benchtv
a benchmark production

Précis Paper

Appeals by the Crown on Errors of Law Alone in Criminal Cases

A discussion on the recent decision of *R v TS* [2017] NSWCCA 247 relating to appeals by the Crown on errors of law alone.

Discussion Includes

- Legal issues in the case
- Facts of the case
- When can a no case submission be heard?
- Requirement to take evidence at its highest
- Applicability of the last act test
- Adequate reasons for decisions

Précis Paper

Appeals by the Crown on Errors of Law Alone in Criminal Cases

In this edition of BenchTV, Ian Bourke SC (Barrister – Frederick Jordan Chambers, Sydney) and Ian Fraser (Barrister – Frederick Jordan Chambers, Sydney) discuss the recent decision of *R v TS* [2017] NSWCCA 247, a case which considered an appeal by the Crown to the NSW Criminal Court of Appeal on errors of law alone.

Legal issues in the case

1. The case of *R v TS* [2017] NSWCCA 247 involved an appeal by the Crown against the decision made at trial in the District Court. The respondent who was the accused at trial had been charged with two counts, the first being indecent assault, and the second being attempted sexual intercourse without consent.

2. The decision of the trial judge to return a verdict directing the jury to return a verdict of not guilty on the second charge was the issue at the centre of the appeal. The Crown brought an appeal to the NSW Court of Criminal Appeal under ss 107(2) of the *Crimes (Appeal and Review) Act 2001* (NSW). The nature of this appeal is one where the Crown had to show that there had been an error involving a question of law alone.

3. There were five grounds that the Crown had in their appeal, but these can be broken down into 3 fundamental issues:
    i. When is it that a no case submission can be heard by a judge?
    ii. Did the trial judge apply the correct test when deciding if there was a case capable of going to the jury?
    iii. Did the trial judge give adequate reasons for his decision?

Facts of the case

4. The Crown, in its opening to the jury, alleged that the complainant, the alleged victim, was born anatomically as a male, but at the time of the relevant alleged offences was identifying as a female. She had changed her name to a female name in 2015, had had some hormone therapy to induce secondary characteristics such as the development of breasts, but had not had sex affirmation surgery.

5. The alleged victim met the accused on an online dating app, and ultimately the day after they met online the pair agreed to meet at her house where she lived alone. According to her evidence, she was dressed but she was not wearing any underwear when she answered the door to the accused. The Crown alleged that he immediately put his hands straight up

her shirt and touched her on the breasts. The first count of indictment, the indecent assault, was based upon this initial action alleged against the accused.

6. The Crown then alleged that he followed the complainant into her bedroom where he exposed his genitals and attempted to force himself on to her. The event of allegedly throwing her face down onto the bed and pulling up the complainants skirt was what the Crown relied upon in its opening to the jury as supportive of the count of attempted sexual intercourse without consent.

7. When the complainant gave evidence, she gave evidence of the events leading up to the bedroom consistent with what was said by the Crown, but her evidence was inconsistent with what was alleged by the Crown in that she could not recall the accused doing anything after he had turned her face down onto the bed. After the complainant gave this evidence, the defence counsel applied to the trial judge to have the matter dismissed on a no case basis.

8. The application by the defence barrister on the no case basis was made immediately after the complainant had finished her evidence in chief meaning there was no cross-examination by the defence. Essentially the application by the defence counsel was that the judge should direct the jury to return a verdict of not guilty because the evidence given by the complainant was incapable of making out the attempt.

9. The only witnesses to what happened in the bedroom were the complainant and the accused, therefore the case could not get any better than as it had already been described by the plaintiff, meaning any further evidence the Crown had to present was not essential for the judge to hear. Ultimately the trial judge directed the jury to return a verdict of not guilty on count two only, the attempted sexual intercourse without consent.

<u>When can a no case submission be heard?</u>

10. The first ground on appeal by the Crown was that the judge had committed an error of law by deciding the no case submission before the end of the Crown case had been presented. The application was made immediately upon the conclusion of the evidence in chief, before cross-examination and before all of the evidence in the Crown case had been led. The Respondent in the Court of Criminal Appeal argued that this was an incorrect application of the law and therefore the Crown's argument was incorrect.

11. The Court of Criminal Appeal held that there is no principle that requires that a no case submission can only be heard after all of the evidence is given. Rather, the principle is that

the trial judge is required to take the evidence at its highest, but that does not necessarily mean that you will have to wait until all of the Crown evidence has been led.

12. In some cases, in applying that principle, you would still need to wait. For example, in a circumstantial case where the only issue may be the accused's knowledge and the Crown relies upon a combination of circumstances to prove by inference the accused's knowledge, it would be necessary for the judge to wait until all of the evidence in those circumstances had been led, otherwise it would be unfair to the Crown. However in a case such as *R v TS* [2017] NSWCCA 247 which relies upon evidence of one witness, there is no reason why the no case submission should have to wait until all other evidence has come out.

13. In *R v RMC* [2013] NSWCCA 285 a judge had directed a jury to return a verdict of not guilty based upon there being insufficient evidence. The difference in this case was that there was still evidence to come in the Crown case which had not yet been heard which the judge had not taken into account. The evidence that was still yet to be heard was a record of interview in which the accused has made certain submissions on which the Crown intended to rely. The Court of Criminal Appeal held that there was an error by the judge by effectively prematurely deciding the no case submission when there was still relevant evidence to come.

