

THE QUEEN

v.

RONALD ALBERT CONNELL

Coram: Cooke J. (presiding)
McMullin J.
Savage J.

Hearing: 29 and 30 April and 1 May 1985

Counsel: W.D. Baragwanath Q.C. and R.B. Lange for
Appellant
D.C.H. Percy for Crown

Judgment: 10 May 1985

JUDGMENT OF THE COURT DELIVERED BY COOKE J.

From 25 September to 25 October 1984 Ronald Albert Connell was tried by Thorp J. in the High Court at Auckland on an indictment containing nine counts charging various frauds alleged to arise from his activities as governing director of Southwest Helicopters Limited or, following a change of the company's name, R.C.S. International (1981) Limited. The trial was before a Judge without a jury, pursuant to a consent order under the Crimes Act 1961, s.361B - one of the sections authorising trial by Judge alone on the application of the accused which were enacted in 1979.

The Crown evidence ended late in the afternoon of 17 October. Argument then began on applications by counsel

for the accused under s.347 of the Crimes Act. At the conclusion of the argument on those applications on 19 October the Judge discharged the accused on five counts. After an hour's adjournment the trial continued. The only evidence for the defence was certain documentary material, then put in as exhibits. Final speeches were heard on 23, 24 and 25 October. At 1 p.m. on the latter day the Court adjourned, with an intimation that the verdict would be given at 3.15 p.m. on the following day. On that day the Judge delivered a verdict and statement of reasons comprising 29 typed pages. He found the accused guilty on two of the remaining counts and not guilty on the other two.

On 9 November 1984 the Judge sentenced the accused to three months' imprisonment concurrently on each count. The accused now appeals against the convictions. The Solicitor-General applies for leave to appeal against the sentence.

Background

The accused formed his company (which it is convenient to call Southwest) in 1972 with a capital of only \$5000. The original business was deer recovery and sale, and helicopter hire. Aircraft trading was added later. The company made spectacular progress until a 1980 slump in the deer market. Towards the end of August 1981 the company was in a financial position that can fairly be described as desperate. The overdraft limit at its Taupo bank, \$150,000,

had already been substantially exceeded and \$473,000 was needed very shortly to meet a bill of exchange liability to NZI Finance Limited, which company had financed certain Southwest dealings.

The evidence is that the accused told the bank manager that the equivalent of US\$398,520.00 would be coming from the United States. He approached Broadbank Corporation Limited and represented that he was seeking finance to enable Southwest to buy an aircraft in the United States and sell it at a profit in New Zealand. The aircraft was called Juliet Lima; it was a Mitsubishi turbo prop MU2B10. It had already been bought and sold on several occasions over the years by Southwest, but had never been brought to New Zealand. Nor has it since been brought here. At the time of the approach to Broadbank it was registered in the United States in the name of R.C.S. International Incorporated, an Oklahoma company with which the accused was identified, but it was apparently at the disposal of Dick Sawyer International Incorporated, another Oklahoma company. It had been suffering from engine trouble and by early 1982 was being described by the accused as a 'dog' - an expression apparently meaning something that had completed its useful life. In his dealings with Broadbank he represented that this aircraft was unencumbered and that he had a firm order for its on-sale in New Zealand to Air Central Limited, a company owned in equal shares by the accused and a Mr Gardiner, the latter being the operations manager.

Broadbank agreed to the proposal on terms set out in a telex to Southwest of 1 September 1981. Among other requirements the telex stipulated for evidence of a firm order from Air Central and that, pending on-sale, the aircraft was to be purchased and registered in Broadbank's name. The evidence at the trial established that aircraft of this type were not normally operated by Air Central but that company operated planes of the series or model MU2G (also called MU2B30), a different type of plane; and at least one more of these was on order. There is evidence on which the Judge was entitled to find that the accused represented to Broadbank that a letter to the accused, dated 15 September 1981 and signed by Mr Gardiner, placing an order for 'another MU 2 in a similar configuration as the aircraft currently being operated by us' related to Juliet Lima. And in fact and to the knowledge of the accused the letter did not relate to Juliet Lima and there was no intention of buying an MU2B10 for use by Air Central. There was another MU2B10 (ZKWAL) which was ostensibly sold by Southwest to Air Central, but again the Judge was entitled to find that this was not intended to be a genuine purchase by Air Central.

