HIGH COURT OF AUSTRALIA

HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ

THE QUEEN APPELLANT

AND

PETER MAXWELL EDWARDS AND ANOR RESPONDENTS

The Queen v Edwards
[2009] HCA 20
21 May 2009
H4/2008

ORDER

1. *Appeal allowed.*

2. *Set aside paragraph 1 of the orders of the Supreme Court of Tasmania entered on 16 May 2008 and, in its place, order that the application for a permanent stay of proceedings on the indictment be dismissed.*

On appeal from the Supreme Court of Tasmania

Representation

W J Abraham QC with I M Arendt for the appellant (instructed by Director of Public Prosecutions (Cth))

B W Walker SC with J M Morris and B A P Kelleher for the respondents (instructed by Deacons Lawyers)

CATCHWORDS

The Queen v Edwards

Criminal law – Practice and procedure – Permanent stay of proceedings on indictment – Threshold for grant of permanent stay – Respondents charged with reckless operation of aircraft – Electronic records of event giving rise to charge overwritten – Delay in prosecuting offences – Whether combination of delay and lost evidence justified grant of permanent stay.

1 HAYNE, HEYDON, CRENNAN, KIEFEL AND BELL JJ. The Supreme Court of Tasmania (Slicer J) ordered that proceedings on an indictment which charged the respondents with the reckless operation of an aircraft be stayed. The Court's reasons were delivered on 28 April 2008, the primary judge holding that a "stay of proceedings ought to be granted".[1] The order which was entered on 16 May 2008 is recorded as "grants stay of proceedings". It is not in issue that the order had the effect of permanently staying proceedings on the indictment.

2 The indictment charges the respondents jointly with operating an aircraft being reckless as to whether the manner of operation could endanger the life of another person, contrary to ss 20A(1) and 29 of the *Civil Aviation Act* 1988 (Cth)[2].

3 No appeal lies to the Court of Criminal Appeal of Tasmania from the decision of a trial judge ordering a stay of proceedings on indictment[3].

4 The Crown appeals by special leave to this Court against the order on the ground that the primary judge's discretion miscarried in that he acted upon a wrong principle and that he took into account irrelevant considerations relating to the suggested complexity of the trial. These submissions should be accepted. For the reasons that follow the order staying the proceeding should be set aside.

The Crown case

5 The respondents are airline pilots who were the pilot and first officer of a Qantas Boeing 737-400 aircraft on a flight to and from Launceston, which took place during night hours on 23 October 2001. Each of the respondents was responsible for the operation of the aircraft. The Crown alleges that the aircraft took off from Launceston Airport ("the airport") in darkness, without the necessary lighting being turned on. Qantas did not provide scheduled services to Launceston. This was a relief flight that was arranged in order to collect 70 passengers who had been stranded as the result of a mishap.

6 The control tower at the airport was unmanned between the hours of 10.00pm and 6.00am. The apron and terminal lights at the airport operated 24 hours a day. The taxiway, runway edge lights and the illuminated wind direction indicator ("IWDI"), or windsock lighting, (collectively, "the runway

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1 *R v Edwards and Sarunic* [2008] TASSC 17 at [60].

2 In the alternative, the respondents are charged with operating an aircraft being reckless as to whether the manner of operation could endanger the person or property of another person, contrary to ss 20A(2) and 29 of the *Civil Aviation Act* 1988 (Cth).

3 Chapter XLVI of the *Criminal Code* (Tas).

lighting") were not illuminated when the control tower was unmanned. During these hours it was the responsibility of pilots arriving at, or departing from, the airport to turn on the runway lighting. This was done with the Pilot Activated Lighting system ("the PAL"). The PAL was activated by a signal that was transmitted from the aircraft's radio to a receiving device at the control tower. Once activated, the runway lighting remained illuminated for a period of 32 minutes.

7 The aircraft touched down at the airport at 10.32pm. Before this a signal had been transmitted from the aircraft to the control tower, which had activated the PAL. Thus the runway lighting was on. The aircraft arrived outside the terminal building at 10.34pm. The interval between activation of the PAL and the aircraft's arrival is not known. Accordingly, the end of the cycle of runway lighting commenced by the initial activation of the PAL cannot be determined with precision.

