

13/83

ON APPEAL FROM
THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

BRIAN RONALD McDONALD Appellant

AND

THE QUEEN Respondent

10 CASE OF RESPONDENT PURSUANT TO RULE 63

"THE CIRCUMSTANCES OUT OF WHICH THE
APPEAL ARISES"

RECORD

1. This is an appeal from a judgment of the Court of Appeal of New Zealand (Richmond P., Woodhouse and Quilliam J.J.) given on 9 October 1980 dismissing an appeal against the conviction of the Appellant after trial upon indictment of a charge that on 1 July 1979 at Auckland he did murder Margaret Hinurewa Ngahiwi Bell.

20 2. The Appellant was tried in the Supreme Court of New Zealand at Auckland between 21 April 1980 and 6 May 1980. The jury returned a verdict of guilty and Appellant was sentenced to imprisonment for life. After the verdict had been delivered the foreman of the jury added the following statement:

 "The jury have asked me to inform the Court that we have found this man guilty as a participant with others."

Court of
Appeal
judgment
p. 109

30 3. The evidence called by the prosecution at trial showed that the deceased Margaret Bell was employed as a waitress at a nightclub known as the Main Street Cabaret situated in Queen Street, Auckland. She died as a result of gunshot wounds to the head inflicted in the early hours

RECORD

Part I
p. 45; 46

of the morning of 1 July 1979 whilst she was standing in the foyer of the Cabaret. There was evidence that some time prior to the shooting Appellant McDonald and some associates who included two men named O'Connor and Speck had arrived at the Cabaret. Speck was refused admittance because of the manner of his dress and this caused a short disturbance with members of the Cabaret staff. Appellant and his associates left shortly after.

Part I
p. 84-112
p. 114-145

4. The evidence given by O'Connor and Speck (who were called as witnesses for the Crown in the circumstances disclosed below) was to the effect that after the group had left the Cabaret they proceeded in a car driven by Appellant to a house situated in Harris Road, Mount Wellington, where O'Connor left the vehicle and obtained from the residence a rifle and ammunition wrapped in a blanket. The group returned to the city in the same vehicle driven by Appellant finally stopping at a point near Myers Park in the vicinity of the Cabaret. Appellant alighted from the car in possession of the rifle. O'Connor and Speck got out of the car with him. O'Connor's evidence was that he was then directed by Appellant to move into Queen Street to take up watch for the Police. His evidence was that he went into Queen Street but immediately made off on foot to the property in which he was living situated in the suburb of Glen Innes. The evidence given by Speck was that he accompanied Appellant through Myers Park to an area in which tennis courts were located and where he was told by Appellant to wait. His evidence was that Appellant then disappeared and shortly after he saw the flash and heard the sound of the discharge of a firearm. He then ran back towards the motorcar. Appellant caught him up as he proceeded through the tennis courts and when both arrived at the car Appellant handed him the rifle which he threw into the back of the car. Appellant then drove the car to a bridge situated in the suburb of Panmure where Speck on the instructions of Appellant disposed of the rifle, its quilt wrapping and some clothing. Appellant then drove to the property in Glen Innes where Speck on the instructions of the Appellant removed his clothing which was then taken and disposed of at Half Moon Bay.

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Part I
p. 212-216

5. The evidence given by Appellant was that on leaving the Cabaret he drove to the property at Mount Wellington at the suggestion of O'Connor. O'Connor went into the house and returned with a rifle wrapped in a blanket. Appellant then drove to the property at Glen Innes and then back into the city finally stopping the car near Myers Park. O'Connor and Speck left the car for a short period. On their return O'Connor took possession of the rifle and began to load the magazine. Appellant asked what was going on and Speck indicated to him that they were going to scare somebody. After further discussion Appellant secured possession of the magazine and

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10 O'Connor and Speck then left the car with the rifle. Appellant believed at that time that the rifle could not be fired. O'Connor and Speck returned to the car about 15 minutes later in a state of excitement and urged Appellant to drive off. His evidence was that at this stage he did not know anyone had been shot. Speck disposed of the firearm at the Panmure Bridge and later his clothes at Half Moon Bay. The group then returned to the property at Glen Innes. Appellant then fell asleep and gave in evidence that he did not know of the shooting until Speck told him about it some time after 10 a.m. that morning.

20 6. The prosecution evidence established that the firearm obtained by O'Connor from the property at Mount Wellington and later disposed of at the Panmure Bridge (from where it was later recovered) was the firearm used in the fatal shooting. The firearm was fitted with a telescopic sight. The telescopic sight was set in a position most favourable for a short-sighted person. Evidence given at the trial indicated that Appellant tended to be long-sighted whereas Speck was somewhat short-sighted. It was established however that notwithstanding the setting of the telescopic sight a person with the same sight characteristics as Appellant would not have had a significantly impaired view of the foyer of the Cabaret and the persons in it through the sight in the conditions that existed at the time of the shooting.