Broadbank remitted to the United States funds to produce US\$370,000 and these were exchanged in New York for invoices in Broadbank's favour on or about 8 September 1981, but the evidence indicates that no steps or instructions were given by the accused at this stage with a view to having the

registered title to Juliet Lima transferred to Broadbank. In that connection we refer particularly to a telex from Dick Sawyer International Incorporated, sent on 20 December 1981, which indicates that even at that late date D.S.I. did not understand that it was proposed to transfer the Juliet Lima title to Broadbank. Nevertheless virtually immediately after their receipt in the United States the funds were sent back to Southwest in New Zealand by D.S.I., the credit being recorded in Southwest's Taupo bank account on 18 September 1981. The accused caused them to be used for the general purposes of Southwest. It is unnecessary to go into further or subsequent detail, although counsel for the accused devoted much attention to this in support of the appeal, as he had at the trial, and we do not overlook what he said.

The two counts on which the accused was convicted were laid respectively under ss.246(1) and 222 of the Crimes Act and read as follows:

1. THE CROWN SOLICITOR AT AUCKLAND charges that RONALD ALBERT CONNELL on or about the 8th day of September 1981, at Taupo and Auckland, being the governing director of SOUTHWEST HELICOPTERS LIMITED, (later to be known as R.C.S. INTERNATIONAL (1981) LIMITED, with intent to defraud, by means of a false pretence caused BROADBANK CORPORATION LIMITED to execute a valuable security, namely a bill of exchange drawn on BROADBANK CORPORATION LIMITED dated 8.9.81, payable to the Bank of New Zealand Limited for the sum of \$467,582.89 by falsely representing that a Mitsubishi MU 2B aircraft number N53 JL serial number 28 was unencumbered and

available for purchase from DICK SAWYER INTERNATIONAL INCORPORATED, and further or in the alternative that a firm order from AIR CENTRAL LIMITED had been confirmed in respect of the same aircraft.

2. THE said Crown Solicitor further charges that RONALD ALBERT CONNELL on or about the 18th day of September 1981, at Taupo, being the governing director of SOUTHWEST HELICOPTERS LIMITED (later to be known as R.C.S. INTERNATIONAL (1981) LIMITED which had received the proceeds of a valuable security, namely a telegraphic transfer credit for the sum of \$442,160.61 from DICK SAWYER INTERNATIONAL INCORPORATED on terms requiring it to account for or pay the said proceeds to BROADBANK CORPORATION LIMITED, fraudulently omitted to account for or pay the same proceeds to the said BROADBANK CORPORATION LIMITED and thereby committed theft.

With regard to count 1, it was the further or alternative representation on which the accused was convicted. The Judge was not satisfied, having regard to problems of foreign law, that the first had been proved to be false.

Seven main grounds of appeal, with numerous subgrounds, were filed. They were dealt with in a different order and recast in counsel's synopsis of submissions, and we found it necessary to ask Mr Baragwanath to deal with the essentially factual points first. It is convenient in this judgment to do the same.

Alleged Erroneous Findings

A matter of general importance arises under this heading. A number of the grounds of appeal allege that the Judge was in error in factual conclusions or in failing to give sufficient weight to certain factors or in failing 'to address' certain factors.

It may have been overlooked when the notice of appeal and the argument on appeal were prepared that the grounds for allowing an appeal against a conviction on indictment are limited by s.385(1) of the Crimes Act 1961 to the following:

- (a) That the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence; or
- (b) That the judgment of the Court before which the appellant was convicted should be set aside on the ground of a wrong decision on any question of law; or
- (c) That on any ground there was a miscarriage of justice; or
- (d) That the trial was a nullity - ...

It will be seen that the only two grounds capable of covering challenges to factual findings or reasoning are (a) and (c).

The available grounds were not altered when the 1979 Amendment Act introduced provisions whereby the accused may apply for trial by a Judge alone. Reading the principal Act and the Amendment Act together, there is no difficulty in

accepting that the verdict of a Judge sitting alone is to be treated as the equivalent of the verdict of a jury and may be challenged on the ground that it is unreasonable or cannot be supported having regard to the evidence. But no new or more extensive ground of appeal has been given. In particular this Court is not authorised to retry the case on the facts.

Further, what the Judge sitting alone delivers is intended to be a verdict. It need not be supported by elaborate reasons. To require the Judge to set out in writing all the matters that he has taken into account and to deal with every factual argument would be to prolong and complicate the criminal process to a degree which Parliament cannot have contemplated. There are cases where a point or argument is of such importance that a Judge's failure to deal expressly with it in his reasons will lead this Court to hold that there has been a miscarriage of justice. A demonstrably faulty chain of reasoning may be put in the same category. But it is important that the decision to convict or acquit should be made without much delay. Careful consideration is an elementary need, but not long exposition.