8 The aircraft moved from the terminal building at 11.01pm. It travelled along taxiway A, instead of taxiway C. Taxiway A was usually reserved for smaller aircraft. It taxied past the Royal Flying Doctor Service ("RFDS") hangar and prepared for take-off at 11.03pm. Its wheels left the runway at 11.05pm. The take-off was observed by Mr Griffiths and Mr Withers, two RFDS pilots, a paramedic and two nearby residents, Mr Walker, an aircraft enthusiast, and Mr Dergacz, a pilot.

9 Mr Griffiths telephoned the duty operations officer at the airport shortly after the aircraft's departure to enquire whether there was a problem with the operation of the runway lights. The following day he reported the matter to the Civil Aviation Safety Authority ("CASA"). Mr Withers reported the matter to the Air Transport Safety Bureau ("ATSB") on 29 October 2001.

The investigation

10 Qantas was first notified of the incident on 9 November 2001.

11 On 14 December 2001 CASA appointed an investigator to enquire into the incident. Mr Griffiths, Mr Withers and the paramedic made statements in the course of the investigation in which they said that the runway lighting was not illuminated when they observed the aircraft moving along the taxiway and when it took-off. Mr Walker made a statement saying that he had watched the aircraft as it moved along the taxiway and he had noted that the runway lighting was not on at that time nor during the aircraft's take-off. Mr Dergacz made a statement saying that he had heard the sound of a jet aircraft rotating from the runway and

he had looked out of his window and observed that the runway lights were not illuminated.

12 Statements were taken in the course of the investigation from Mr Gomez, the duty fire officer at the airport, and from Mr Axon, the maintenance engineer on board the aircraft. Mr Gomez watched the take-off with the use of binoculars. He paid attention to the aircraft's engines. When he was interviewed a few days after the incident he was unable to say whether the runway lighting was on or off at the relevant time. Mr Axon was present in the cockpit at the time of the take-off and had no memory of any unusual occurrence.

13 Each of the respondents was contacted in connection with the investigation and each declined to be interviewed. On 2 January 2002, Qantas wrote to CASA advising that each of the respondents had reported that the runway lights were activated and operating during the take-off. On 15 January 2002, the first respondent made a statutory declaration stating that the runway lights were illuminated for the departure of the aircraft.

The delays in prosecuting the offences

14 In April 2002 CASA referred the matter to the Commonwealth Director of Public Prosecutions. For reasons that are not explained, complaints were not sworn against the respondents until 30 March 2004. The proceedings came before the Court of Petty Sessions on 8 June 2004. The respondents entered pleas of not guilty on 14 September 2004. The proceedings were listed for a committal hearing between 28 and 30 June 2005. These dates were vacated on the application of the defence. The committal hearing was held between 2 and 4 November 2005. The respondents were committed for trial. Delays associated with the provision of the transcript followed thereafter. The proceedings were listed for trial at the sittings of the Supreme Court commencing 21 November 2006. The trial did not proceed at this time apparently as the result of further difficulties associated with the provision of a complete transcript. On 13 March 2007 the proceedings were adjourned on the application of the defence to allow for the submission of a "no bill" application.

15 The application for a stay came before Slicer J on 26 November 2007. The application was based on the loss of "primary technological evidence" ("the lost evidence") and on the delay which, it was said, strengthened the "prejudice" flowing from the lost evidence[4].

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4 *R v Edwards and Sarunic* [2008] TASSC 17 at [7].

The lost evidence and the operation of the PAL

16 The lost evidence comprises the electronic record of the activation of the PAL made by a Monitor at the airport ("the Monitor List") and the information recorded on the aircraft's flight data recorder ("FDR").

17 The Monitor List contained a record of the last 13 activations of the PAL. A print-out of the Monitor List was obtained two days after the incident. This only contained records of activations on 24 and 25 October 2001.

18 The FDR recorded the keying of the VHF radio system, the time of transmission and its duration. It did not identify the specific frequency or the purpose of the transmission. Given the time of night at which the incident occurred and the absence of staff in the control tower, an inference could be drawn from the FDR data that a radio transmission was made in order to activate the PAL. Data recorded on the FDR was overwritten after a time. The evidence established that the information recorded on the FDR during the aircraft's flight on 23 October 2001 could have been retrieved within 13 to 15 days of that day.

