

THE QUEEN

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v.

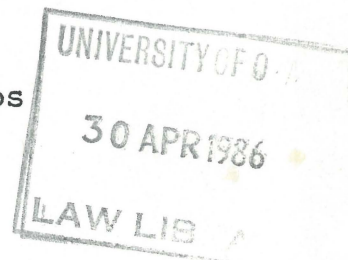
EMMANUEL PAPADOPOULOS and
KENNETH PAUL MacKAY

Coram: Cooke J. (presiding)
Richardson J.
Somers J.

Hearing: 6 August 1979

Counsel: P.A. Williams for Papadopoulos
M.J. Quirke for MacKay
I.L. McKay for Crown

Judgment: 7 August 1979



JUDGMENT OF THE COURT DELIVERED BY COOKE J.

These two appellants have twice been found guilty by juries of wilfully setting fire to a certain building on or about 7 July 1976. The building was Ocean House on Jervois Quay, in which Ziggy's night club operated. They were originally charged jointly with one McMahon, but he pleaded guilty. The first verdict against them was set aside on appeal, because of an inadequate direction in the summing up on the relevance of lies. The grounds on which they seek to achieve the same result regarding the verdict at the second trial have undergone evolution. Some of the history appears from the interim judgment of this Court delivered on 13 July 1979 when we ruled that an affidavit from a juror was inadmissible and dealt with certain grounds connected with that. At yesterday's hearing some other grounds were abandoned or not pressed and two more were added. We allow this very belated addition - the trial was in February last

- so that there can be no possible suggestion that these men have not had every opportunity of putting their cases forward.

For Papadopoulos Mr Williams put in the forefront of his argument yesterday these new grounds, and what he said was adopted and added to by Mr Quirke for MacKay. So it is appropriate to deal with the new grounds first. As Mr Williams said, they really reduce to one. As both defence counsel accept, the Crown case did not depend on proving that either accused actually lit the fire. It is true that against Papadopoulos the Crown did so allege, but Mr Williams rightly accepts that in the alternative he could have been found guilty as a party, by aiding and abetting; while the essence of the case against MacKay was that he was guilty as a party in that way.

The new argument relates to the part of the summing up concerned with how the accused could be parties by aiding the crime of arson. That such a crime was committed was accepted at the trial. At the end of the opening by counsel for the Crown the following formal admissions were read to the jury:

The two matters admitted on behalf of both accused pursuant to s.369 of the Crimes Act 1961:

(1) That the fire at Ziggy's on 7 July 1976 was the result of arson, i.e., that it was deliberately lit by some person.

(2) That access was gained to the building for the purpose of setting fire to it by means of the door from Jervois Quay in respect of which there is evidence that the lock was changed on the day of the fire.

3.

Accordingly the Judge said in his summing up:

As you know the crime alleged against both of the accused is the crime of arson and you will recollect that at the outset counsel indicated to us that for the purposes of the trial it has been admitted the fire at Ziggy's with which you are concerned was the result of arson, that is it was deliberately lit. That admission does not extend to including an admission for the purposes of trial, by whom it was lit. It therefore doesn't include any admission that McMahon either lit the fire or was a party to the crime of arson.

Shortly afterwards he discussed the law about parties to crimes, saying that the Crown case had been put on the basis that the accused were parties to the crime of arson. He gave the standard illustration of people playing different parts in a bank robbery. Referring to s.66(1) and (2) of the Crimes Act, he explained that he had rejected a suggestion for the Crown that subs.(2) might be relevant. He said:

Why I have ruled against Mr McKay's submission to you that you should apply this section here, is that we don't have the two offences one following on the other, we have the arson only, the common intention was, if there was a common intention, to set fire to the building and the offence that is alleged is the setting fire to the building.

It is important that the Judge referred to the common intention, if there was one, as being to set fire to the building and to the offence alleged as being setting it on fire. For it was in that context that he went on to say in the passage now complained of:

Before I leave the matter I return again to the first subsection, because that is the one upon which you must focus your attention. "Everyone is a party to and guilty of an offence - (a) Who actually commits the crime; (b) Does or omits any act for the purpose of aiding any person to commit the offence; (c) Abets any person in the commission of the offence." This provision fixes guilt of the offence in question to all those parties no matter how slight is the degree of participation or assistance of the aider and the abetter, or to put it in more modern parlance, no matter how slight the degree of participation or assistance of the accomplice in the events. Presence at the actual commission of the offence is not a prerequisite - being there in this case when the fire was set alight. Here I give you an instance and it is an opposite one. If you accept that MacKay drove McMahon to the Ocean House entrance of Ziggy's at lunchtime on the day in question and MacKay knew that he was going there, either to alter the lock, or to investigate what precisely was required to effect the alterations, then he MacKay has done an act for the purpose of aiding McMahon to commit the offence. Similarly we know it was Papadopoulos's car, if Papadopoulos knew that McMahon was being driven there by MacKay and that the purpose of their going was to make ready for entrance into the building to commit the crime, that is to tinker with the lock, then he too is guilty as a party, as an aider and abetter - an accomplice. Of course the absolute prerequisite to guilt in that circumstance is knowledge, knowledge of MacKay on the one hand or Papadopoulos on the other.