In practice, if the reasons are of some length it has sometimes been found fairest to announce the verdict at the outset. There can be no invariable rule; the Judge will wish to take into account the implications case by case. If

necessary the reasons can be delivered later in writing, although preferably they should be given with the verdict.

Only in most exceptional cases, if ever, is it likely to be consistent with the judicial role in trying an indictment to give no reasons for the verdict. If the verdict is not guilty, however, occasionally a very brief statement of reasons is best. In other cases, whether the verdict is guilty or not guilty, it is obviously impossible to work out a formula covering all circumstances. But in general no more can be required than a statement of the ingredients of each charge and any other particularly relevant rules of law or practice; a concise account of the facts; and a plain statement of the Judge's essential reasons for finding as he does. There should be enough to show that he has considered the main issues raised at the trial and to make clear in simple terms why he finds that the prosecution has proved or failed to prove the necessary ingredients beyond reasonable doubt. When the credibility of witnesses is involved and key evidence is definitely accepted or definitely rejected, it will almost always be advisable to say so explicitly.

At this stage in the history of Judge-alone jurisdiction in trials on indictment in New Zealand we will not add to these general observations. They are of course not meant to be exhaustive or the last word on the subject. What we stress now most is that a long and careful trial, as this one was, need not mean an extensive judgment.

In this case we think that Thorp J.'s judgment met admirably the requirements that we have outlined. It was unnecessary for him to say any more either on the credibility of Mr Gardiner as a witness and the criticisms directed against the latter by the defence or on any of the other arguments urged by counsel for the defence. We see no reason to infer that he failed to take into account anything of real significance, and we have no misgivings about his findings. They were neither unreasonable nor unsupported by the evidence.

On the Crown case counts 1 and 2 were closely related, representing different stages of the same fraud. There was ample evidence that, in the sense referred to in R. v. Scale [1977] 1 N.Z.L.R. 178, the money was earmarked by Broadbank, to the knowledge of the accused, to be used solely for the purpose of buying Juliet Lima and reselling the plane to Air Central to fulfil what the accused represented to be a firm order. If, as the Judge was entitled to find, the accused obtained control of the money knowing that it had been extracted from Broadbank by a false pretence that such an order existed, it was certainly his duty to account for it to Broadbank. Despite his unique knowledge of the complicated dealings to which the charges relate, the accused did not go into the witness box. In substance there was nothing to rebut the inferences open beyond reasonable doubt against him.

Fugitive Offenders Act 1881 (U.K.)

The accused was returned from Australia in late October 1983 under the above Act. The Fugitive Offenders Amendment Act 1976 (N.Z.) makes certain amendments to that Act in its application to New Zealand and declares for the avoidance of doubt that it is and always has been in force in New Zealand as part of the law of New Zealand.

The basis for the return was a charge of fraudulently taking gold bullion. This was represented by two counts in the indictment ultimately presented by the Crown. The accused was acquitted on these counts.

Section 18 of the principal Act as amended by the New Zealand Act of 1976 now reads:

18. Sending back of prisoner not prosecuted or acquitted to Commonwealth country of same group - Where a prisoner accused of an offence is returned in pursuance of this Part of this Act to a [Commonwealth country], and either is not prosecuted for the said offence within 6 months after his arrival in that [Commonwealth country], or is acquitted of the said offence, the [Minister of Justice or Attorney-General] of that [Commonwealth country], if he thinks fit, may, on the requisition of such person, cause him to be sent back, free of cost, and with as little delay as possible, to the [Commonwealth country] in or on his way to which he was apprehended.

On its face the section merely gives the Minister or the Attorney-General a discretion to cause the person to be sent

back, free of cost, in the circumstances specified. Mr Baragwanath argues, however, that the Act prevents the Crown from prosecuting on what he calls the extradition charges after the six months, or from declining a requisition for return made in the circumstances specified, or from bringing non extradition charges. In the alternative he seeks to invoke the Court's inherent jurisdiction to prevent abuse of process. He concedes that these arguments would not apply to prevent a prosecution for an offence alleged to have been committed after the return, but in this case there was no such charge.