Part I
p. 187, 247
Part I
p. 191, 250
Part I
p. 253

30 7. The witnesses O'Connor and Speck gave evidence for the prosecution at trial after the Solicitor-General had provided in respect of each a written undertaking that he would direct a stay of proceedings in the event of prosecutions being commenced against either man:

- (a) as a party to any offence involving the culpable homicide of Margaret Bell on or about the 1st day of July 1970 at Auckland; or
- (b) as a party to any conspiracy involving the culpable homicide of Margaret Bell; or
- (c) as an accessory after the fact in respect of any offence involving the culpable homicide of the said Margaret Bell

Part II
p. 1-2

40 The undertaking given by the Solicitor-General was conditional only on each giving evidence in proceedings against Appellant charging him with the murder of the said Margaret Bell and when so giving evidence not refusing to answer questions on the grounds of self-incrimination. The written undertakings of the Solicitor-General were dated 12 December 1979 being the date

RECORD

- Part I
p. 148
p. 122; 198
- on which O'Connor gave his deposition and the day prior to that on which Speck gave his deposition. Neither Speck nor O'Connor knew of the undertakings given by the Solicitor-General until the commencement of the trial. At an earlier stage both men had made written statements to the Police on the basis of undertakings given to them by Police officers that they would not be prosecuted provided they told the truth and provided further that they did not fire the fatal shot. The evidence showed that O'Connor provided no information until he had received the Police undertaking. Speck on the other hand gave an oral account of events to Police officers before making a written statement. The Police undertaking was not given to Speck until after his oral account of events but prior to his written statement being taken. 10
- Part I
p. 256
8. Prior to the commencement of trial Counsel for the Appellant made objection to the admission of the evidence of O'Connor and Speck. The grounds of the objection were: 20
- (1) that the witnesses were primary parties to the commission of the offence and that for that reason the Solicitor-General had no power to grant them immunity from prosecution
 - (2) that if the immunity was properly given the trial Judge should in the proper exercise of his discretion exclude the evidence in order to ensure a fair trial
- The trial Judge did not uphold either objection and the evidence was ruled admissible. 30
9. The Appellant having been convicted appealed to the Court of Appeal of New Zealand upon the grounds, inter alia:
- (1) that the Solicitor-General had no power to give the undertakings referred to in paragraph 7 hereof
 - (2) that the purported immunities against prosecution given by Police officers as described in paragraph 7 hereof was an abuse of the Court's process 40
 - (3) that the trial Judge should properly have excluded the evidence of O'Connor and Speck in the exercise of his powers to ensure a fair trial

- (4) that the trial Judge misdirected the jury as to the effect of the Solicitor-General's undertaking and failed to give an adequate direction as to the dangers of the witnesses concerned still being influenced by the terms of the original undertakings of immunity given by Police officers

Judgment of the Court of Appeal dismissing the appeal was given on 9 October 1980.

- 10 10. On 26 May 1982 Her Majesty in Council ordered that the Appellant be granted leave to appeal from the Judgment of the Court of Appeal to Her Majesty in Council.

"CONTENTIONS TO BE URGED BY RESPONDENT"

11. The Respondent contends:

- A. That the provision of the undertakings by the Solicitor-General as described in paragraph 7 hereof was properly within the lawful powers of the Solicitor-General and was a proper exercise of those powers.
- 20 B. That it is not unlawful for members of the Police to offer immunity from prosecution in order to obtain evidence from witnesses. Such offers are relevant only to the weight and credibility to be given to evidence so obtained.
- C. That there was no basis upon which the trial Judge could properly have excluded the evidence of the witnesses O'Connor and Speck.
- 30 D. That there was no misdirection or inadequate direction by the trial Judge in his charge to the jury either in respect of the distinction between the immunities promised by the Police officers on the one hand and those given by the Solicitor-General on the other or in respect of the dangers of convicting the Appellant on the evidence of the two accomplices or in any other respect whatsoever.
- 40 E. That in the event the contentions contained in paragraphs A., B. and D. hereof are not accepted there was nonetheless no substantial miscarriage of justice thereby occasioned on the trial of the Appellant.

RECORD

- F. That if contrary to the contention contained in paragraph E hereof there has been a substantial miscarriage of justice on the trial of the Appellant a new trial should properly be directed.

12. The Respondent contends that this appeal should be dismissed and the Appellant's conviction affirmed for the following, amongst other, reasons:

REASONS

- (1) That the decision of the trial Judge to admit the evidence of O'Connor and Speck was correct. 10
- (2) That there was no misdirection or inadequate direction by the trial Judge in his charge to the jury.
- (3) That the decision of the Court of Appeal of New Zealand as to the power of the Solicitor-General to give undertakings in the nature of those given to Speck and O'Connor and in relation to the issues involved in (1) and (2) hereof was correct. 20

S. B. W. Grieve

R. B. Squire