The point which counsel for the appellants now raise is that, in their submission, the Judge did not deal adequately with mens rea. From his words the jury could have understood, they argue, that mere knowledge that McMahon was going to commit merely whatever offence might be

involved in tinkering with the lock, and assisting McMahon with such knowledge, would be enough to make one or both the accused guilty of the more serious offence of arson. But the summing up must be read as a whole, in the context of a lengthy trial (six days) of an indictment for wilfully setting fire to a building, and regard must be had to the immediate context in the summing up already mentioned and also to the formal admissions which had been read to the jury and were referred to in the summing up. It is perfectly obvious on reading the passage in its entirety, and must have been perfectly obvious to the jury, that when speaking of 'the offence' and 'the crime' the Judge meant wilfully setting the premises on fire; and that he was telling them that knowledge of MacKay on the one hand or Papadopoulos on the other of McMahon's purpose of facilitating the setting of the premises on fire by changing the lock was necessary before either accused could be convicted. The Judge had already given clear directions about the need to consider the case of each accused separately. It is unreal to suggest, as was argued for MacKay, that the jury could have thought that against him proof of lesser knowledge would suffice that was requisite against Papadopoulos. We are satisfied that what the Judge said must have brought home to them that aiding McMahon, in the commission of arson, with knowledge of his intention to commit arson, must be established to make either man a party. The new point must fail so far as each is concerned.

It is convenient next to consider a submission for MacKay that the Judge should have polled the jury. What happened when the verdict was taken is set out at some length in our interim judgment and need not be repeated in full. The important points are that the foreman was in effect twice asked whether the jury were unanimously agreed and answered in the affirmative each time. Counsel for the defendants apparently had difficulty in hearing what was said the first time; supporters of the accused were making a noise in the courtroom. Counsel for MacKay made some mention of a poll (possibly using the word twice) but when the Judge asked him to elaborate sat down without taking the matter further. Mr Quirke fairly acknowledged in this Court therefore that a request for a poll was not in fact refused. The Judge did not formally take a poll. What he did is recorded at the end of his summing up and in his report. He himself asked the foreman whether it was the verdict of them all, to which the foreman replied that it was. The Judge says that he then cast his eyes at each juror, one by one, and there were no indications of dissent.

After satisfying himself in that way as to the verdict, the Judge gave Mr Williams an opportunity for any further submissions, but counsel had nothing to add. So the facts are that the usual procedure was gone through twice to make sure that the verdict was unanimous; the Judge himself had no reason to doubt that it was unanimous; and no one suggested to him that any juror was giving any indication of dissent.

The place in which the jury's verdict is expected to be reached is the jury room and the foreman is their spokesman. The Court does not pry into the discussions in the jury room. After the foreman has been asked whether they are unanimously agreed upon their verdict and has announced it, a question is customarily asked as a precaution: 'And so say you all?' or 'Is that the unanimous verdict of you all?' So jurors have a full opportunity of indicating dissent in open court. Polling of the jury by the Judge has not been a practice in New Zealand. In our opinion, if the Judge has reason to doubt their unanimity it is within his discretion to take a poll. Such a departure from usual practice should be necessary in rare cases only; the matter must rest very much in the discretion of the Judge, who will be conscious of the atmosphere of the trial. Perhaps one cannot entirely exclude the possibility of an exceptional case where it might be held by an appellate Court that a Judge had wrongly refused a request for a poll; but the present case is clearly not in that category. The suggestion of a poll was not pursued by counsel and the precautions to ensure unanimity were adequate. If the continued disturbance led to any jurors having further thoughts later, that could not detract from the validity of the verdict.

Another point concerns the occupation of the foreman of the jury. In the jury list made available to the prosecution and the defence before the trial it was shown as 'Lab.Dir.' None of the counsel engaged in the trial knew that at the time he was an Assistant Director-General of the

Department of Scientific and Industrial Research. He is now a State Services Commissioner. Having learnt of his position in the Department from his affidavit filed in response to the affidavit by a juror previously mentioned, defence counsel contend that the verdict was vitiated by his participation, because two witnesses employed in the Department's forensic section gave evidence. The foreman explains the position in a further affidavit, sworn on 3 August 1979:

2. AT the time of that trial I was one of three Assistant Directors-General of the Department of Scientific and Industrial Research. I held responsibility for seven divisions of the Department. One of these divisions was the Chemistry Division of which the Forensic Laboratory forms part. The Chemistry Division has its own director and he along with the heads of the other six divisions was responsible to me.

3. I HAD no direct operational responsibility for the Forensic Laboratory. I was not in any involved with its day-to-day work. I did not know what projects were in hand, or what particular work members of the staff were engaged in. My responsibility was one of policy and general administration. So far as the Forensic Laboratory was concerned, this meant that it was my responsibility to obtain the resources necessary to enable the Laboratory to carry out the work which came its way, but not to control, direct or oversee that work.