19 The PAL was activated by the transmission of three pulses on a frequency specified by the manufacturer. Each pulse was required to be between one and five seconds in duration and it was necessary for all three to be transmitted within a 25 second span. Once activated, the PAL operated for an interval of between 30 and 60 minutes depending on the timer setting. The timer setting at the airport provided for a period of 32 minutes illumination. The system was designed to warn of the impending extinguishment of the lights; during the final 10 minutes of the cycle the IWDI flashed continuously.

20 There were two distinctive features of the operation of the PAL at the airport. First, if the final pulse was transmitted during or after the 25th second, the lighting cycle defaulted to the concluding 10 minute phase, which was accompanied by the flashing of the primary IWDI ("the straddle effect"). Secondly, Civil Aviation Order 92 required the primary IWDI to be located on the left side of the runway, unless this was impractical. The primary IWDI at the airport was positioned on the right side of the runway. There were two IWDIs at the airport. Only the southern IWDI was configured to flash during the concluding phase of the PAL cycle. The northern IWDI, which was closer to the terminal, remained constantly alight throughout the PAL cycle.

21 The respondents did not give evidence at the hearing of their application.

The primary judge's reasons

22 The primary judge concluded that factors of overall delay and the lost evidence made it appropriate to grant the stay[5]. In arriving at this conclusion his Honour stated the test in this way:[6]

> "[W]hether the combination of loss of primary data or evidence and delay constitute, not abuse of power or inappropriate prosecution or abuse of process, but whether on the material before this Court continuation of the indictment to trial by jury *could* constitute an unacceptable injustice or unfairness (*Walton v Gardiner*)." (Emphasis added)

23 His Honour purported to state the test by reference to the decision of this Court in *Walton v Gardiner*[7]. A majority of the Court approved each of the formulations of the test applied by members of the Court of Appeal; "whether, in all the circumstances, the continuation of the proceedings *would* involve unacceptable injustice or unfairness", or whether the "continuation of the proceedings *would* be 'so unfairly and unjustifiably oppressive' as to constitute an abuse of process".[8] Their Honours observed that it had been made plain by the Court of Appeal that the court would only be satisfied that continuation of the proceedings constituted an abuse in an exceptional or extreme case[9].

24 The respondents acknowledge that the primary judge misstated the test in asking whether the loss of primary data and the delay *could* constitute an unacceptable injustice or unfairness. However, they submit that a fair reading of the whole of his Honour's reasons discloses that the error was one of expression and not of principle. This submission must be rejected. Throughout the reasons

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5 *R v Edwards and Sarunic* [2008] TASSC 17 at [60].

6 *R v Edwards and Sarunic* [2008] TASSC 17 at [59].

7 (1993) 177 CLR 378; [1993] HCA 77.

8 *Walton v Gardiner* (1993) 177 CLR 378 at 392 per Mason CJ, Deane and Dawson JJ (emphasis added).

9 *Walton v Gardiner* (1993) 177 CLR 378 at 392 per Mason CJ, Deane and Dawson JJ.

it is apparent that his Honour is directing attention to the risk that the lost evidence may be productive of unfairness to the respondents[10].

25 His Honour's consideration of the evidence of the "straddle effect" and its significance to the issues in the trial is demonstrative of an approach which addressed the possibility that the trial may be unfair to the respondents because they had lost the opportunity of establishing by objective evidence an hypothesis that was consistent with their innocence. His Honour said this:[11]

> "Accepting that the aircraft spent some four minutes in taxiing and the PAL transmission sent during pre-flight procedures some six minutes previous, the differing accounts of the RFDS pilots that there was no runway lighting with the claims of activation by the pilots, could be reconciled. The lighting sequence ended during take-off and the observation of the RFDS members made during that take-off, following their hearing the aircraft's acceleration. That might be conjecture but *could* be a matter advanced at trial. That conjecture is relevant to the initial question of whether or not the runway lighting was on at the relevant time. Less problematic is its relevance to the issue of recklessness. The sequence, especially the 'straddle' possibility, is whether the pilots were reasonably entitled to assume that the lighting was in operation.
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> The above matters are made more complex and significant if, at trial, the jury accepted the prosecution evidence that the aircraft had moved along runway A, whereas it ought to have exited the terminal apron upon taxiway C before executing a 180 degree turn at the southern end of the main runway. This course would have impinged on the capacity of the pilots for observation of the IWDI. Thus even if the jury were to be satisfied, on the evidence, that the runway lights were 'off' at the time of take-off, the issues of timing, straddle, activation by transmission, and the like, remain cogent matters on 'recklessness'. The jury would be well able to consider whether the differing views of the pilots and the RFDS pilots, the position of the windsocks, the use of runways A or C for taxiing, the effects of other illumination from the