There are reported decisions contrary to these arguments, those cited to us being R. v. Philips (1858) 1 F. & F. 105, R. v. Cohen (1901) 71 J.P. 190, and Re McDougall's Habeas Corpus Application (1965) 53 W.W.R. 618. They are not decisions of appellate courts and Mr Baragwanath argues that they were wrong. He cited to us a number of familiar authorities on construing powers as duties and other aspects of statutory interpretation.

We accept that despite what has been decided by a Queen's Bench Divisional Court in R. v. Plymouth Justices, ex parte Driver (The Times, April 19, 1985) this Court and the High Court in New Zealand have a wider jurisdiction to prevent unfairness and abuse of process than is currently accepted in England: see Busby v. Thorn EMI Video Programmes Limited [1984] 1 N.Z.L.R. 461, 471 and the cases

there collected, including R. v. Hartley [1978] 2 N.Z.L.R. 199, 215. But there was nothing unlawful in the accused's return under the Act in the present case, nor in our view anything else in the facts of the case calling for the exercise of the jurisdiction.

Insofar as the argument depends on qualifying the terms of s.18 by a process of interpretation, or treating the power therein as a duty, or evolving implied rights from the section, it can only fail in face of the general legislative pattern. The Fugitive Offenders Act 1881 dealt with the return of fugitive offenders within Her Majesty's Dominions and now deals with their return within the Commonwealth. Its historical origins differ from and its provisions are less restrictive than those of the legislation relating to extradition under treaties with foreign countries. As regards the latter the law was to be found previously in the Extradition Act 1870 (U.K.) and its amendments and is now in the Extradition Act 1965 (N.Z.). Those statutes have express provisions prohibiting or restricting trial of surrendered persons for pre-surrender offences not disclosed by the facts on which the surrender is grounded: s.19 of the 1870 Act, s.14 of the 1965 Act. In the United Kingdom, restrictions upon proceedings for other offences, in the case of persons returned from Commonwealth countries, are now enacted by the Fugitive Offenders Act 1967, s.14. By contrast there are no such provisions in the 1881 Act and none were added when in 1976

that Act was expressly declared, subject to some amendments, to be part of New Zealand law. It is unpersuasive to suggest that the New Zealand Courts, in the name of interpretation, should add amendments which Parliament has not chosen to enact. Section 18 is permissive only and did not prevent the course taken in this case.

Addition to First Count

The part of count 1 on which the accused was convicted - the alleged further or alternative false representation about Air Central - was not contained in the draft indictment made available to the accused in May 1984. It was included in the indictment itself, which was not presented until the day when the trial commenced, and was first made known to the accused only a few days earlier, on Friday 21 September 1984 at 4.45 p.m. The Crown had thought the addition advisable because argument before Henry J. on 30 and 31 August 1984, on an application for the accused under s.347 of the Crimes Act for an order that no indictment be presented against him, had revealed a possible loophole in the first count. The application had led Henry J. to quash count 10 in the proposed indictment, but that is not material to the present point.

By s.345(1) of the Crimes Act an indictment may be presented for any charge founded on the evidence disclosed in the depositions. It has not been denied on behalf of the

accused that the added particular was founded on evidence in the depositions, including that of Mr Gardiner. It is argued, however, that the Judge was wrong not to strike out the added particular, on the ground of prejudice to the defence, when application was made to him to do so on 25 September before the commencement of the trial, and again when it was renewed on 17 October at the end of the Crown case.

In support of the grounds of appeal concerned with this point Mr Baragwanath made as much as he reasonably could of the verbal point that in his ruling on 25 September (Ruling 1) the Judge said that, as he was not sufficiently in command of the facts of what appeared to be a complex commercial case to be able to know whether or not this further allegation might cause an injustice to the accused, he was standing the application over. It is clear though that in substance the Judge allowed the indictment as presented to stand - and the accused thereafter pleaded to it - but indicated that the application could be renewed, no later than the conclusion of the Crown case, in which event he would reconsider whether there was any real likelihood of injustice through the retention of the additional allegation. The application was duly renewed, submissions being heard on it on 17 and 18 October, and in Ruling 8, given on 19 October, it was declined.

To strike out altogether before the arraignment of the accused a count or part of a count which the Crown desires

to present, and which is founded on evidence in the depositions, is a strong step. We are satisfied that the Judge did not exercise his discretion wrongly or unfairly by refraining from that course. It is significant that no application for an adjournment was made for the accused, neither at the presentation of the indictment nor at the end of the prosecution evidence. Moreover the added particular did not really add to the issues at the trial. All the evidence and arguments on it were equally relevant to count 2, which had been in the draft indictment from the outset.