4. I HAD nothing whatever to do with the matters about which evidence was given by officers of the Forensic Laboratory at this trial. I had had no prior discussion with anyone concerning these matters or indeed any prior knowledge of them. In fact, I had not prior to the commencement of the trial even heard of Ziggys Night Club nor was I aware of the fact that there had been a previous trial.

In general it is obviously undesirable that a person closely connected with a prospective witness should be a juror: see the Practice Note in [1973] 1 All E.R. 240 and R. v. Hubbert (1975) 31 C.R.N.S. 27, 38, in the Ontario Court of Appeal. Such a person might well be open to challenge for cause under s.363(1)(b) of the Crimes Act on the ground that he is not indifferent between the Crown and the accused. Moreover if a close connection is known to counsel it will be the duty of counsel to take appropriate steps. Crown counsel can ask the person to stand aside if called; defence counsel can invite Crown counsel to take that course. Whether the connection is sufficiently close to disqualify the person as a juror is a question of degree. The significance in the trial of the evidence of the witness is among the factors relevant to that question. It is a factor that may be more easily assessed after the evidence is given. If called upon to rule on it by a challenge for cause, the Judge may well be disposed to the safe course of upholding the challenge or suggesting that the Crown exercise its right to stand aside a person called.

It may also be the duty of a juror to disclose an association with a party or a witness at the beginning of a trial or during a trial when he realises the position. In the light of the facts stated in his affidavit and already read, and the nature of the evidence given by the two forensic laboratory witnesses, we do not think that the foreman was under that duty here.

No attempt to state the law in this field completely is called for. The test that seems to us right in the present case, viewing the case after the trial, is whether there is reasonable ground for suspecting that the verdict may have been influenced by bias on the part of the foreman towards the prosecution. We answer that question No, and for two main reasons.

First, the connection between the foreman of the jury and the two witnesses was not close. He was not himself involved in the forensic work of the laboratory, nor was he in charge of the laboratory in any direct sense. He knew nothing about this case or the work of the two witnesses related to it.

Secondly, the evidence of the two witnesses was of only peripheral importance in the trial. The Judge did not find it necessary to make any reference at all to their evidence in his summing up. One of them was asked no questions by defence counsel in cross-examination. The other was asked some questions in cross-examination by Mr Williams only. No expert evidence was called for the defence to contradict what either said. The integrity and competence of the witnesses were not in question. There was no issue as to the procedures of the laboratory, still less as to the wider operations of the Department. Their evidence related to a can containing fluid which had been found at the scene of the fire by firemen while still fighting the fire, rather less than an hour after the brigade arrived on the scene. The two witnesses also dealt in their evidence with some

other exhibits, including carpet and glass. Their evidence went to show that the fire was started by an accelerant fluid, some of which was left in the can. The can admittedly belonged to Papadopoulos, and it was of importance to part of the Crown's case that his fingerprint was found on it; but the fingerprint evidence did not come from these witnesses. At the trial the defence suggestion was that McMahon, who had been living at the same address as Papadopoulos, had taken the can and unbeknownst to Papadopoulos used it in lighting the fire. In this Court an alternative theory was mentioned - apparently its first explicit mention was here - that while the firemen were controlling the blaze someone managed to ascend the stairs, enter the burning Night Club premises and 'plant' the can to incriminate Papadopoulos. This is so far-fetched that we are not surprised that it was not advanced explicitly at the trial. In our view it does nothing to elevate the importance of the evidence of the two scientists.

This Court certainly has not the slightest wish to minimise the very real importance of ensuring not only that justice is done but also, that it is seen to be done. In this case we see no threat to that principle. We do not think that the fact that the two witnesses worked in the Department of which the foreman was a more senior officer could have had any influence on the verdict. And in all other respects he was obviously well qualified to be foreman of the jury, as it was a case where the ability to concentrate on evidence over a number of days and to marshal

the facts would be of particular help. Someone of his apparent experience is likely to have the qualities desirable in a foreman in a case of this kind.

There remain two other grounds. Counsel for MacKay made a submission to this Court that in summing up the Judge had misstated an argument put to the jury by counsel for Papadopoulos about the fact that some of the witnesses called for the defence had convictions for dishonesty. Evidently the argument was intended to stress the fairly obvious point that if someone happens to be the only witness of an event, it cannot be helped that he may have convictions for dishonesty; the party who calls him may have no choice but to do so. The Judge does not seem to have put the point quite accurately. He indicated that he was not sure that he had. But he made it clear to the jury that the only bearing of the convictions was on the reliability of otherwise of the witnesses - which there is no gainsaying. No miscarriage of justice can have arisen from the Judge's words.

Finally there was an argument for MacKay, adopted and emphasised by counsel for Papadopoulos in his reply, that for a combination of reasons the second trial was unsatisfactory. As to that we say only that, having considered the appeals following the second trial at two hearings, and having heard all the arguments that could possibly be urged on behalf of the appellants, this Court entertains no misgivings about the verdicts against the

two accused. We can only dismiss the appeals, with the result that the appellants must serve the remainder of their sentences.

R.B. Cooke J.

Solicitors:

N.G. Gallate, Wellington, for Papadopoulos

Crown Solicitor, Wellington, for Crown.