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[COURT OF APPEAL]

* REGINA v. GALBRAITH

1981 May 12; 19 Lord Lane C.J., Peter Pain and Stuart-Smith JJ.

B *Crime—Practice—Submission of no case to answer—Evidence of person charged committing crime alleged—Strength or weakness of evidence depending on view taken of witnesses—Whether for jury to determine*

The applicant was charged with having fought and made an affray. The prosecution evidence showed that there had been an affray in a bar in which at least three men were stabbed, C one fatally. There were passages in the evidence of two witnesses which tended to show that the applicant had taken an active part in the affray, although in a statement to the police the applicant had maintained that at the time the affray was in progress he had not been in the bar but downstairs in the lavatory. At the close of the prosecution evidence a submission of no case to answer was rejected. The applicant, who made a statement from the dock reiterating the self-exculpatory D statement which he had made to the police, was convicted.

On an application for leave to appeal against conviction:—

Held, refusing the application, that when a submission of no case was made the case was to be stopped when there was no evidence that the person charged had committed the crime alleged and was also to be stopped if the evidence was tenuous and the judge concluded that the prosecution's evidence taken at its highest was such that a properly directed jury could not E properly convict on it; but that, where the prosecution's evidence was such that its strength or weakness depended on the view to be taken of the reliability of a witness or other matters which were, generally speaking, within the province of a jury and one possible view of the facts was that there was evidence on which they could properly conclude that the person charged was guilty, the matter was to be tried by them; that borderline cases were in the judge's discretion; and that, in the F circumstances, the applicant's submission of no case to answer was properly rejected.

Reg. v. *Barker* (*Note*) (1975) 65 Cr.App.R. 287, C.A. approved.

Reg. v. *Mansfield* [1977] 1 W.L.R. 1102, C.A. explained.

The following cases are referred to in the judgment:

G *Reg.* v. *Barker* (*Note*) (1975) 65 Cr.App.R. 287, C.A.
Reg. v. *Mansfield* [1977] 1 W.L.R. 1102; [1978] 1 All E.R. 134, C.A.
Reg. v. *Tobin* [1980] Crim.L.R. 731.

The following additional cases were cited in argument:

Reg. v. *Falconer-Atlee* (1973) 58 Cr.App.R. 348, C.A.
Reg. v. *Hipson* [1969] Crim.L.R. 85, C.A.

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APPLICATION for leave to appeal against conviction.

On November 13, 1979, at the Central Criminal Court (Mars-Jones J.) the applicant, George Charles Galbraith, was convicted on an indictment charging that he fought and made an affray. He was sentenced to four years' imprisonment. He applied for leave to appeal against conviction on the grounds that the judge wrongly rejected a submission at the end of the prosecution's case that the case against him should be

withdrawn from the jury and that the verdict was unsafe and unsatisfactory. An application for leave to appeal against sentence does not call for report. At the conclusion of the argument Lord Lane C.J. announced that the application for leave to appeal against conviction was refused for reasons to be given at a later date. A

The facts are stated in the judgment.

Robin Simpson Q.C. and *Howard Godfrey* for the applicant. B
Allan Green and *Susan Edwards* for the Crown.

Cur. adv. vult.

May 19. LORD LANE C.J. read the following judgment of the court. On November 13, 1979, at the Central Criminal Court, the applicant C was convicted by a majority verdict of affray and was sentenced to four years' imprisonment. He now applies for leave to appeal against that conviction, the application having been referred to this court by the single judge.

The facts of the case were these. On November 20, 1978, at the Ranelagh Yacht Club, Putney Bridge, in the early hours of the evening D a fight broke out in the bar. There were a number of people present, amongst them being Darke, Begbe, Bohm, Dennis and Bindon. Knives were used. At least three men were stabbed, Darke fatally, Bindon seriously, and Dennis less so. There was in these circumstances no doubt that there had been an affray. The only question for the jury to decide was whether it had been established with a sufficient degree of certainty that the applicant had been unlawfully taking part in that affray. E

At the close of the prosecution evidence, a submission was made by counsel for the applicant that there was no case for him to answer. The judge rejected that submission. The principal ground of appeal to this court is that he was wrong in so doing. There are other subsidiary grounds of appeal which we shall have to examine in due course.