Police Material and Discovery

Complaint is made that the Judge did not order production by the Crown to the defence of 'the material which records the outcome of the enquiries of the 50 odd persons described as witnesses or persons spoken to by the police in the list given to defence counsel on Friday 21 September'. And also that the Judge declined an application to give 'directions in general terms as to what the principles of discovery are insofar as this case is concerned'. These matters are linked with an argument that the Official Information Act 1982 has overridden R. v. Mason [1976] 2 N.Z.L.R. 122, where this Court, affirming Moller J., held that while the prosecution should give the defence the names and addresses of persons whom it does not propose to call but knows to be able to give material

evidence, it is not normally bound to produce statements taken from those persons; although the Judge has a discretion to make an order for production. That corresponds with English practice: see Archbold, 41st ed., para.4-178.

To the extent that the case for the appellant may involve any suggestion of departure from the letter or spirit of what was said in R. v. Mason, it is clear that the argument must fail. We have to repeat that application was never made for an adjournment. Further, as the Judge put it in Ruling 8, 'I have since endeavoured to ensure that any reasonable request for additional information made by the defence was met as expeditiously as practicable, and do not believe that there is any file or document which Mr Baragwanath has sought which has not been provided'.

But it was the Official Information Act on which Mr Baragwanath placed the main weight of this part of the argument. He cited Fletcher Timber Ltd v. Attorney-General [1984] 1 N.Z.L.R. 290, where that Act was referred to as part of the environment in which a claim to public interest immunity on the ground of confidentiality now falls to be assessed. The same subject has been considered again in this Court in Brightwell v. Accident Compensation Corporation (1985) 5 N.Z.A.R. 65.

It is important to note that in the present case no request was made under s.12 to a Department or Minister of

the Crown or organisation to make available any specified official information. We are not now concerned with rights of review when such a request is refused. All that we are now concerned with is an argument that the Act has affected the approach established in Mason. That case has nothing to do with a claim for public interest immunity in civil or indeed other litigation. It deals with the power of the Court to require the supply of information by the prosecution to the defence as a matter of fairness in criminal proceedings. There is nothing in either the Act itself or the Danks report which led to it to suggest that there was any intention of altering the practice in connection with criminal trials. That practice remains governed by Mason. For the purposes of the present case we need say no more about the Act, and it would be undesirable to offer any observations; questions of the interpretation of the Act will arise more directly in other cases.

Before parting with the appeal against the convictions we should say that, in view of the natural attempt that was made to buttress some of the grounds of appeal by others, we have found nothing unsatisfactory in this trial considered as a whole or any of the rulings given in the course of it. The one major gap was the absence of any evidence from the accused himself, but that of course was an election that he was fully entitled to make.

Sentence

This is the only question of real difficulty in the case. In general, imprisonment for three months would clearly be too small a penalty for a commercial fraud on this scale. The Solicitor-General's application for leave to appeal is thoroughly understandable.

On the other hand there are certain mitigating factors. The accused, a man now of 46, starting with no advantages in life and leaving school at the age of twelve, achieved by his own efforts in the late nineteen-seventies apparently remarkable business success. A change in a market in which he was operating precipitated an equally rapid change of fortune and led to his succumbing to the temptation of deceiving a major New Zealand finance house. Evidently - and to a degree understandably - he believed that, if he staved financial disaster off for a time, all would come right again. The lending organisation, in its willingness to take over the financing of his activities, also seems to have been more optimistic than an objective and thorough examination of the circumstances would have warranted. The offences were committed in 1980. The accused was not returned from Australia until 1983 and has undergone the ordeal of that procedure and of subsequent delay which was no doubt largely inevitable. Some recovery of the money has been made by the sale of the aircraft together with others; counsel were unable to inform us accurately of the ultimate

loss. There was medical evidence of a depressive condition suffered by the accused, to which the Judge gave some weight.

In these circumstances the Judge decided to extend to the accused such mercy as he properly could. On balance, although the decision is not an easy one, we are not prepared to interfere with the Judge's discretion by increasing the sentence.

Accordingly the applications of the accused as regards the convictions and the Crown as regards the sentence are dismissed. He must now surrender to his bail and serve his sentence.

R. B. L. J.

Solicitors:

Simpson Grierson, Auckland, for Appellant

Crown Solicitor, Auckland, for Crown