plainly interfering with the functions of the fact-finding tribunal. No doubt for the best of reasons. But that does not make the differentiation between the trial judge's functions and appeal court's functions more

logical in this respect. Of course it is properly said that the life of the law has not been logic but experience. But experience has not in my view demonstrated that trial judges too frequently in the past have taken cases away from juries which should, on any argument, have been left to them. (I appreciate that this is necessarily subjective and I would be glad to hear of views to the contrary by those far more experienced than I in these matters.) But I cannot escape the uneasy feeling that the present rulings of appellate courts are based on the unspoken premiss that trial judges cannot be trusted to deal with this sort of exceptional case; but appeal courts can.

There is no doubt that it must be an exceptional case to disturb the findings of a jury on factual matters. I would echo in full the views of the High Court, and indeed of many other courts, that to interfere excessively or unduly with the functions of a jury is to strike at the very heart of our criminal system. Nevertheless it is clear that exceptional cases do exist where a conviction is or would be unsafe. An ultimate safeguard for such exceptional cases is clearly warranted to avoid a real injustice; but there seems no point in denying the obvious that such a safeguard does involve an interference in the function of the jury. But if a jury's function is to be disturbed in those exceptional cases I cannot see the logic of restricting

it to appellate courts. What I regret is the loss of the double safeguard. Previously, at least in some jurisdictions, the trial judge could direct an acquittal when it appeared to him unsafe to convict. But if he did not, and the evidence was indeed unsafe, there was still the power in the appeal court to set aside the conviction on the same basis. The preliminary safeguard is now closed out; and this may sometimes leave an appeal court in a dilemma. Faced with a situation in which the conviction could not confidently be said to be unsafe, but nevertheless raises some unease, will the court strictly adhere to the boundaries; or will it be tempted to trespass further? The first alternative may work injustice to the individual; the second may in time cause serious inroads into one of the most important and established principles of the common law. Yet it is just those situations which would have often been avoided because an experienced trial judge attuned to the "feel" of the trial would have directed an acquittal.

Dis aliter visum. The High Court has spoken plainly and unambiguously. To ask for review now is equivalent to asking Robespierre to rescind the death penalty on Louis XVI after the royal head had dropped into the basket. This paper is really no more than a recognition that a practice once acceptable in some jurisdictions is now prohibited in Australia; but not in England; coupled with the reflection that on this

occasion the English might be right. In any event its passing is of sufficient importance to warrant at least one cri de coeur from those who feel we may have lost something of value.