We are told that some doubt exists as to the proper approach to be F adopted by the judge at the close of the prosecution case upon a submission of "no case": see *Archbold, Criminal Pleading Evidence & Practice,* 40th ed. (1979), 6th Cumulative Supplement, para. 575 and *Reg.* v. *Tobin* [1980] Crim.L.R. 731.

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 G 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 functions and on the other the danger of an unjust conviction. H

Before the Criminal Appeal Act 1966, the second test was that which was applied. By section 4 (1) (*a*) of that Act however the Court of Appeal was required to allow an appeal if they were of the opinion that the verdict should be set aside on the grounds that "under all the circumstances of the case it is unsafe or unsatisfactory." It seems that thereafter a practice grew up of inviting the judge at the close of the prosecution case to say that it would be unsafe (or sometimes unsafe or unsatisfac-

A tory) to convict on the prosecution evidence and on that ground to withdraw the case from the jury. Whether the change in the powers of the Court of Appeal can logically be said to justify a change in the basis of a "no case" submission, we beg leave to doubt. The fact that the Court of Appeal have power to quash a conviction on these grounds is a slender basis for giving the trial judge similar powers at the close of the prosecution case.

B There is however a more solid reason for doubting the wisdom of this test. If a judge is obliged to consider whether a conviction would be "unsafe" or "unsatisfactory," he can scarcely be blamed if he applies his views as to the weight to be given to the prosecution evidence and as to the truthfulness of their witnesses and so on. That is what Lord Widgery C.J., in *Reg.* v. *Barker* (*Note*) (1975) 65 Cr.App.R. 287, 288, said C was clearly not permissible:

> "... even if the *judge*"—our emphasis—"has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those D cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury ..."

Although this was a case where no submission was in fact made, the E principle is unaffected.

Some of the difficulties have arisen from the subsequent case of *Reg.* v. *Mansfield* [1977] 1 W.L.R. 1102. Lawton L.J. said, at p. 1106:

> "Unfortunately since this practice started ..."—sc. withdrawing a case from the jury on the ground that a conviction on the evidence would be unsafe—"there has, it seems, been a tendency for some F judges to take the view that if they think that the main witnesses for the prosecution are not telling the truth then that by itself justifies them in withdrawing the case from the jury. Lord Widgery C.J. in his judgment in *Reg.* v. *Barker* pointed out that this was wrong...."

He then cited part of the passage we have already quoted. Lawton L.J. then went on to say:

> G "Mr. Cockburn intended to submit to the judge that some of the evidence was so conflicting as to be unreliable and therefore if the jury did rely upon it the verdict would be unsafe. In our judgment he was entitled to make that submission to the judge and the judge was not entitled to rule that he could not."

On one reading of that passage it might be said to be inconsistent both H with *Reg.* v. *Barker* (*Note*) 65 Cr.App.R. 287 and with the earlier part of the judgment itself. It is an illustration of the danger inherent in the use of the word "unsafe"; by its very nature it invites the judge to evaluate the weight and reliability of the evidence in the way which *Reg.* v. *Barker* (*Note*) forbids and leads to the sort of confusion which now apparently exists. "Unsafe," unless further defined, is capable of embracing either of the two schools of thought and this we believe is the cause of much of the difficulty which the judgment in *Reg.* v. *Mansfield* has apparently

given. It may mean unsafe because there is insufficient evidence on which a jury could properly reach a verdict of guilty; it may on the other hand mean unsafe because in the judge's view, for example, the main prosecution witness is not to be believed. If it is used in the latter sense as the test, it is wrong. We have come to the conclusion that if and in so far as the decision in *Reg.* v. *Mansfield* [1977] 1 W.L.R. 1102 is at variance with that in *Reg.* v. *Barker* (*Note*) 65 Cr.App.R. 287 we must follow the latter.