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10 *R v Edwards and Sarunic* [2008] TASSC 17 at [20], [38], [39], [40], [43], [44], [56] and [57].

11 *R v Edwards and Sarunic* [2008] TASSC 17 at [36]-[37] (emphasis added).

terminal or apron lighting, and various inconsistencies between the evidence of observers, both inside and outside of the aircraft in their general consideration of a verdict. But the PAL related matters require a journey into conjecture and/or complex evaluation exposing the [respondents] to the risk of an unfair conviction."

His Honour went on:[12]

"Retrieval of the electronic data from either the FDR and/or the Monitor List would have resolved the issue of whether the runway lights were active at the relevant time. Each might have provided certainty as to whether there had been activation or its attempt. Comparison of times recorded might have shown equipment failure or the likelihood of a 'straddle' effect, resulting in truncated operation. Given the limited time the aircraft was on the ground (33 minutes), the length of the lighting operation (32 minutes), and the time spent in taxiing (4 minutes), the impact of timing sequences and the need for the 'warning' lighting, the matters relied on by the [respondents] are neither far-fetched nor artificial forensic constructs. If a 'straddle' was sent while the pilots were preparing for take-off whilst the passengers were embarking, the lights might have ended the 10 minute sequence later in the taxiing manoeuvre or as the aircraft accelerated. The observations of the RFDS pilots could be reconciled with the pilot having activated the system."

26 His Honour had earlier noted that it was a mandatory requirement that the PAL be activated before the aircraft commenced taxiing. This, it may be observed, is against acceptance of the proposition that retrieval of the data from the FDR would have resolved the issue of whether the runway lights were on at the relevant time since the FDR only records information when the aircraft's engines are running. Activation of the PAL at the airport before the aircraft's engines were turned on while the passengers were embarking, as his Honour posits in the above extract, would not have been captured by the FDR.

27 His Honour's conclusion was expressed as follows:[13]

"The stay of proceedings ought be granted. Two accused who, on the allegation, are jointly liable, had differing tasks in the operation of the

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12 *R v Edwards and Sarunic* [2008] TASSC 17 at [56].

13 *R v Edwards and Sarunic* [2008] TASSC 17 at [60] (emphasis added).

> aircraft at the relevant times of taxiing and take-off. Severance provides no purpose. The nature of crime with its doctrine of strict liability and the statutory provisions governing 'mistake of fact', make any trial more complex. The time elapsed from the event until trial is some seven years, increasing the understandable, but greater, need for witnesses to rely on their first statements, and the effects of the passage of time on memory, might, absent primary evidence, reduce the case to 'word on word'. The complexity of the IWDI and 'straddle' matters is real and resolution requires more than assumption or conjecture for a fair and just determination. The peripheral matters raised by the [respondents] might have some prejudicial effect going to discretion, *but it is the factors of overall delay and loss of significant primary evidence which persuades me to grant the applications*."

28 An essential element that the Crown must prove in support of the principal and alternative counts is that the runway lighting was not on at the time the aircraft moved along the runway and took-off. The lost evidence goes to this issue as does the testimony of witnesses whose accuracy and reliability may be affected by delay. The appellant correctly submits that his Honour's consideration of the complexity of the joint trial involving possible "defences" of mistake of fact under the *Criminal Code* (Cth) was not relevant to any issue raised by the application.