14. In *TS*, the Court of Criminal Appeal specifically said that it was not just about what other evidence was to be tendered by the Crown, but that the defence did not need to be embark on cross-examination. Justice Latham held at paragraph [19] of the judgement that 'it is not incumbent on defence counsel to commence cross-examination or await the end of the Crown case, with the attendant risk that the gap be filled'.

<u>Requirement to take evidence at its highest</u>

15. It is a fundamental principle that when deciding a no case submission, the trial judge is required to take the evidence of the Crown at its highest. The second ground argued by the Crown in the appeal was that the judge had failed to take the evidence at its highest.

16. However, this ground of appeal was abandoned by the Crown on the basis that it did not involve a question of law alone. The Crown was correct in abandoning this ground as it would have involved assessing evidence and looking at facts which would have been a mixed question of fact and law, not a question of law alone.

<u>Applicability of the last act test</u>

17. The Court of Criminal Appeal dealt with ground 3 and 5 of the appeal together. Ground three was an argument that the trial judge made an error by determining that the evidence was incapable of supporting guilt of count two, the attempted sexual intercourse without consent. Latham J held that this was not a question of law alone, but was a mixed question of fact and law.

18. Ground five was that the trial judge had made an error of law. This was on the basis that it was necessary for the Crown to prove that if the accused had continued with what he was doing, that an act of penetrative sex would have occurred.

19. In considering whether the evidence was capable of proving that if the accused continued doing what he was doing, an act of penetrative sex would have eventuated, was argued by the Crown as not being the correct test, arguing that it was effectively an adoption of the last act test. The last act test essentially means that it is necessary for the accused to do everything right up until immediately before the actual commission of the offence, rather than just the attempt.

20. Case law states that the correct test is the unequivocal act test. This test provides that the conduct must be more than merely preparatory and it must be conduct that could not be reasonably regarded as having any other purpose than the commission of that offence. In relation to this ground, the Court of Criminal Appeal held that the trial judge had not applied the last act test. The test articulated by the trial judge was perhaps slightly different than the traditional description of the unequivocal act test, but it was not inconsistent with the test.

21. Whenever you have a charge of attempt there is an element of judgement that needs to be made on the facts as to whether the actions of the accused person have crossed over from merely preparatory acts to the actual commission of an offence. The case of *R v Barker* [1924] NZLR 865 summarizes this concept nicely at [874]: 'To constitute a criminal attempt, the first step along the way of criminal intent is not necessarily sufficient, and the final step is not necessarily required'

22. On this issue, the Court of Criminal Appeal said that the judge had applied a test consistent with the appropriate test. The question of whether the evidence was capable of satisfying that test or not was a question of fact, or at least a mixed question of fact and law.

<u>Adequate reasons for decisions</u>

23. The fourth ground of appeal for the Crown was an alleged failure by the trial judge to give adequate reasons for his decision to direct the jury to return a verdict of not guilty. The

Respondent's argument was that the judge had provided adequate reasons. The reasons given were very brief – there was no written judgement, it was an oral extemporary decision.

24. Essentially the trial judge said that is was highly suspicious as to what the accused was about to attempt, but he held that any attempt he had on his mind had not initiated to a point where one could say if he continued doing what he was doing it would have eventuated in an act of penetrative sex. The trial judge said to the jury, among other things, that mere preparation to commit is not an attempt, there must be steps taken which if completed would result in the commission of the acts that would constitute the offence.

25. The Crown did not accept that they were adequate reasons, but the Crown did accept that the Court was entitled to take into account what was said both in the absence and presence of the jury. The Court of Appeal ultimately held that the reasons were adequate.

26. There is an obligation on any judicial officer normally to give reasons, but the reasons just need to set out the fundamental grounds upon which a decision is made and the level of detail required will depend upon the circumstances. In this case, the level of detail to be given in reasons was said to depend also upon the nature of the appeal.

27. The outcome of this case may have been different had this been a full appeal involving errors of fact or things of that kind, as in this case the Crown was limited to questions of law alone. Ultimately this final ground of appeal was dismissed, and the overall appeal was also dismissed.

BIOGRAPHY

Ian Bourke SC

Barrister – Frederick Jordan Chambers, Sydney

Ian has been practising as a lawyer since 1985, and as a barrister since 1993. He was appointed as Senior Counsel in 2014. He has developed a broad practice in a variety of areas, focusing in particular on criminal prosecutions, administrative law appeals in the Supreme Court, coronial inquests, commissions of inquiry, disciplinary proceedings and care proceedings/appeals concerning children.

Ian Fraser

Barrister – Frederick Jordan Chambers, Sydney

Ian practised as a solicitor for 15 years before coming to The Bar in 2015. Most recently he was employed at the NSW Crown Solicitor's Office variously as Special Counsel, Solicitor Advocate and Senior Solicitor in the office's Criminal Law and Inquiries teams. He was Special Counsel responsible for the representation of the State of NSW and its various agencies, before the Royal Commission into Institutional Reponses to Child Sexual Abuse. He has considerable advocacy experience having appeared as counsel in Supreme Court appeals, jury trials, applications for judicial review, and as counsel assisting the coroner in numerous inquests.

BIBLIOGRAPHY

Focus Case

R v TS [2017] NSWCCA 247

Benchmark Link

R v TS [2017] NSWCCA 247

Judgment Link

R v TS [2017] NSWCCA 247

Cases

R v RMC [2013] NSWCCA 285

R v Barker [1924] NZLR 865 at 874

Legislation

Crimes (Appeal and Review) Act 2001 (NSW) ss 107(2)