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 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. It follows that we think the second of the two schools of thought is to be preferred.

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.

We turn now to the evidence in this case. It was admitted that the applicant had gone to the club with Darke and Begbe and, using a false name, had signed them in. They had later been joined by Bohm. It was further not disputed that at the conclusion of the fighting the applicant was in the bar and, much to his credit, was helping a dying Darke. He did not go into the witness box, but the account of events which he gave in a self-exculpatory statement to the police, reiterated in a statement from the dock, was that he had at the material time when the affray was in progress not been in the bar at all but had been downstairs in the lavatory.

There were two principal pieces of evidence called by the prosecution which tended to disprove that assertion and to show that he was in the bar taking an active part in the affray. The first was a witness called John Gilette. He said that Darke had attacked Bindon and that at that time there were three men with Darke. They all had knives. He then described the three men. One description plainly referred to Begbe, another to Bohm and the third was an accurate description of the applicant. These men were described by Gilette as standing by the fight watching with knives out in a threatening way. He had attended an identification parade on February 19, 1979. On that parade the applicant was standing. Gilette however said he was not able to point out anyone on that parade whom he recognised as having been in the club that night.

The second piece of evidence was from a witness called Cook. He was the doorman of the club and was a very reluctant witness. Leave was eventually given to treat him as hostile. Cook described how the applicant, or a man who, from the description given by Cook, was plainly and

A admittedly the applicant, had signed Darke and Begbe into the club at about 4.15 p.m. At 6.15 p.m. he heard glass breaking and people shouting in the bar, so he went upstairs. When he got there Dennis had told him that he had been stabbed and pointed to a group of people standing by the juke box. This group was described by Cook as being " John Darke's party, the man with the beard, the fair-haired chap and the bloke with the twisted nose." The reference to the fair-haired chap was B plainly intended to be a reference to the same person as had signed the other two in at the door two hours previously, namely, the applicant. In cross-examination he said that he could have been mistaken in thinking that the fair-haired man with Darke by the juke box was the same blonde man who signed them in.

In addition to these two pieces of evidence there was a further witness C called Stanton who gave evidence that when Darke was attacking Bindon as Bindon lay on the floor, a little guy went up to Darke and said " stop it John, you'll kill him." This man was described by Stanton in a way which would fit the applicant. However, in cross-examination, Stanton said the little guy was not the applicant. There was a body of evidence which seemed to indicate that there had been some form of agreement between the witnesses that they would, so far as possible, back-pedal from D the statements which they had made to the police immediately after the incident had taken place.

In these circumstances it seems to us that this was eminently a case where the jury should be left to decide the weight of the evidence upon which the prosecution based their case. It was not a case where the judge would have been justified in saying that the prosecution evidence E taken at its highest was such that the jury properly directed could not properly convict upon it.

Of the remaining subsidiary grounds which the applicant advances in his perfected grounds of appeal, the only one that has any substance is the complaint that the judge misdirected the jury in directing them that they could regard Bindon's evidence of having shaken hands with the co-defendants Bohm and Galbraith and having said to them " let bygones be F bygones " in a cell at the magistrates' court as evidence against the applicant. We are inclined to agree that strictly speaking that was a misdirection. The evidence was certainly part of the background of the case and an important part of the background, but it could not properly be said to be evidence against the applicant. However this minor error on the part of the judge can have had no possible effect on the outcome G of the case and can safely be disregarded.

There is nothing in the other grounds of appeal which makes it necessary to comment upon them.

Accordingly, as indicated at the close of the argument before us, the application for leave to appeal against conviction is refused. We have already dealt with the question of sentence.

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Application refused.

Solicitors: *Henry Milner & Co., Director of Public Prosecutions.*

L. N. W.