29 His Honour had earlier concluded that the delay alone would not warrant a stay of proceedings[14]. He distinguished between the delay to the date the complaints were laid and the subsequent delays associated with the court proceedings. However, his ultimate conclusion was based upon the loss of the primary evidence and "overall" delay. It was not explained how the overall delay operated in combination with the lost evidence to create irremediable prejudice to the respondents, nor did his Honour address the circumstance that at least some of the delay was attributable to the conduct of the defence[15]. On the appeal the respondents do not rely on the overall delay but maintain that the unexplained delay of two years and three months before the complaints were laid occasioned prejudice in that they had lost the opportunity to obtain the early recollection of

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14 *R v Edwards and Sarunic* [2008] TASSC 17 at [20].

15 See *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 33 per Mason CJ; [1989] HCA 46 as to the significance of the reasons for delay as a factor in the exercise of the balancing process in determining whether to grant a stay.

witnesses. It is to be noted that the respondents were on notice of the allegation not later than 2 January 2002.

30 The respondents do not contend that the loss of objective evidence, such as electronically recorded data or the like, would ordinarily justify a stay of proceedings on indictment. In the course of argument the respondents conceded that the loss of film recorded by a closed-circuit television camera at the scene of an alleged offence would not afford a basis for a stay[16]. They seek to distinguish their case on the basis that the loss here is of the independent record of the event giving rise to the charge. This is said to be productive of unfairness of the kind that informs the power to stay since the trial will necessarily involve an incomplete reconstruction of the event.

31 The distinction between an independent record forming a constituent part of an event and an independent record of an event is without substance. Trials involve the reconstruction of events and it happens on occasions that relevant material is not available; documents, recordings and other things may be lost or destroyed. Witnesses may die. The fact that the tribunal of fact is called upon to determine issues of fact upon less than all of the material which could relevantly bear upon the matter does not make the trial unfair[17].

32 The respondents submit that in the event error is established their application should be remitted to the Supreme Court of Tasmania given what is described as "the complexity of the factual matters". This submission should be rejected. The exercise of the primary judge's discretion has been shown to have miscarried. It is open to this Court to reach its own decision in substitution for that of the primary judge in circumstances where, as here, the materials are before it[18].

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16 See *Police v Sherlock* [2009] SASC 64.

17 *Jago v District Court of New South Wales* (1989) 168 CLR 23 at 34 per Mason CJ, 47 per Brennan J; *Williams v Spautz* (1992) 174 CLR 509 at 519 per Mason CJ, Dawson, Toohey and McHugh JJ; [1992] HCA 34.

18 *R v Carroll* (2002) 213 CLR 635 at 657 [73]; [2002] HCA 55.

33 It is well established that the circumstances in which proceedings may be found to be an abuse of process are not susceptible of exhaustive definition[19]. It is not necessary to consider whether there may be circumstances in which the loss of admissible evidence occasions injustice of a character that would make the continuation of proceedings on indictment an abuse of the process of the court. This is not such a case. The content of the Monitor List and the recording made by the FDR is unknown. In these circumstances it is not correct to characterise their loss as occasioning prejudice to the respondents. The lost evidence serves neither to undermine nor to support the Crown case. It is to be observed that if the Crown is unable to exclude the hypothesis, that the runway lighting was illuminated as the aircraft moved along it and that it ceased operating coincidentally at the time of take-off, it would fail to establish an element of the principal and the alternative offence.

34 There is no feature of the delay that justifies taking the extreme step of permanently staying proceedings on the indictment. It has not been established that any prejudice arising by reason of the delay cannot be addressed by direction[20].

35 For these reasons the appeal should be allowed, the order of the Supreme Court of Tasmania entered on 16 May 2008 should be set aside and in its place the application for a permanent stay of proceedings on the indictment should be dismissed.

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19 *Ridgeway v The Queen* (1995) 184 CLR 19 at 74-75 per Gaudron J; [1995] HCA 66; *R v Carroll* (2002) 213 CLR 635 at 657 [73] per Gaudron and Gummow JJ; *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256 at 265-267 [9]-[15] per Gleeson CJ, Gummow, Hayne and Crennan JJ; [2006] HCA 27.

20 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 34 per Mason CJ, 60 per Deane J, 77-78 per Gaudron J; *R v Glennon* (1992) 173 CLR 592 at 605 per Mason CJ and Toohey J; [1992] HCA 16; see also *Longman v The Queen* (1989) 168 CLR 79; [1989] HCA 60.